ROBERT A. STOLZBERG, ESQ.
CHARMOY, STOLZBERG & HOLIAN
44 School Street - Suite 1100
Boston, MA 02108

WITHDRAWN
No longer the property of the
Boston Public Library.
Sale of this material benefits the Library

SUPERINTENDENT OF DOCUMENTS
DEPOSITORY
FEB 1 6 2000
BOSTON PUBLIC LIBRARY
GOVERNMENT DOCUMENTS DEPARTMENT

Digitized by the Internet Archive
in 2017 with funding from
Kahle/Austin Foundation

https://archive.org/details/lccn_17025985111

CITE THIS VOLUME 111 L Ed 2d

UNITED STATES SUPREME COURT REPORTS

OCTOBER TERM, 1989

CASES CONTAINED IN U. S. REPORTS

Vol. 497 US (opinion pages 1 to end)

LAWYERS' EDITION

SECOND SERIES

VOLUME 111

COMPLETE WITH HEADNOTES, SUMMARIES OF DECISIONS
AND BRIEFS, ANNOTATIONS, TABLES, AND INDEX

1993

Lawyers Cooperative Publishing
Aqueduct Building, Rochester, New York 14694

Copyright © 1990, 1993
by
Lawyers Cooperative Publishing,
a division of Thomson Legal Publishing Inc.

Copyright is not claimed in any works of
the United States Government.

The paper used in this publication meets the minimum requirements of American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials, ANSI Z39.48-1984.

Library of Congress Catalog Card Number 17–25985

111 L Ed 2d

Editorial Director

THOMAS R. TRENKNER

Managing Editor

GEORGE L. BOUNDS

Editor

SHELDON R. SHAPIRO

Contributing Editors

DANIEL A. KLEIN
GARY KNAPP
ALAN K. STETLER
DAVID B. SWEET
JOHN E. THEUMAN
TIM A. THOMAS
J. W. THOMEY
JOHN F. WAGNER JR.

Editorial Support Staff

DAVID FORSTBAUER
GORDON V. PENNISTON
RITA A. SADWICK
BARBARA MCDANIEL SCHUE
PETER D. SULLIVAN

TABLE OF CONTENTS

PAGE

Personnel of Supreme Court ix

Table of Allotment of Justices x

Subjects Annotated in This Volume xi

Table of Cases Reported Herein xiii

Reference Table of Vol 497 US (pages 1–end) xxv

Table of Federal Constitutional Provisions, Statutes, Court Rules, and Regulations Cited and Construed in 111 L Ed 2d xxvii

Table of Classifications to the United States Supreme Court Digest, Lawyers' Edition from Cases Reported in 111 L Ed 2d xxix

Miscellaneous Proceedings.................................... xxxiii

Cases Reported in Vol 497 US 1

Annotations and Briefs....................................... 841

Index to Decisions and Annotations 1013

JUSTICES
OF THE
SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS

CHIEF JUSTICE

HON. WILLIAM H. REHNQUIST

ASSOCIATE JUSTICES

HON. WILLIAM J. BRENNAN, JR.*

HON. BYRON R. WHITE

HON. THURGOOD MARSHALL

HON. HARRY A. BLACKMUN

HON. JOHN PAUL STEVENS

HON. SANDRA DAY O'CONNOR

HON. ANTONIN SCALIA

HON. ANTHONY M. KENNEDY

ATTORNEY GENERAL

RICHARD L. THORNBURGH

SOLICITOR GENERAL

KENNETH W. STARR

CLERK

JOSEPH F. SPANIOL, JR.

REPORTER

FRANK D. WAGNER

MARSHAL

ALFRED WONG

LIBRARIAN

SHELLEY L. DOWLING

---

* RETIRED JULY 20, 1990.

ALLOTMENT, ETC., OF THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND COMMENCEMENT OF SERVICE RESPECTIVELY

For Order of Court Making Allotment, see 98 L Ed 2d, page lxxxviii

NAMES OF JUSTICES, AND WHENCE APPOINTED	BY WHOM APPOINTED	CIRCUITS (28 USCS § 41)	COMMISSIONED	SWORN IN
CHIEF JUSTICE WILLIAM H. REHNQUIST, Virginia	President REAGAN	DISTRICT OF COLUMBIA; FEDERAL	1986 (Sept. 25)	1986 (Sept. 26)
Associate Justice WILLIAM J. BRENNAN, JR., New Jersey	President EISENHOWER	FIRST ME., MASS., N. H., PUERTO RICO, R. I.	1957* (March 21)	1957* (March 22)
ASSOCIATE JUSTICE THURGOOD MARSHALL, New York	President JOHNSON	SECOND CONN., N. Y., VT.	1967 (Aug. 30)	1967 (Oct. 2)
ASSOCIATE JUSTICE WILLIAM J. BRENNAN, JR., New Jersey	President EISENHOWER	THIRD DEL., N. J., PA., VIRGIN ISLANDS	1957* (March 21)	1957* (March 22)
CHIEF JUSTICE WILLIAM H. REHNQUIST, Virginia	President REAGAN	FOURTH MD., N. C., S. C., VA., W. VA.	1986 (Sept. 25)	1986 (Sept. 26)
ASSOCIATE JUSTICE BYRON R. WHITE, Colorado	President KENNEDY	FIFTH CANAL ZONE, LA., MISS., TEX.	1962 (Apr. 12)	1962 (Apr. 16)
ASSOCIATE JUSTICE ANTONIN SCALIA, Virginia	President REAGAN	SIXTH KY., MICH., OHIO, TENN.	1986 (Sept. 25)	1986 (Sept. 26)
ASSOCIATE JUSTICE JOHN PAUL STEVENS, Illinois	President FORD	SEVENTH ILL., IND., WIS.	1975 (Dec. 17)	1975 (Dec. 19)
ASSOCIATE JUSTICE HARRY A. BLACKMUN, Minnesota	President NIXON	EIGHTH ARK., IOWA, MINN., MO., NEB., N. D., S. D.	1970 (May 14)	1970 (June 9)
ASSOCIATE JUSTICE SANDRA DAY O'CONNOR, Arizona	President REAGAN	NINTH ALASKA, ARIZ., CAL., IDAHO, MONT., NEV., OR., WASH., GUAM, HAWAII	1981 (Sept. 22)	1981 (Sept. 25)
ASSOCIATE JUSTICE BYRON R. WHITE, Colorado	President KENNEDY	TENTH COLO., KAN., N. M., OKLA., UTAH, WYO.	1962 (Apr. 12)	1962 (Apr. 16)
ASSOCIATE JUSTICE ANTHONY M. KENNEDY, California	President REAGAN	ELEVENTH ALA., FLA., GA.	1988 (Feb. 11)	1988 (Feb. 18)

---

* Recess appointment October 16, 1956

SUBJECTS ANNOTATED IN THIS VOLUME

These annotations, as well as all decisions reported in this volume, are indexed in the "Index to Decisions and Annotations" appearing at the end of this volume. For additional case and annotation references, consult appropriate topics and sections in the United States Supreme Court Digest, Lawyers' Edition, or consult the L Ed Index.

Validity, under Federal Constitution's Fourth Amendment, of search conducted pursuant to consent—Supreme Court cases 850

Supreme Court's views as to validity, under Federal Constitution, of abortion laws 879

Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances—Supreme Court cases 947

TABLE OF CASES REPORTED IN 111 L Ed 2d

For earlier cases during the 1989–90 Term, see table of cases in 107, 108, 109, and 110 L Ed 2d

A

Accolla v Sullivan, 788
Accolla v Sullivan, 832
Adamson, Lewis v 795
Aetna Casualty & Surety Co., Foreman v 783
Ahmad v Wigen, 835
Akron Center for Reproductive Health, Ohio v 405
Alabama, Freeman v 823
Alabama, Magwood v 772
Alabama, Siebert v 806
Alabama, Steeley v 835
Alabama, Whisenhant v 824
Albert Lea Medical Surgical Center, Ltd., Stalheim v 821
Allen v Zant, 801
Allen v Zant, 830
Allevato v County of Oakland, 747
Allustiarte v Cooper, 815
Allustiarte v Cooper, 823
Alvarado v United States, 439
American Bakeries Co., Curtis v 788
American Bakeries Co., Curtis v 832
American Mining Congress v United States EPA, 748
American Tel. & Tel. Co., Block v 760
Amiri v District of Columbia, 824
Amiri v Johnson, 754
Amiri v Johnson, 823
Antico, Re Disbarment of, 839
AP Propane, Inc., Myers v 784
Arboleda v United States, 752
Arizona, Bracy v 800
Arizona, Hooper v 801
Arizona, Libberton v 797
Arizona, Libberton v 829
Arizona, McCall v 798
Arizona, Nash v 799
Arizona, Vickers v 806
Arizona, Vickers v 829
Arizona, Walton v 511
Arizona, Walton v 828
Arkansas, Pickens v 766
Asante v United States, 813
Ashland Oil, Inc. v Caryl, 734
Aspromonti v United States, 781

B

Baasch v United States, 815
Babcock & Wilcox Co., Illinois Human Rights Com. v 750
Barber v United States, 762
Barefield v Texas, 766
Barnes v Thompson, 766
Barnett v Oklahoma, 753
Barnett v Petro-Tex Chemical Corp., 784
Barrasso, Benson v 758
Barrow v Illinois, 767
Barrow v Illinois, 832
Bay Area Rapid Transit, Whitaker v 755
Beaulieu v United States, 762
Beaulieu v United States, 811
Becerra v United States, 760
Bell v Texas, 758
Belle v Freeman, 755
Ben Cooper, Inc., Insurance Co. of Pennsylvania v 779
Benson v Barrasso, 758
Berbick v Provident Nat. Bank, 813
Bernard v Gulf Oil Corp., 748
Bertolotti v Dugger, 804
Bertolotti v Dugger, 818
Betancourt v United States, 760
Beverly Hills Sav. & Loan Assn. v Carter, 780
Beyer, Burke v 819
Beyer, Burke v 826
Bittaker v California, 822
Block v American Tel. & Tel. Co., 760
Blue Cross & Blue Shield, Inc. v Reazin, 752
Board of County Comrs., Doughty v 771
Board of Educ. of Oklahoma City Public Schools, etc. v Dowell, 826
Board of Trustees of University of Kentucky, Hayse v 783
Bockting v Nevada, 777
Boggs v Muncy, 818
Bonamy, Demos v 759
Borden Chemical, Iron Workers Mid-South Pension Fund v 782
Boren v N. L. Industries, Inc., 792
Bracy v Arizona, 800
Bradley v Ohio, 768
Bradley v Ohio, 830
Brimberry, Re Disbarment of, 838

Cases with opinions are **boldface.** Other cases are lightface.

For earlier cases during the 1989–90 Term, see table of cases in 107, 108, 109, and 110 L Ed 2d

Brockmeier, Re Disbarment of, 836
Brooks, Re, 771
Brooks, Re, 824
Brooks v Georgia State Bd. of Elections, 826
Brown v Sherman, 757
Brown v Toombs, 757
Bryant v Tate, 758
Buckley v Lockhart, 753
Bullock v Utah, 780
Burke v Beyer, 819
Burke v Beyer, 826
Burns v Reed, 779
Burns, Spillers v 788
Burns v United States, 780
Bush, Davis v 789
Business Guides, Inc. v Chromatic Communications Enterprises, Inc., 746
Bussey, Re Disbarment of, 838
Buxton v Collins, 803

C

Cain v South Carolina, 764
Cain v South Carolina, 828
California, Bittaker v 822
California v FERC, 813
California, Lake v 814
California, Lloyd v 786
California, McCarter v 822
California, Murtishaw v 764
California, Williams v 826
Callins v Texas, 766
Cargill v Zant, 823
Carol Pub. Group, New Era Publications Int'l, ApS v 835
Carota v Celotex Corp., 749
Carpenter v Thomas, 747
Carter, Beverly Hills Sav. & Loan Assn. v 780
Carter v Kentucky, 791
Cartwright v Oklahoma, 771
Cartwright v Oklahoma, 831
Caryl, Ashland Oil, Inc. v 734
Caryl, National Mines Corp. v 740
Castellano, Klacsmann v 756
Castiglia v United States, 749
Castillo v Collins, 814
Castillo v United States, 814
Celebrity Service Int'l, Inc., Celebrity World, Inc. v 782
Celebrity World, Inc. v Celebrity Service Int'l, Inc., 782
Celeste, Shuman v 756
Celotex Corp., Carota v 749
Chambers v Office of Federal Contract Compliance Programs, 825
Chesapeake Pub. & Advertising, Inc., Eastern Pub. & Advertising, Inc. v 784
Chicago & North Western Transp. Co., Railway Labor Executives' Assn. v 748
China, Republic of v Liu, 840
Christmas v Marson, 783
Christopherson v Shawano County, 755
Christopherson v Shawano County, 831
Chromatic Communications Enterprises, Inc., Business Guides, Inc. v 746
Church by Mail, Inc. v United States, 751
Churchill v F/V Fjord, 783
Cialoni v United States, 795
Clark v Illinois, 786
Clarke v West Virginia Bd. of Regents, 779
Coca-Cola Co., Royal Crown Cola Co. v 767
Cochran v Turner, 816
Coleman v Illinois, 802
Coleman v Illinois, 831
Coleman v Oklahoma Pardon & Parole Bd., 834
Coleman v Saffle, 834
Collins, Buxton v 803
Collins, Castillo v 814
Collins, Derrick v 817
Collins, Downs v 823
Collins, Kerns v 756
Collins, Leal v 813
Collins v Maryland, 805
Collins v Youngblood, 30
Commissioner, McFadden v 823
Commissioner, Portland Golf Club v 126
Commissioner, Quarterman v 816
Committee on Professional Responsiblity, Louisiana State Bar Assn., Fontham v 751
Communications Satellite Corp. v FCC, 749
Communications Satellite Corp. v FCC, 829
Connor v United States, 793
Cooper, Allustiarte v 815
Cooper, Allustiarte v 823
Cooper v Remax Wyandotte County Real Estate, Inc., 814
Cornwell v Crawford, 784
Corpus v United States, 761
Cosby v Doyle, 757
Court of Appeals, Demos v 758
Covington v United States, 794
Craig, Maryland v 666
Cramblett, Townsend v 785
Crawford, Cornwell v 784
Crider v United States, 832
Crist, Sands v 788
Cruzan v Director, Missouri Dept. of Health, 224

Cases with opinions are **boldface.** Other cases are lightface.

TABLE OF CASES REPORTED IN 111 L Ed 2d

For earlier cases during the 1989–90 Term, see table of cases in 107, 108, 109, and 110 L Ed 2d

Curci, Messer v 745
Curtis v American Bakeries Co., 788
Curtis v American Bakeries Co., 832

D

D'Amario, Re, 812
Dau Van Tran, Estate of, Texaco Refining & Marketing, Inc. v 776
Davey, Whitacre v 810
Davis v Bush, 789
Davis v County of Jefferson, 758
Day, Re Disbarment of, 778
Deam, Re Disbarment of, 839
Deeds, Fixel v 755
Delaware, Lamborn v 751
Delaware, Wei v 779
Delo, Gilmore v 828
Delo, Gilmore v 833
Delo v Newlon, 810
Deming v Richner, 755
Demos v Bonamy, 759
Demos v Court of Appeals, 758
Demos v Supreme Court of Washington, 758
Departmental Disciplinary Committee, Mason v 784
Department of Army, Scott v 813
Department of Interior, Wexler v 825
Department of Revenue, General Motors Corp. v 813
Derrick v Collins, 817
Dineff, Re Disbarment of, 746
Director, Missouri Dept. of Health, Cruzan v 224
District of Columbia, Amiri v 824
District of Columbia, Sindram v 824
District of Columbia Dept. of Public Works, Moore v 756
Dixon-Bookman, Jackson v 824
Dodge, Re Disbarment of, 820
Dole v OSHRC, 747
Dole, Solid Waste Services, Inc. v 781
Donald v United States Dept. of Educ., 816
Donofrio v United States, 752
DOT, Nat. Transp. Safety Bd., Mikesell v 814
Dougherty v United States, 759
Doughty v Board of County Comrs., 771
Douglas v Stone, 782
Dowell, Board of Educ. of Oklahoma City Public Schools, etc. v 826
Downs v Collins, 823
Doyle, Cosby v 757
Duggan, Hasso v 751
Dugger, Bertolotti v 804
Dugger, Bertolotti v 818
Dugger, Hamblen v 797
Dugger, Hamblen v 835
Dugger v Hamblen, 818
Dugger, Jackson v 803
Dugger, Kennedy v 802
Dugger, Lusk v 805
Dugger, Lusk v 825
Dugger, Parker v 780
Dugger v White, 818

E

Eastern Auto Distributors, Inc. v Peugeot Motors of America, Inc., 752
Eastern Pub. & Advertising, Inc. v Chesapeake Pub. & Advertising, Inc., 784
Edmiston, Kurtz v 757
Edmiston, Kurtz v 832
Eli Lilly & Co. v Medtronic, Inc., 825
Elmore v South Carolina, 824
Endsley v Young, 780
Erickson, Re Disbarment of, 836
Espinueva v Garrett, 751
Esquibel, Lepiscopo v 787
Etlin v Etlin, 786
Evans v Pennsylvania, 789
Evans v Thompson, 764
Evans v United States, 763
Everson v Ott, 823

F

Fairchild, Lockhart v 833
Fairchild v Lockhart, 834
F. & H. R. Farman-Farmaian Consulting Engineers Firm v Harza Engineering Co., 809
Farnan, Martin v 789
Farnan, Martin v 825
Fauver, Long v 756
FCC, Communications Satellite Corp. v 749
FCC, Communications Satellite Corp. v 829
FCC, Metro Broadcasting, Inc. v 445
FCC, Metro Broadcasting, Inc. v 829
Fedak, Klacsmann v 757
Feldman, Re Disbarment of, 839
FERC, California v 813
Ferrell, Maryland v 810
Fink v Fink, 750
First Bank Nat. Assn., Willis v 755
Fitz v United States, 794
Fixel v Deeds, 755
Flanagan v United States, 815
Flannigan, Lee v 786
Flores v Illinois, 799
Flores v Illinois, 830
Florida, Stewart v 802

Cases with opinions are **boldface**. Other cases are lightface.

For earlier cases during the 1989–90 Term, see table of cases in 107, 108, 109, and 110 L Ed 2d

Fluker v Townsend, 824
Foley v WCCO TV, Inc., 811
Fontham v Committee on Professional Responsiblity, Louisiana State Bar Assn., 751
Ford v Rutledge, 831
Foreman v Aetna Casualty & Surety Co., 783
Foster v Oklahoma, 801
Fox v United States Dept. of Interior, 814
Frank v United States, 762
Franklin v Lockhart, 788
Freeman v Alabama, 823
Freeman, Belle v 755
Fryhover v United States, 772
Fulcomer, Hilliard v 790
F/V Fjord, Churchill v 783

G

Gallego, Schaefer v 785
Gallego, Schaefer v 832
Gallion v Zinn, 755
Gallion v Zinn, 786
Gamble v United States, 761
Garcia v United States, 795
Garner, Grogan v 827
Garraghty, Ramsey v 791
Garrett, Espinueva v 751
Gates v Michigan, 749
Gedan, Partington v 810
Gedan v Partington, 776
General Motors Corp. v Department of Revenue, 813
Georgetown Steel Corp., Law Engineering, Inc. v 749
Georgia, Isaacs v 805
Georgia, Isaacs v 832
Georgia, Roberts v 822
Georgia v South Carolina, 309
Georgia v Stewart, 744
Georgia, Williams v 815
Georgia State Bd. of Elections, Brooks v 826
Gifford v United States, 754
Gilmore v Delo, 828
Gilmore v Delo, 833
Gilmore v Missouri, 833
Glados, Inc., Reliance Ins. Co. v 783
Golub v IBM Corp., 816
Goree v United States, 795
Graham v Wernz, 745
Grammer, Otey v 796
Granet, Jaffer v 778
Grgurinovich, Moerlien v 791
Grogan v Garner, 827
Gruis, Pollack v 785
Gulf Oil Corp., Bernard v 748
Gulf Oil Corp., Perron v 782
Gunter, Rust v 746

H

Hagman, Re Disbarment of, 819
Hajecate v United States, 781
Hamblen, Dugger v 818
Hamblen v Dugger, 797
Hamblen v Dugger, 835
Hamilton v Mississippi, 781
Hamilton v Texas, 772
Harmelin v Michigan, 779
Harris v United States, 759
Harris v United States, 793
Harza Engineering Co., F. & H. R. Farman-Farmaian Consulting Engineers Firm v 809
Hasso v Duggan, 751
Hauges v United States Postal Service, 787
Hawk-Bey v United States, 815
Hayse v Board of Trustees of University of Kentucky, 783
Hegwood, Re, 812
Henderson, Re Disbarment of, 820
Henley v Tennessee, 800
Hernandez-Escarsega v United States, 748
Herrera v Oklahoma, 791
HHS, Taylor v 813
Hill, Lockhart v 767
Hilliard v Fulcomer, 790
Hinojosa-Ramos v United States, 794
Hobson, Re Disbarment of, 838
Hodgdon v United States, 795
Hodgson v Minnesota, 344
Holman v Illinois, 804
Holman v Illinois, 831
Holsey v Nuth, 763
Honolulu, Kanekoa v 777
Hooper v Arizona, 801
Hopkinson v Shillinger, 765
Huff v North Carolina, 777
Huffman v Indiana, 767
Huyett, Martin v 789
Huyett, Martin v 825
Huynh v United States, 759

I

IBM Corp., Golub v 816
ICC, United Transp. Union v 781
Idaho, Lankford v 803
Idaho, Lankford v 831
Idaho, McKinney v 800
Idaho, McKinney v 830

Cases with opinions are **boldface.** Other cases are lightface.

TABLE OF CASES REPORTED IN 111 L Ed 2d

For earlier cases during the 1989–90 Term, see table of cases in 107, 108, 109, and 110 L Ed 2d

Idaho v Wright, 638
Illinois, Barrow v 767
Illinois, Barrow v 832
Illinois, Clark v 786
Illinois, Coleman v 802
Illinois, Coleman v 831
Illinois, Flores v 799
Illinois, Flores v 830
Illinois, Holman v 804
Illinois, Holman v 831
Illinois, Jimerson v 796
Illinois, Jimerson v 828
Illinois, Kokoraleis v 804
Illinois, Kokoraleis v 831
Illinois, Mahaffey v 799
Illinois, Nunn v 787
Illinois, Odle v 798
Illinois, Odle v 830
Illinois, Owens v 802
Illinois, Owens v 831
Illinois, Phillips v 798
Illinois, Phillips v 830
Illinois v Rodriguez, 148
Illinois, Salazar v 797
Illinois, Salazar v 829
Illinois, Turner v 787
Illinois, Young v 798
Illinois, Young v 830
Illinois Human Rights Com. v Babcock & Wilcox Co., 750
Immuno v Moor-Jankowski, 776
Indiana, Huffman v 767
Indiana, McCollum v 824
Indiana, Meyers v 772
INF, Ltd. v Spectro Alloys Corp., 744
Ingersoll-Rand Co. v McClendon, 827
INS, Ivezaj v 836
Insurance Co. of Pennsylvania v Ben Cooper, Inc., 779
International Total Services, Inc., Kelley v 816
Ireland, Re Disbarment of, 839
Iron Workers Mid-South Pension Fund v Borden Chemical, 782
Isaacs v Georgia, 805
Isaacs v Georgia, 832
Isaacson, Re Disbarment of, 837
Ivezaj v INS, 836

J

Jabe, Proctor v 761
Jackson v Dixon-Bookman, 824
Jackson v Dugger, 803
Jackson v United States, 794
Jackson v United States Dist. Court for Eastern Dist., 752
Jacquin v Stenzil, 747
Jaffer v Granet, 778
Jeffers, Lewis v 606
Jeffers, Lewis v 829
Jefferson, County of, Davis v 758
Jensen, Klacsmann v 790
Jimerson v Illinois, 796
Jimerson v Illinois, 828
Johnson, Amiri v 754
Johnson, Amiri v 823
Johnson v Leapley, 787
Johnson v United States, 793
Johnston v Texas, 747
Johnstone, Re Disbarment of, 820
Joint Com. on Accreditation of Hosp., Wilk v 822
Jones, Taylor v 791
Jones, Thomas v 817
Jones, Walker v 790

K

Kanekoa v Honolulu, 777
Kansas v Utilicorp United, Inc., 169
Karem v Priest, 817
Kassicieh, Wilson v 793
Keady, Re Disbarment of, 837
Keane, Sheffield v 794
Kelley v International Total Services, Inc., 816
Kelly, Re Disbarment of, 819
Kennedy v Dugger, 802
Kentucky, Carter v 791
Kentucky, Poorman v 759
Kerns v Collins, 756
Kessler, Sun v 758
King v United States, 793
Klacsmann v Castellano, 756
Klacsmann v Fedak, 757
Klacsmann v Jensen, 790
Klacsmann v Lockheed Space Operations Co., 792
Klein v Massachusetts, 814
Knapp v Maschner, 831
Kokernak, Re Disbarment of, 819
Kokinda, United States v 571
Kokoraleis v Illinois, 804
Kokoraleis v Illinois, 831
Kopcho v United States, 785
Kozak v United States Dept. of Agriculture, 772
Kurtz v Edmiston, 757
Kurtz v Edmiston, 832

Cases with opinions are **boldface.** Other cases are lightface.

For earlier cases during the 1989–90 Term, see table of cases in 107, 108, 109, and 110 L Ed 2d

L

Lake v California, 814
Lamborn v Delaware, 751
Lane, Wilson v 771
Lankford v Idaho, 803
Lankford v Idaho, 831
Laroque v United States, 794
Latessa, McLaughlin v 816
Latessa, Whirty v 816
Law Engineering, Inc. v Georgetown Steel Corp., 749
Leal v Collins, 813
Leapley, Johnson v 787
Lee v Flannigan, 786
Lee v McCaughtry, 754
Lepiscopo v Esquibel, 787
Lepiscopo v Sannicks, 789
Lepiscopo v Tansy, 790
Levine v United States, 792
Lewis v Adamson, 795
Lewis v Jeffers, 606
Lewis v Jeffers, 829
Lewis, Snyder v 750
Lewis, Snyder v 829
Libberton v Arizona, 797
Libberton v Arizona, 829
Libreros v United States, 760
Littlejohn v South Carolina, 789
Liu, Republic of China v 840
Lloyd v California, 786
Local 4501, Communications Workers of America v Ohio State University, 783
Lockhart, Buckley v 753
Lockhart, Fairchild v 834
Lockhart v Fairchild, 833
Lockhart, Franklin v 788
Lockhart v Hill, 767
Lockheed Space Operations Co., Klacsmann v 792
Long v Fauver, 756
Lorain Journal Co., Milkovich v 1
Louisiana, Perry v 827
Lovell, Re Disbarment of, 820
Lujan v National Wildlife Federation, 695
Lusk v Dugger, 805
Lusk v Dugger, 825
Lussy v Ticor Title Ins. Co., 792

M

Magwood v Alabama, 772
Mahaffey v Illinois, 799
Main v United States, 752
Maislin Industries, U.S., Inc. v Primary Steel, Inc., 94
Malloy, Re, 812
Manchester v United States, 792
Manufacturers Hanover Mortg. Corp., Thomas v 778
Marsh, Re, 817
Marson, Christmas v 783
Martin v Farnan, 789
Martin v Farnan, 825
Martin v Huyett, 789
Martin v Huyett, 825
Martin, Mennen Co. v 749
Martin v Shank, 815
Martin v Supreme Court of Pennsylvania, 815
Martinez v United States, 792
Maryland, Collins v 805
Maryland v Craig, 666
Maryland v Ferrell, 810
Maschner, Knapp v 831
Mason v Departmental Disciplinary Committee, 784
Massachusetts, Klein v 814
Massachusetts, Sullivan v 779
Mathis v United States, 760
Mazur, Re Disbarment of, 819
McAfee v United States, 781
McBride, Re Disbarment of, 837
McCall v Arizona, 798
McCallum, Re Disbarment of, 836
McCarter v California, 822
McCaughtry, Lee v 754
McClendon, Ingersoll-Rand Co. v 827
McCollum v Indiana, 824
McColpin v Wichita, 824
McFadden, Re, 822
McFadden v Commissioner, 823
McKinney v Idaho, 800
McKinney v Idaho, 830
McLaughlin v Latessa, 816
McLendon v Pettey, 785
McMillan v United States, 759
Medtronic, Inc., Eli Lilly & Co. v 825
Melaro, Re Disbarment of, 837
Mennen Co. v Martin, 749
Messer v Curci, 745
Metro Broadcasting, Inc. v FCC, 445
Metro Broadcasting, Inc. v FCC, 829
Meyer v State Bar of Texas, 785
Meyer v State Bar of Texas, 829
Meyers v Indiana, 772
Michigan, Gates v 749
Michigan, Harmelin v 779
Mikesell v DOT, Nat. Transp. Safety Bd., 814
Milkovich v Lorain Journal Co., 1
Miller v Prudential Bache Secur., Inc., 751

Cases with opinions are **boldface**. Other cases are lightface.

TABLE OF CASES REPORTED IN 111 L Ed 2d

For earlier cases during the 1989–90 Term, see table of cases in 107, 108, 109, and 110 L Ed 2d

Miller v Tennessee, 801
Miller v Tennessee, 830
Minnesota, Hodgson v 344
Minnick v Mississippi, 828
Mississippi, Hamilton v 781
Mississippi, Minnick v 828
Missouri, Gilmore v 833
Missouri, Sidebottom v 804
Missouri, Sidebottom v 822
Moerlien v Grgurinovich, 791
Molony, Re Disbarment of, 745
Moore v District of Columbia Dept. of Public Works, 756
Moore v Zant, 765
Moore v Zant, 826
Moor-Jankowski, Immuno v 776
Morgan v Rowe, 790
Morrow, Re Disbarment of, 821
Morts, Three Buoys Houseboat Vacations, Ltd. v 775
Mountain States Legal Foundation v National Wildlife Federation, 775
Mukhtar v United States, 762
Mukhtar v United States, 832
Muncy, Boggs v 818
Murray, Reed v 789
Murray, Watkins v 788
Murtishaw v California, 764
Myers v AP Propane, Inc., 784
Myers v United States, 787

N

Nash v Arizona, 799
National Fuel Gas Supply Corp., Public Service Com. v 750
National Mines Corp. v Caryl, 740
National Wildlife Federation, Lujan v 695
National Wildlife Federation, Mountain States Legal Foundation v 775
Nevada, Bockting v 777
New Era Publications Int'l, ApS v Carol Pub. Group, 835
Newlon, Delo v 810
News/Sun Sentinel Co. v NLRB, 748
Nichols, Re Disbarment of, 820
Nicholson, Norton v 822
N. L. Industries, Inc., Boren v 792
NLRB, News/Sun Sentinel Co. v 748
Nordstrom v Washington, 752
North Carolina, Huff v 777
Northwest Food Processors Assn. v Reilly, 750
Norton v Nicholson, 822
Nunn v Illinois, 787
Nuth, Holsey v 763

O

Oakland, County of, Allevato v 747
Odle v Illinois, 798
Odle v Illinois, 830
Office of Federal Contract Compliance Programs, Chambers v 825
Office of Personnel Management v Richmond, 821
Ohio v Akron Center for Reproductive Health, 405
Ohio, Bradley v 768
Ohio, Bradley v 830
Ohio, Wood v 788
Ohio DOT, Rice v 744
Ohio State University, Local 4501, Communications Workers of America v 783
Oklahoma, Barnett v 753
Oklahoma, Cartwright v 771
Oklahoma, Cartwright v 831
Oklahoma, Foster v 801
Oklahoma, Herrera v 791
Oklahoma Natural Gas Co. v Williams Natural Gas Co., 747
Oklahoma Pardon & Parole Bd., Coleman v 834
Olster, Re Disbarment of, 836
O'Melia v Santa Monica Municipal Court, 790
O'Riley v Union Oil Co., 776
OSHRC, Dole v 747
Ostrowsky, Re Disbarment of, 836
Otey v Grammer, 796
Ott, Everson v 823
Owens v Illinois, 802
Owens v Illinois, 831

P

Pantoja v Texas Gas Transmission Corp., 782
Paris v Young, 754
Parker, Re Disbarment of, 837
Parker v Dugger, 780
Partington, Gedan v 776
Partington v Gedan, 810
Peelman, Sansom Park v 786
Pennsylvania, Evans v 789
Pennsylvania, Reese v 748
Perron v Gulf Oil Corp., 782
Perry v Louisiana, 827
Peterson, Scully v 810
Petro-Tex Chemical Corp., Barnett v 784
Pettey, McLendon v 785
Peugeot Motors of America, Inc., Eastern Auto Distributors, Inc. v 752
Phillips v Illinois, 798
Phillips v Illinois, 830
Pickens v Arkansas, 766

For earlier cases during the 1989–90 Term, see table of cases in 107, 108, 109, and 110 L Ed 2d

Pinhas v Summit Health, Ltd., 778
Pittsburgh Corning Corp. v Simpson, 840
Pogue v White Stone Baptist Church, 821
Pollack v Gruis, 785
Poorman v Kentucky, 759
Portland Golf Club v Commissioner, 126
Potter v United States, 757
Price, Re Disbarment of, 745
Priest, Karem v 817
Primary Steel, Inc., Maislin Industries, U.S., Inc. v 94
Proctor v Jabe, 761
Provident Nat. Bank, Berbick v 813
Prudential Bache Secur., Inc., Miller v 751
Public Service Com. v National Fuel Gas Supply Corp., 750
Pulliam v United States, 761

Q

Quarterman v Commissioner, 816

R

Railway Labor Executives' Assn. v Chicago & North Western Transp. Co., 748
Ramirez v United States, 763
Ramirez v United States, 813
Ramirez v Woods, 785
Ramos-Benavidez v United States, 761
Ramsey v Garraghty, 791
Ransom v Texas, 765
Reazin, Blue Cross & Blue Shield, Inc. v 752
Redmond v United States, 753
Reed, Burns v 779
Reed v Murray, 789
Reese v Pennsylvania, 748
Reilly, Northwest Food Processors Assn. v 750
Reino v United States, 760
Reliance Ins. Co. v Glados, Inc., 783
Remax Wyandotte County Real Estate, Inc., Cooper v 814
R. Enterprises, Inc., United States v 827
Republican Party of Illinois, Rutan v 52
Republican Party of Illinois, Rutan v 828
Rice v Ohio DOT, 744
Richmond, Office of Personnel Management v 821
Richner, Deming v 755
Rierro v Texas, 825
Roberts v Georgia, 822
Rodriguez, Illinois v 148
Rodriguez v United States, 761
Roe v Texas, 814
Rogers v Slansky, 790
Romero v United States, 762
Rommann v United States, 839
Ross, Re Disbarment of, 838
Rowe, Morgan v 790
Royal Crown Cola Co. v Coca-Cola Co., 767
Ruby, Sisson v 292
Russell, Salve Regina College v 780
Rust v Gunter, 746
Rust v Sullivan, 746
Rutan v Republican Party of Illinois, 52
Rutan v Republican Party of Illinois, 828
Rutledge, Ford v 831
Ryan, Re Disbarment of, 838

S

Saahir v United States, 793
Saffle, Coleman v 834
Salazar v Illinois, 797
Salazar v Illinois, 829
Salsman v United States, 823
Salve Regina College v Russell, 780
Sanchez-Rodriguez v United States, 762
Sandberg, Virginia Bankshares, Inc. v 827
Sanders, Re Disbarment of, 745
Sands v Crist, 788
Sannicks, Lepiscopo v 789
Sansom Park v Peelman, 786
Santa Monica Municipal Court, O'Melia v 790
Santiago v United States, 754
Sawyer v Smith, 193
Sawyer v Smith, 830
Schaefer v Gallego, 785
Schaefer v Gallego, 832
Schwartz, Re Disbarment of, 836
Scott v Department of Army, 813
Scully v Peterson, 810
Seaview Industries, Inc., United Brotherhood of Carpenters & Joiners, Union No. 1149 v 784
Seitu, Re, 825
Senkowski, Shaffer v 753
Shaffer v Senkowski, 753
Shank, Martin v 815
Shawano County, Christopherson v 755
Shawano County, Christopherson v 831
Sheffield v Keane, 794
Sherman, Brown v 757
Shillinger, Hopkinson v 765
Shuman v Celeste, 756
Sidebottom v Missouri, 804
Sidebottom v Missouri, 822
Siebert v Alabama, 806
Sierra v United States, 761
Silagy v Thompson, 835
Simpson, Pittsburgh Corning Corp. v 840

Cases with opinions are **boldface.** Other cases are lightface.

TABLE OF CASES REPORTED IN 111 L Ed 2d

For earlier cases during the 1989–90 Term, see table of cases in 107, 108, 109, and 110 L Ed 2d

Sindram v District of Columbia, 824
Sisson v Ruby, 292
Skevin, Re Disbarment of, 836
Slansky, Rogers v 790
Smith, Sawyer v 193
Smith, Sawyer v 830
Smith, United States v 827
Smith v United States, 795
Snyder v Lewis, 750
Snyder v Lewis, 829
Solid Waste Services, Inc. v Dole, 781
South Carolina, Cain v 764
South Carolina, Cain v 828
South Carolina, Elmore v 824
South Carolina, Georgia v 309
South Carolina, Littlejohn v 789
SouthTrust Bank of Alabama, Thomas v 756
Spectro Alloys Corp., INF, Ltd. v 744
Spillers v Burns, 788
Spotted War Bonnet v United States, 777
Stalheim v Albert Lea Medical Surgical Center, Ltd., 821
Standard, Re Disbarment of, 838
State Bar of Texas, Meyer v 785
State Bar of Texas, Meyer v 829
Steeley v Alabama, 835
Stenzil, Jacquin v 747
Stewart v Florida, 802
Stewart, Georgia v 744
Stone, Douglas v 782
Strube v United States, 782
Stull v United States, 822
Sullivan, Accolla v 788
Sullivan, Accolla v 832
Sullivan v Massachusetts, 779
Sullivan, Rust v 746
Sullivan v United States, 794
Summit Health, Ltd., Pinhas v 778
Sun v Kessler, 758
Supreme Beef Processors, Inc. v Yaquinto, 763
Supreme Court of Pennsylvania, Martin v 815
Supreme Court of Washington, Demos v 758
Sutton v Tennessee, 796
Swentek, Re, 833

T

Tansy, Lepiscopo v 790
Tate, Bryant v 758
Taylor v HHS, 813
Taylor v Jones, 791
Taylor v Tennessee, 799
Taylor v United States, 822
Tennessee, Henley v 800
Tennessee, Miller v 801
Tennessee, Miller v 830
Tennessee, Sutton v 796
Tennessee, Taylor v 799
Tennessee, Thompson v 796
Tennessee, West v 764
Texaco Refining & Marketing, Inc. v Estate of Dau Van Tran, 776
Texas, Barefield v 766
Texas, Bell v 758
Texas, Callins v 766
Texas, Hamilton v 772
Texas, Johnston v 747
Texas, Ransom v 765
Texas, Rierro v 825
Texas, Roe v 814
Texas Gas Transmission Corp., Pantoja v 782
Thomas, Carpenter v 747
Thomas v Jones, 817
Thomas v Manufacturers Hanover Mortg. Corp., 778
Thomas v SouthTrust Bank of Alabama, 756
Thompson, Barnes v 766
Thompson, Evans v 764
Thompson, Silagy v 835
Thompson v Tennessee, 796
Three Buoys Houseboat Vacations, Ltd. v Morts, 775
Ticor Title Ins. Co., Lussy v 792
Tierney, Re Disbarment of, 819
Tobin, Re Disbarment of, 819
Toombs, Brown v 757
Townsend v Cramblett, 785
Townsend, Fluker v 824
Turner, Cochran v 816
Turner v Illinois, 787

U

Union Oil Co., O'Riley v 776
United Brotherhood of Carpenters & Joiners, Union No. 1149 v Seaview Industries, Inc., 784
United States, Alvarado v 439
United States, Arboleda v 752
United States, Asante v 813
United States, Aspromonti v 781
United States, Baasch v 815
United States, Barber v 762
United States, Beaulieu v 762
United States, Beaulieu v 811
United States, Becerra v 760
United States, Betancourt v 760
United States, Burns v 780
United States, Castiglia v 749
United States, Castillo v 814

Cases with opinions are **boldface.** Other cases are lightface.

For earlier cases during the 1989–90 Term, see table of cases in 107, 108, 109, and 110 L Ed 2d

United States, Church by Mail, Inc. v 751
United States, Cialoni v 795
United States, Connor v 793
United States, Corpus v 761
United States, Covington v 794
United States, Crider v 832
United States, Donofrio v 752
United States, Dougherty v 759
United States, Evans v 763
United States, Fitz v 794
United States, Flanagan v 815
United States, Frank v 762
United States, Fryhover v 772
United States, Gamble v 761
United States, Garcia v 795
United States, Gifford v 754
United States, Goree v 795
United States, Hajecate v 781
United States, Harris v 759
United States, Harris v 793
United States, Hawk-Bey v 815
United States, Hernandez-Escarsega v 748
United States, Hinojosa-Ramos v 794
United States, Hodgdon v 795
United States, Huynh v 759
United States, Jackson v 794
United States, Johnson v 793
United States, King v 793
United States v Kokinda, 571
United States, Kopcho v 785
United States, Laroque v 794
United States, Levine v 792
United States, Libreros v 760
United States, Main v 752
United States, Manchester v 792
United States, Martinez v 792
United States, Mathis v 760
United States, McAfee v 781
United States, McMillan v 759
United States, Mukhtar v 762
United States, Mukhtar v 832
United States, Myers v 787
United States, Potter v 757
United States, Pulliam v 761
United States, Ramirez v 763
United States, Ramirez v 813
United States, Ramos-Benavidez v 761
United States, Redmond v 753
United States, Reino v 760
United States v R. Enterprises, Inc., 827
United States, Rodriguez v 761
United States, Romero v 762
United States, Rommann v 839
United States, Saahir v 793
United States, Salsman v 823
United States, Sanchez-Rodriguez v 762
United States, Santiago v 754
United States, Sierra v 761
United States, Smith v 795
United States v Smith, 827
United States, Spotted War Bonnet v 777
United States, Strube v 782
United States, Stull v 822
United States, Sullivan v 794
United States, Taylor v 822
United States, U.S. Gold & Silver Invest., Inc. v 750
United States, Utz v 753
United States, Vastola v 744
United States, Wallace v 753
United States, Watson v 754
United States, Wey v 792
United States, White v 763
United States, Williams v 763
United States, Williams v 791
United States, Winston v 787
United States Bankruptcy Court, Wagner v 821
United States Dept. of Agriculture, Kozak v 772
United States Dept. of Educ., Donald v 816
United States Dept. of Interior, Fox v 814
United States Dist. Court for Eastern Dist., Jackson v 752
United States EPA, American Mining Congress v 748
United States Postal Service, Hauges v 787
United Transp. Union v ICC, 781
U.S. Gold & Silver Invest., Inc. v United States, 750
Utah, Bullock v 780
Utilicorp United, Inc., Kansas v 169
Utz v United States, 753

V

Vastola v United States, 744
Vickers v Arizona, 806
Vickers v Arizona, 829
Virginia Bankshares, Inc. v Sandberg, 827

W

Wagner v United States Bankruptcy Court, 821
Walker v Jones, 790
Wallace v United States, 753
Walton v Arizona, 511
Walton v Arizona, 828

Cases with opinions are **boldface.** Other cases are lightface.

TABLE OF CASES REPORTED IN 111 L Ed 2d

For earlier cases during the 1989–90 Term, see table of cases in 107, 108, 109, and 110 L Ed 2d

Washington, Nordstrom v 752
Watkins, Re Disbarment of, 746
Watkins v Murray, 788
Watson v United States, 754
WCCO TV, Inc., Foley v 811
Wei v Delaware, 779
Weiss, Re Disbarment of, 821
Wernz, Graham v 745
West v Tennessee, 764
West Virginia Bd. of Regents, Clarke v 779
Wexler v Department of Interior, 825
Wey v United States, 792
Whirty v Latessa, 816
Whisenhant v Alabama, 824
Whitacre v Davey, 810
Whitaker v Bay Area Rapid Transit, 755
White, Dugger v 818
White v United States, 763
White Stone Baptist Church, Pogue v 821
Wichita, McColpin v 824
Wigen, Ahmad v 835
Wilk v Joint Com. on Accreditation of Hosp., 822
Williams, Re Disbarment of, 746
Williams v California, 826
Williams v Georgia, 815
Williams v United States, 763
Williams v United States, 791
Williams Natural Gas Co., Oklahoma Natural Gas Co. v 747
Willis v First Bank Nat. Assn., 755
Wilson v Kassicieh, 793
Wilson v Lane, 771
Winston v United States, 787
Wood v Ohio, 788
Woods, Ramirez v 785
Wright, Idaho v 638

Y

Yaquinto, Supreme Beef Processors, Inc. v 763
Yinger, Re Disbarment of, 820
Young, Endsley v 780
Young v Illinois, 798
Young v Illinois, 830
Young, Paris v 754
Youngblood, Collins v 30

Z

Zant, Allen v 801
Zant, Allen v 830
Zant, Cargill v 823
Zant, Moore v 765
Zant, Moore v 826
Zinn, Gallion v 755
Zinn, Gallion v 786

Cases with opinions are **boldface.** Other cases are lightface.

TABLE OF PARALLEL REFERENCES

FOR CASES REPORTED HEREIN AND IN OFFICIAL REPORTER'S EDITION

VOLUME 497 US (pages 1–end)

497 US	Title of Case	111 L Ed 2d
1-36	Milkovich v Lorain Journal Co.	1-29
37-61	Collins v Youngblood	30-51
62-115	Rutan v Republican Party of Illinois Frech v Rutan	52-93
116-153	Maislin Industries, U.S., Inc. v Primary Steel, Inc.	94-125
154-176	Portland Golf Club v Commissioner	126-147
177-198	Illinois v Rodriguez	148-168
199-226	Kansas v Utilicorp United, Inc.	169-192
227-260	Sawyer v Smith	193-223
261-357	Cruzan v Director, Missouri Dept. of Health	224-291
358-375	Sisson v Ruby	292-308
376-416	Georgia v South Carolina	309-343
417-501	Hodgson v Minnesota Minnesota v Hodgson	344-404
502-542	Ohio v Akron Center for Reproductive Health	405-438
543-546	Alvarado v United States	439-444
547-638	Metro Broadcasting, Inc. v FCC Astroline Communications Co. Ltd. Partnership v Shurberg Broadcasting of Hartford, Inc.	445-510
639-719	Walton v Arizona	511-570
720-763	United States v Kokinda	571-605
764-804	Lewis v Jeffers	606-637
805-835	Idaho v Wright	638-665
836-870	Maryland v Craig	666-694
871-915	Lujan v National Wildlife Federation	695-733
916-921	Ashland Oil, Inc. v Caryl	734-739
922-924	National Mines Corp. v Caryl	740-743

Also Memorandum Cases

(See 111 L Ed 2d 744-840)

TABLE OF FEDERAL CONSTITUTIONAL PROVISIONS, STATUTES, COURT RULES, AND REGULATIONS CITED AND CONSTRUED IN 111 L Ed 2d

CONSTITUTION

	111 L Ed 2d page
Art I, § 8, cl 3	734, 740
Art I, § 10	30
1st Amend	1, 52, 445, 571
4th Amend	148
5th Amend	445
6th Amend	30, 439, 511, 638, 666
8th Amend	193, 511, 606
14th Amend	52, 193, 224, 405, 511, 606, 638, 666

UNITED STATES CODE SERVICE

Title and section	*111 L Ed 2d page*
5 USCS	
§§ 551 et seq.	695
§ 551(13)	695
§§ 701 et seq.	695
§ 702	695
§ 704	695
15 USCS	
§ 15(a)	169
§ 15c(a)(1)	169
26 USCS	
§ 162(a)	126
§ 501(c)(7)	126
§ 512(a)(1)	126
§ 512(a)(3)(A)	126
28 USCS	
§ 1333(1)	292
42 USCS	
§ 1983	52
§§ 4321 et seq.	695
43 USCS	
§§ 1701 et seq.	695
46 USCS Appx	
§ 183(a)	292
49 USCS	
§§ 10101 et seq.	94
§ 10701	94
§ 10735(a)(1)	94
§ 10741	94
§ 10761	94
§ 10761(a)	94
§ 10761(b)	94
§ 10762	94
§ 10762(a)(1)	94
§ 11903(b)	94

STATUTES AT LARGE

	111 L Ed 2d page
101 Stat 1329-1331	445
102 Stat 2216	445
103 Stat 1020	445

FEDERAL RULES OF CIVIL PROCEDURE

	111 L Ed 2d page
Rule 6	695
Rule 12(b)(6)	52
Rule 56	695

ADMINISTRATIVE RULES AND REGULATIONS

Title and section	*111 L Ed 2d page*
39 CFR	
§ 232.1(h)(1)	571

TABLE OF CLASSIFICATIONS TO THE U.S. SUPREME COURT DIGEST, LAWYERS' EDITION, FROM CASES REPORTED IN 111 L Ed 2d

---

Topic and section	*111 L Ed 2d page*
Abortion	
§ 8	344, 405
§ 9	344, 405
Administrative Law	
§ 214	695
§ 216	695
§ 219	695
§ 220	695
§ 223	695
§ 276	94
Admiralty	
§ 45	292
§ 70	292
Appeal	
§ 386	666
§ 487	148
§ 500	1, 148
§ 774	1
§ 775	1
§ 806	511
§ 910.6	439, 740
§ 951	439
§ 1087.5(2)	30
§ 1088	30, 439
§ 1092	30, 638
§ 1113	292
§ 1289	126, 511
§ 1293	52
§ 1297	638
§ 1304	94
§ 1321	30
§ 1332	292
§ 1333	30
§ 1336	292
§ 1379	511
§ 1452	1
§ 1478	511
§ 1562	638
§ 1662	94, 126, 292, 666
§ 1673	126, 638
§ 1677	571, 740
§ 1692.1	148, 439
§ 1692.3	666, 740
§ 1750	1, 94
§ 1767	1
§ 1768	1
§ 1769	695
§ 1770	695
Boundaries	
§ 4	309
§ 5	309
§ 8	309
§ 9	309
§ 10	309
§ 11	309
§ 12	309
§ 16	309
§ 29	309
Civil Rights	
§ 3	445
§ 4.3	445
§ 6.4	445
§ 6.5	445
Commerce	
§ 329	734, 740
Communications	
§ 8	445
§ 15	445
§ 16	445
§ 20	445
§ 25	445
Constitutional Law	
§ 1	193
§ 8	224
§ 17	30
§ 37	638, 666
§ 74	30
§ 76	30
§ 78	30
§ 79	30
§ 82	30
§ 83	30
§ 101.3	224
§ 347.5	224
§ 514	224
§ 525	224
§ 526	405

Topic and section	*111 L Ed 2d page*
§ 528.3	224
§ 528.5	224
§ 778.5	405
§ 829	224
§ 830.7	224, 405
§ 839.5	193
§ 925	1, 52
§ 934	571
§ 937	445
§ 940	52
§ 947	1
§ 948	1
Courts	
§ 106	445
§ 141	445
§ 538.11	695
§ 538.12	695
§ 766	734
§ 775	94, 309, 606
§ 777.5	30, 193, 734, 740
Criminal Law	
§ 46	148
§ 50	638, 666
§ 82	193, 511, 606
§ 83	193, 511, 606
§ 93	606
Damages	
§ 22	1
Environmental Law	
§ 3	695
Evidence	
§ 99(1)	405
§ 147	94, 511
§ 176	1
§ 192	1
§ 273	511
§ 380	148
§ 396	1
§ 551	224
§ 681	148
§ 686	638
§ 687	638
§ 720	638
§ 750	638
§ 755	638
§ 866	695
§ 869(1)	224
§ 918	224
§ 980	148
Habeas Corpus	
§ 28	193
§ 35	606
§ 36	193, 606
§ 41	30
§ 47	193
§ 61	193, 606
Income Taxes	
§ 84	126
§ 91	126
§ 93	126
§ 94	126
§ 95	126
§ 100	126
§ 104	126
Incompetent Persons	
§ 1	224
Interstate Commerce Commission	
§ 3	94
Judgment	
§ 109	309
§ 179	309
§ 209	309
Jury	
§ 2	30
§ 33	511
§ 34	30
Motor Vehicles and Carriers	
§ 10	94
§ 14	94
Notice	
§ 16	309
Parent and Child	
§ 1	344
Pleading	
§ 103	52
§ 179	52, 695
Postal Service	
§ 2	571
Public Lands	
§ 13	695
Reference	
§ 19	309
§ 23	309
§ 26	309
Restraints of Trade, Monopolies, and Unfair Trade Practices	
§ 67	169
Search and Seizure	
§ 5	148
§ 9	148
§ 12	148
§ 14	148
§ 25	148
§ 27	148
States, Territories, and Possessions	
§ 12	193
Statute of Frauds	
§ 1	224
Statutes	
§ 1	445

Topic and section — *111 L Ed 2d page*

§ 1.5 445
§ 91 126
§ 102 94
§ 103 94
§ 107 405
§ 109 94
§ 152 94
§ 154 94
§ 160 94
§ 164 .... 94, 126

Summary Judgment and Judgment on Pleadings
§ 4 695
§ 5 695
§ 8 695

Supreme Court of the United States
§ 64 309
§ 67 309
§ 71 309

Trial
§ 113 1
§ 291 511

United States
§ 19 445

MISCELLANEOUS PROCEEDINGS

July 23, 1990

Assignment Order

Pursuant to the provisions of Title 28 USC Section 42 [28 USCS § 42], it is ordered that The Chief Justice be, and he is hereby, assigned to the First Circuit and the Third Circuit as Circuit Justice, effective July 20, 1990, pending further order.

August 7, 1990

Assignment Order

Pursuant to the provisions of Title 28 USC Section 42 [28 USCS § 42], it is ordered that Justice Blackmun be, and he is hereby, assigned to the First Circuit as Circuit Justice, effective August 7, 1990, pending further order.

Pursuant to the provisions of Title 28 USC Section 42 [28 USCS § 42], it is ordered that Justice Stevens be, and he is hereby, assigned to the Third Circuit as Circuit Justice, effective August 7, 1990, pending further order.

It is further ordered that the order entered July 23, 1990, assigning The Chief Justice to the First Circuit and to the Third Circuit as Circuit Justice is vacated.

September 21, 1990

Assignment Order

An order of The Chief Justice designating and assigning Justice Powell (retired) to perform judicial duties in the United States Court of Appeals for the Eleventh Circuit during the period of September 19 through September 20, 1990, and for such time as may be required to complete unfinished business, pursuant to 28 USC Section 294(a) [28 USCS § 294(a)], is ordered entered on the minutes of this Court, pursuant to 28 USC Section 295 [28 USCS § 295].

CASES ADJUDGED

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1989

VOLUME 497 US (pp 1–end)

†

MICHAEL MILKOVICH, Sr., Petitioner

v

LORAIN JOURNAL CO. et al.

497 US 1, 111 L Ed 2d 1, 110 S Ct 2695

[No. 89-645]

Argued April 24, 1990. Decided June 21, 1990.

Decision: First Amendment held not to require separate privilege for "opinion," where statements published in newspaper were allegedly defamatory under state law.

SUMMARY

A high school wrestling coach and the superintendent of the public school district in which the coach was employed testified at a hearing held in an Ohio state court concerning an altercation which took place at a wrestling meet involving the coach's team. Thereafter, an article which appeared in a local newspaper expressed disapproval of the conduct of the coach and the superintendent at the hearing and included a statement that "[a]nyone who attended the [wrestling] meet . . . knows in his heart that [the coach and the superintendent] lied at the hearing." The coach commenced a defamation action in the Court of Common Pleas of Lake County, Ohio against the author of the article and the owner of the newspaper in which it was published, alleging that various passages in the article, and the headline appearing above it, (1) accused him of committing the crime of perjury, (2) damaged him in his occupation as a coach and teacher, and (3) constituted libel per se. The court granted a directed verdict for the defense on the ground that the evidence failed to establish that the article was published with "actual malice." The Ohio Court of Appeals for the Eleventh Appellate District reversed and remanded, holding that there was sufficient evidence of actual malice to permit the case to go to the jury. On remand, the trial court granted summary judgment for the defense on the grounds that (1) the article was an opinion protected from a libel action by "constitutional law," and alternatively, (2) as a public figure, the coach had failed to make a prima facie case of actual malice. The Ohio Court of Appeals affirmed both rulings, but the Supreme Court of Ohio reversed and remanded, holding

Briefs of Counsel, p 843, infra.

that (1) the coach was neither a public figure nor a public official under the relevant law, and (2) the allegedly defamatory statements were factual assertions as a matter of law and were not constitutionally protected as the opinions of the author. Meanwhile, the public school superintendent had been pursuing a separate defamation action in the Ohio courts, based on the same newspaper article. Two years after its decision in the coach's suit, the Ohio Supreme Court, upholding a summary judgment against the superintendent in his suit, reversed its position on the article, stating that the article was "constitutionally protected opinion." Considering itself bound by the Ohio Supreme Court's decision in the superintendent's suit, the Ohio Court of Appeals subsequently affirmed a summary judgment for the defense in the coach's suit, concluding that it had been decided as a matter of law that the newspaper article was constitutionally protected opinion (46 Ohio App 3d 20, 545 NE2d 1320). The Ohio Supreme Court dismissed the coach's appeal (43 Ohio St 3d 707, 540 NE2d 724).

On certiorari, the United States Supreme Court reversed and remanded for further proceedings. In an opinion by Rehnquist, Ch. J., joined by White, Blackmun, Stevens, O'Connor, Scalia, and Kennedy, JJ., it was held that the Federal Constitution's First Amendment did not prohibit the application of Ohio's libel laws to the allegedly defamatory statements contained in the newspaper article, because (1) no additional constitutional privilege for "opinion" is required to ensure the freedom of expression guaranteed by the First Amendment, inasmuch as the breathing space which freedoms of expression require in order to survive is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between "opinion" and fact; (2) a reasonable factfinder could conclude that the statements in the newspaper article imply an assertion that the coach perjured himself at the judicial hearing; (3) the connotation that the petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false; and (4) the refusal to declare a separate constitutional privilege for "opinion" strikes a proper balance between the First Amendment's vital guarantee of free and uninhibited discussion of public issues and the important social values which underlie the law of defamation.

Brennan, J., joined by Marshall, J., dissented, expressing the view that the allegedly defamatory statements could not reasonably be interpreted as either stating or implying defamatory facts about the coach.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Appeal § 1452; Constitutional Law §§ 925, 947, 948; Damages § 22; Evidence §§ 176, 396 — defamation — statements protected by First Amendment — public figures — matters of public concern — proof of malice — presumed or punitive damages — review of whole record

1a-1j. In a state-law action for defamation brought against the author

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

50 Am Jur 2d, Libel and Slander § 14

USCS, Constitution, Amendment 1

US L Ed Digest, Constitutional Law § 947

Index to Annotations, First Amendment; Libel and Slander; Newspapers and Periodicals; New York Times Rule; Perjury

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Free speech and press clauses of Federal Constitution's First Amendment as affecting damages recoverable for defamation—Supreme Court cases. 86 L Ed 2d 816.

Progeny of New York Times v Sullivan in the Supreme Court. 61 L Ed 2d 975.

Constitutional aspects of libel and slander—Supreme Court cases. 28 L Ed 2d 885.

Libel and slander: necessity of expert testimony to establish negligence of media defendant in defamation action by private individual. 37 ALR4th 987.

Libel by newspaper headlines. 95 ALR3d 660.

Libel and slander: who is a "public figure" in the light of Gertz v Robert Welch, Inc. (1974) 418 US 323, 41 L Ed 2d 789, 94 S Ct 2997. 75 ALR3d 616.

Libel and slander: what constitutes actual malice, within federal constitutional rule requiring public officials and public figures to show actual malice. 20 ALR3d 988.

Libel and slander: who is a public official or otherwise within the federal constitutional rule requiring public officials to show actual malice. 19 ALR3d 1361.

of a newspaper article and the owner of the newspaper in which the article was published, where a reasonable factfinder could conclude that statements in the article imply an assertion that a high school athletic coach perjured himself at a judicial hearing, and where the connotation that the coach committed perjury is sufficiently factual to be susceptible of being proved true or false, the Federal Constitution's First Amendment does not prohibit the application of state libel laws to such statements, notwithstanding the contention that the statements are expressions of opinion, because (1) no additional constitutional privilege for "opinion" is required to ensure the freedom of expression guaranteed by the First Amendment, inasmuch as, under existing constitutional doctrine, (a) a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection, at least in situations, such as the present case, where a media defendant is involved, (b) statements that cannot reasonably be interpreted as stating actual facts about an individual are constitutionally protected, (c) where a statement of "opinion" on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with "actual malice," that is, with knowledge of their false implications or with reckless disregard of their truth, and where such a statement reasonably implying false and defamatory facts involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault, (d) the limitations on presumed or punitive damages established by New York Times Co. v Sullivan (1964) 376 US 254, 11 L Ed 2d 686, 84 S Ct 710, and Gertz v Robert Welch, Inc. (1974) 418 US 323, 41 L Ed 2d 789, 94 S Ct 2997, apply to the type of statements at issue in the present case, and (e) an appellate court in a case raising First Amendment issues is obligated to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression; (2) the breathing space which freedoms of expression require in order to survive is thus adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between "opinion" and fact; and (3) the refusal to declare a separate constitutional privilege for "opinion" strikes a proper balance between the First Amendment's vital guarantee of free and uninhibited discussion of public issues and the important social values which underlie the law of defamation. (Brennan and Marshall, JJ., dissented from this holding.)

Appeal §§ 775, 1750, 1767, 1768 — preclusion of review — plaintiff as public figure — law of the case — consideration on remand

2a-2c. On certiorari from a state intermediate appellate court's affirmance of a summary judgment for the defense in a state-law defamation suit brought by a high school wrestling coach, review by the United States Supreme Court of whether allegedly defamatory statements concerning the coach and a public school superintendent were "constitutionally protected opinion" is not precluded—notwithstanding that the coach failed to establish actual malice, and, in a separate defamation suit brought by the school superintendent, the state's highest court suggested that the coach was a public figure—because (1) the statement made by the state's highest court in the superintendent's case concerning the coach's status as a public figure was dictum, and (2) the coach was not a party to the superintendent's suit and thus was not bound under state law by anything said in that case; in such a situation, the ruling of the state's highest court in a prior proceeding in the coach's suit that the coach was neither a public figure nor a public official presumably continues to be the law of the case on that issue, but the state's highest court is free to address the issue on remand.

Appeal §§ 774, 1750; Constitutional Law § 947 — First Amendment — requirement of fault in defamation suit — alternative appellate decision — consideration on remand

3a-3c. The United States Supreme Court—on certiorari from a state intermediate appellate court's affirmance of a summary judgment for the defense in a state-law defamation suit on the ground that allegedly defamatory statements published in a newspaper were "constitutionally protected opinion"—will reject the defendants' contention that the state intermediate appellate court alternatively decided that there was no negligence in the case even if the plaintiff were regarded as a private figure—and that the suit is therefore precluded under the rule adopted in Gertz v Robert Welch, Inc. (1974) 418 US 323, 41 L Ed 2d 789, 94 S Ct 2997 (stating that the Federal Constitution's First Amendment bars imposition of liability without fault in a state-law defamation suit brought by a private figure against a publisher or broadcaster of a defamatory falsehood)—where, although the state intermediate appellate court said that "the instant cause does not present any material issue of fact as to negligence or 'actual malice,'" (1) that statement was immediately explained by the court's following statement that a recent ruling in a factually similar case had accorded the defendants in the instant case absolute immunity from liability, and (2) the court never made an evidentiary determination on the issue of the defendants' negligence; the state's highest court is free to address the issue of negligence on remand.

Appeal §§ 500, 1750 — adequate and independent state grounds — consideration on remand

4a, 4b. A state's highest court, in holding that certain allegedly defamatory statements were "constitutionally protected opinion," does not evidence an intent to independently rest its decision on state-law grounds, where, although the court twice cites the state constitution in support of its ruling, the court (1) relies heavily on federal decisions interpreting the scope of Federal Constitution's First Amendment protection accorded defamation defendants, and (2) concludes that the allegedly defamatory statements were constitutionally protected opinion "both with respect to the federal Constitution and under our state Constitution"; under these circumstances, the decision is at least interwoven with federal law and is not clear on its face as to the court's intent to rely on independent state grounds, yet fails to make a plain statement that the federal cases did not themselves compel the result that the court reached; accordingly, where the intermediate appellate court of the same state—considering itself bound by the conclusion of the state's highest court that the allegedly defamatory statements were "constitutionally protected opinion" —subsequently affirms a summary judgment for the defense in a different defamation suit based on the same allegedly defamatory statements, review by the United States Supreme Court of the federal constitutional aspects of the state intermediate appellate court's decision is not barred under the rule concerning adequate and independent state grounds adopted in Michigan v Long (1983) 463 US 1032, 77 L Ed 2d 1201, 103 S Ct 3469; the state's highest court is free to address the foregoing issues on remand.

Trial § 113 — actual malice — question of law

5. The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law.

Constitutional Law § 947 — falsity — liability for defamation

6. The Federal Constitution's First Amendment requires that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least where a media defendant is involved.

Constitutional Law § 947; Evidence § 192 — defamation — proof of falsity

7a, 7b. Under the rule that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection under the Federal Constitution's First Amendment from the application of state defamation laws, the issue of falsity relates to the defamatory facts implied by the statement; although the statement "I think Jones lied" may be provable as false on two levels—first, that the speaker really did not think Jones had lied but said it anyway, and second, that Jones really had not lied—it is the second level of falsity which would ordinarily serve as the basis for a defamation action, though falsity at the first level may serve to establish malice where that is required for recovery.

SYLLABUS BY REPORTER OF DECISIONS

While petitioner Milkovich was a high school wrestling coach, his team was involved in an altercation at a match with another high school's team. Both he and School Superintendent Scott testified at an investigatory hearing before the Ohio High School Athletic Association (OHSAA), which placed the team on probation. They testified again during a suit by several parents, in which a county court overturned OHSAA's ruling. The day after the court's decision, respondent Lorain Journal Company's newspaper published a column authored by respondent Diadiun, which implied that Milkovich lied under oath in the judicial proceeding. Milkovich commenced a defamation action against respondents in the county court, alleging that the column accused him of committing the crime of perjury, damaged him in his occupation of teacher and coach, and constituted libel per se. Ultimately, the trial court granted summary judgment for respondents. The Ohio Court of Appeals affirmed, considering itself bound by the State Supreme Court's determination in Superintendent Scott's separate action against respondents that, as a matter of law, the article was constitutionally protected opinion.

Held:

1. The First Amendment does not require a separate "opinion" privilege limiting the application of state defamation laws. While the Amendment does limit such application, New York Times Co. v Sullivan, 376 US 254, 11 L Ed 2d 681, 84 S Ct 710, 95 ALR2d 1412, the breathing space that freedoms of expression require to survive is adequately secured by existing constitutional doctrine. Foremost, where a media defendant is involved, a statement on matters of public concern must be provable as false before liability can be assessed, Philadelphia Newspapers, Inc. v Hepps, 475 US 767, 89 L Ed 2d 783, 106 S Ct 1558, thus ensuring full constitutional protection for a statement of opinion having no provably false factual connotation. Next, statements that cannot reasonably be interpreted as stating actual facts about an individual are protected, see, e.g., Greenbelt Cooperative Publishing Assn., Inc. v Bresler, 398 US 6, 26 L Ed 2d 6, 90 S Ct 1537, thus assuring that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of this Nation. The reference to "opinion" in dictum in Gertz v Robert Welch, Inc. 418 US 323, 339-340, 41 L Ed 2d 789, 94 S Ct 2997, was not intended to create a wholesale defamation exemption for "opinion." Read in context, the Gertz dictum is merely a reiteration of Justice Holmes' "marketplace of ideas" concept, see Abrams v United States, 250 US 616, 630, 63 L Ed 1173, 40 S Ct 17. Simply couching a statement—"Jones is a liar"—in terms of opinion—"In my opinion Jones is a liar"—does not dispel the factual implications contained in the statement.

2. A reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that Milkovich perjured himself in a judicial proceeding. The article did not use the sort of loose, figurative, or hyperbolic language that would negate the impression that Diadiun was seriously maintaining Milkovich committed perjury. Nor does the article's general tenor negate this impression. In addition, the connotation that Milkovich committed perjury is sufficiently factual that it is susceptible of being proved true or false by comparing, inter alia, his testimony before the OHSAA board with his subsequent testimony before the trial court.

3. This decision balances the First Amendment's vital guarantee of free and uninhibited discussion of public issues with the important social values that underlie defamation law and society's pervasive and strong interest in preventing and redressing attacks upon reputation.

46 Ohio App 3d 20, 545 NE2d 1320, reversed and remanded.

Rehnquist, C. J., delivered the opinion of the Court, in which White, Blackmun, Stevens, O'Connor, Scalia, and Kennedy, JJ., joined. Brennan, J., filed a dissenting opinion, in which Marshall, J., joined.

APPEARANCES OF COUNSEL

Brent Lawson English argued the cause for petitioner.

Richard D. Panza argued the cause for respondents.

Briefs of Counsel, p 843, infra.

OPINION OF THE COURT

Chief Justice **Rehnquist** delivered the opinion of the Court.

[1a] Respondent J. Theodore Diadiun authored an article in an Ohio newspaper implying that petitioner Michael Milkovich, a local high school wrestling coach, lied under oath in a judicial proceeding about an incident involving petitioner and his team which occurred at a wrestling match. Petitioner sued Diadiun and the newspaper for libel, and the Ohio Court of Appeals affirmed a lower court entry of summary judgment against petitioner. This judgment was based in part on the grounds that the article constituted an "opinion" protected from the reach of state defamation law by the First Amendment to the United States Constitution. We hold that the First Amendment does not prohibit the application of Ohio's libel laws to the alleged defamations contained in the article.

This lawsuit is before us for the third time in an odyssey of litigation spanning nearly 15 years.[1] Petitioner Milkovich, now retired, was the wrestling coach at Maple Heights High

School in Maple Heights, Ohio. In 1974, his team was involved in an altercation at a home wrestling match with a team from Mentor High School. Several people were injured. In response to the incident, the Ohio High School Athletic Association (OHSAA) held a hearing at which Milkovich and H. Don Scott, the Superintendent of Maple Heights Public Schools, testified. Following the hearing, OHSAA placed the Maple Heights team on probation for a year and declared the team ineligible for the 1975 state tournament. OHSAA also censured Milkovich for his actions during the altercation. Thereafter, several parents and wrestlers sued OHSAA in the Court of Common Pleas of Franklin County, Ohio, seeking a restraining order against OHSAA's ruling on the grounds that they had been denied due process in the OHSAA proceeding. Both Milkovich and Scott testified in that proceeding. The court overturned OHSAA's probation and ineligibility orders on due process grounds.

The day after the court rendered its decision, respondent Diadiun's column appeared in the News-Herald, a newspaper which circulates in Lake County, Ohio, and is owned by respondent Lorain Journal Co. The column bore the heading "Maple beat the law with the 'big lie,'" beneath which appeared Diadiun's photograph and the words "TD Says." The carryover page headline announced ". . . Diadiun says Maple told a lie." The column contained the following passages:

> "'. . . [A] lesson was learned (or relearned) yesterday by the student body of Maple Heights High

---

[1] The Court has previously denied certiorari twice in this litigation on various judgments rendered by the Ohio courts. See Lorain Journal Co. v Milkovich, 474 US 953, 88 L Ed 2d 305, 106 S Ct 322 (1985); Lorain Journal Co. v Milkovich, 449 US 966, 66 L Ed 2d 232, 101 S Ct 380 (1980).

School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

" 'A lesson which, sadly, in view of the events of the past year, is well they learned early.

" 'It is simply this: If you get in a jam, lie your way out.

" 'If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

" 'The teachers responsible were mainly head Maple wrestling coach, Mike Milkovich, and former superintendent of schools H. Donald Scott.

. . . . .

" 'Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

" 'But they got away with it.

" 'Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

" 'I think not.' " Milkovich v News-Herald, 46 Ohio App 3d 20, 21, 545 NE2d 1320, 1321-1322 (1989).[2]

---

[2] In its entirety, the article reads as follows:

"Yesterday in the Franklin County Common Pleas Court, judge Paul Martin overturned an Ohio High School Athletic Assn. decision to suspend the Maple Heights wrestling team from this year's state tournament.

"It's not final yet—the judge granted Maple only a temporary injunction against the ruling—but unless the judge acts much more quickly than he did in this decision (he has been deliberating since a Nov. 8 hearing) the temporary injunction will allow Maple to compete in the tournament and make any further discussion meaningless.

"But there is something much more important involved here than whether Maple was denied due process by the OHSAA, the basis of the temporary injunction.

"When a person takes on a job in a school, whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator.

"There is scarcely a person concerned with school who doesn't leave his mark in some way on the young people who pass his way—many are the lessons taken away from school by students which weren't learned from a lesson plan or out of a book. They come from personal experiences with and observations of their superiors and peers, from watching actions and reactions.

"Such a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

"A lesson which, sadly, in view of the events of the past year, is well they learned early.

"It is simply this: If you get in a jam, lie your way out.

"If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

"The teachers responsible were mainly head Maple wrestling coach, Mike Milkovich, and former superintendent of schools H. Donald Scott.

"Last winter they were faced with a difficult situation. Milkovich's ranting from the side of the mat and egging the crowd on against the meet official and the opposing team backfired during a meet with Greater Cleveland Conference rival Metor [sic], and resulted in first the Maple Heights team, then many of the partisan crowd attacking the Mentor squad in a brawl which sent four Mentor wrestlers to the hospital.

"Naturally, when Mentor protested to the governing body of high school sports, the OHSAA, the two men were called on the carpet to account for the incident.

"But they declined to walk into the hearing

[497 US 6]

Petitioner commenced a defamation action against respondents in the Court of Common Pleas of Lake County, Ohio, alleging that the headline of Diadiun's article and the

[497 US 7]

nine passages quoted above "accused plaintiff of committing the crime of perjury, an indictable offense in the State of Ohio, and damaged plaintiff directly in his life-time occupation of coach and teacher, and constituted libel per se." App 12. The action proceeded to trial, and the court granted a directed verdict to respondents on the ground that the evidence failed to establish the article was published with "actual malice" as required by New York Times Co. v Sullivan, 376 US 254, 11 L Ed 2d 686, 84 S Ct 710, 95 ALR2d 1412 (1964). See App 21-22. The Ohio Court of Appeals for the Eleventh Appellate District reversed and remanded, holding that there was sufficient evidence of actual malice to go to the jury. See Milkovich v Lorain Journal, 65 Ohio App 2d 143, 416 NE2d 662 (1979). The Ohio

[497 US 8]

Supreme Court dismissed the ensuing appeal for want of a substantial constitutional question, and this Court denied certiorari. 449 US 966, 66 L Ed 2d 232, 101 S Ct 380 (1980).

On remand, relying in part on our decision in Gertz v Robert Welch, Inc. 418 US 323, 41 L Ed 2d 789, 94 S Ct 2997 (1974), the trial court granted summary judgment to respondents on the grounds that the article was an opinion protected from a libel action by "constitutional law," App 55, and alternatively, as a public figure, petitioner had failed to

---

and face up to their responsibilities, as one would hope a coach of Milkovich's accomplishments and reputation would do, and one would certainly expect from a man with the responsible poisition [sic] of superintendent of schools.

"Instead they chose to come to the hearing and misrepresent the things that happened to the OHSAA Board of Control, attempting not only to convince the board of their own innocence, but, incredibly, shift the blame of the affair to Mentor.

"I was among the 2,000-plus witnesses of the meet at which the trouble broke out, and I also attended the hearing before the OHSAA, so I was in a unique position of being the only non-involved party to observe both the meet itself and the Milkovich-Scott version presented to the board.

"Any resemblance between the two occurrances [sic] is purely coincidental.

"To anyone who was at the meet, it need only be said that the Maple coach's wild gestures during the events leading up to the brawl were passed off by the two as 'shrugs,' and that Milkovich claimed he was 'Powerless to control the crowd' before the melee.

"Fortunately, it seemed at the time, the Milkovich-Scott version of the incident presented to the board of control had enough contradictions and obvious untruths so that the six board members were able to see through it.

"Probably as much in distasteful reaction to the chicanery of the two officials as in displeasure over the actual incident, the board then voted to suspend Maple from this year's tournament and to put Maple Heights, and both Milkovich and his son, Mike Jr. (the Maple Jaycee coach), on two-year probation.

"But unfortunately, by the time the hearing before Judge Martin rolled around, Milkovich and Scott apparently had their version of the incident polished and reconstructed, and the judge apparently believed them.

" 'I can say that some of the stories told to the judge sounded pretty darned unfamiliar,' said Dr. Harold Meyer, commissioner of the OHSAA, who attended the hearing. 'It certainly sounded different from what they told us.'

"Nevertheless, the judge bought their story, and ruled in their favor.

"Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

"But they got away with it.

"Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

"I think not." App to Pet for Cert A138-A139.

make out a prima facie case of actual malice. Id., at 55-59. The Ohio Court of Appeals affirmed both determinations. Id., at, 62-70. On appeal, the Supreme Court of Ohio reversed and remanded. The court first decided that petitioner was neither a public figure nor a public official under the relevant decisions of this Court. See Milkovich v News-Herald, 15 Ohio St 3d 292, 294-299, 473 NE2d 1191, 1193-1196 (1984). The court then found that "the statements in issue are factual assertions as a matter of law, and are not constitutionally protected as the opinions of the writer. . . . The plain import of the author's assertions is that Milkovich, inter alia, committed the crime of perjury in a court of law." Id., at 298-299, 473 NE2d, at 1196-1197. This Court again denied certiorari. 474 US 953, 88 L Ed 2d 305, 106 S Ct 322 (1985).

Meanwhile, Superintendent Scott had been pursuing a separate defamation action through the Ohio courts. Two years after its Milkovich decision, in considering Scott's appeal, the Ohio Supreme Court reversed its position on Diadiun's article, concluding that the column was "constitutionally protected opinion." Scott v News-Herald, 25 Ohio St 3d 243, 254, 496 NE2d 699, 709 (1986). Consequently, the court upheld a lower court's grant of summary judgment against Scott.

The Scott court decided that the proper analysis for determining whether utterances are fact or opinion was set forth in the decision of the United States Court of Appeals for the District of Columbia Circuit in Ollman v Evans, 242 US App DC 301, 750 F2d 970 (1984), cert denied, 471 US

1127, 86 L Ed 2d 278, 105 S Ct 2662 (1985). See Scott, 25 Ohio St 3d, at 250, 496 NE2d at 706. Under that analysis, four factors are considered to ascertain whether, under the "totality of circumstances," a statement is fact or opinion. These factors are: (1) "the specific language used"; (2) "whether the statement is verifiable"; (3)"the general context of the statement"; and (4) "the broader context in which the statement appeared." Ibid. The court found that application of the first two factos to the column militated in favor of deeming the challenged passages actionable assertions of fact. Id., at 250-252, 496 NE2d, at 706-707. That potential outcome was trumped, however, by the court's consideration of the third and fourth factors. With respect to the third factor, the general context, the court explained that "the large caption 'TD Says' . . . would indicate to even the most gullible reader that the article was, in fact, opinion." Id., at 252, 496 NE2d, at 707.[3] As for the fourth factor, the "broader context," the court reasoned that because the article appeared on a sports page—"a traditional haven for cajoling, invective, and hyperbole"—the article would probably be construed as opinion. Id., at 253-254, 496 NE2d, at 708[4]

---

[3] The court continued:
"This position is borne out by the second headline on the continuation of the article which states: '. . . Diadiun *says* Maple told a lie.' . . . The issue, in context, was not the statement that there was a legal hearing and Milkovich and Scott lied. Rather, based upon Diadiun's having witnessed the original altercation and OHSAA hearing, it was his view that any position represented by Milkovich and Scott less than a full admission of culpability was, in his view, a lie. . . . A review of the context of the statements in question demonstrates that Diadiun is not making an attempt to be impartial and no secret is made of his bias. . . . While Diadiun's mind is certainly made up, the average reader viewing the words in their internal context would be hard pressed to accept Diadiun's statements as an impartial reporting of perjury." Scott, 25 Ohio St 3d, at 252-253, 496 NE2d, at 707-708 (emphasis in original).

[1b, 2a, 3a, 4a] Subsequently, considering itself bound by the Ohio Supreme Court's decision in Scott, the Ohio Court of Appeals in the instant proceedings affirmed a trial court's grant of summary judgment in favor of respondents, concluding that "it has been decided, as a matter of law, that the article in question was constitutionally protected opinion." 46 Ohio App 3d, at 23, 545 NE2d, at 1324. The Supreme Court of Ohio dismissed petitioner's ensuing appeal for want of a substantial constitutional question. App 119. We granted certiorari, 493 US 1055, 107 L Ed 2d 947, 110 S Ct 863 (1990), to consider the important questions raised by the Ohio courts' recognition of a constitutionally required "opinion" exception to the application of its defamation laws. We now reverse.[5]

---

[4] Specifically, the court reasoned as follows:

"It is important to recognize that Diadiun's article appeared on the sports page—a traditional haven for cajoling, invective, and hyperbole . . . In this broader context we doubt that a reader would assign the same weight to Diadiun's statement as if it had appeared under the byline 'Law Correspondent' on page one of the newspaper. . . . On balance . . . a reader would not expect a sports writer on the sports page to be particularly knowledgeable about procedural due process and perjury. It is our belief that 'legal conclusions' in such a context would probably be construed as the writer's opinion." Id., at 253-254, 496 NE2d, at 708.

[5] **[2b]** Preliminarily, respondents contend that our review of the "opinion" question in this case is precluded by the Ohio Supreme Court's decision in Scott v News-Herald, 25 Ohio St 3d 243, 496 NE2d 699 (1986). First, respondents claim that the determination by the Ohio Supreme Court in Milkovich v News-Herald, 15 Ohio St 3d 292, 298, 473 NE2d 1191, 1196 (1984), that petitioner is not a public official or figure was overruled in Scott. Thus, since petitioner has failed to establish actual malice, his action is precluded under New York Times Co. v Sullivan, 376 US 254, 11 L Ed 2d 686, 84 S Ct 710, 95 ALR2d 1412 (1964), and Curtis Publishing Co. v Butts, 388 US 130, 18 L Ed 2d 1094, 87 S Ct 1975 (1967). This contention is meritless. Respondents rely on the following statements made by the Ohio Supreme Court in its discussion of Scott's status as a public official: " 'To say that Milkovich nevertheless was not a public figure for purposes of discussion about the controversy is simply nonsense,' " 25 Ohio St 3d, at 247, 496 NE2d, at 704 (quoting Milkovich v Lorain Journal Co., 474 US 953, 964, 88 L Ed 2d 305, 106 S Ct 322 (1985) (Brennan, J., dissenting from denial of certiorari)), and "we overrule Milkovich in its restrictive view of public officials and hold a public school superintendent is a public official for purposes of defamation law." 25 Ohio St 3d, at 248, 496 NE2d, at 704. However, it is clear from the context in which these statements were made that the court was simply supporting its determination that Scott was a public official, and that as relates to petitioner Milkovich, these statements were pure dicta. But more importantly, petitioner Milkovich was not a party to the proceedings in Scott and thus would not be bound by anything in that ruling under Ohio law. See Hainbuchner v Miner, 31 Ohio St 3d 133, 137, 509 NE2d 424, 427 (1987) ("It is universally recognized that a former judgment, in order to be res judicata in a subsequent action, must have been rendered in an action in which the parties to the subsequent action were adverse parties") (quotation omitted). Since the Ohio Court of Appeals did not address the public-private figure question on remand from the Ohio Supreme Court in Milkovich (because it decided against petitioner on the basis of the opinion ruling in Scott), the ruling of the Ohio Supreme Court in Milkovich presumably continues to be law of the case on that issue. See Hawley v Ritley, 35 Ohio St 3d 157, 160, 519 NE2d 390, 393 (1988) ("[T]he decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels").

[3b] Nor is there any merit to respondents' contention that the Court of Appeals below

Since the latter half of the 16th century, the common law has afforded a cause of action for damage to a person's reputation by the publication of false and defamatory statements. See L. Eldredge, Law of Defamation 5 (1978).

In Shakespeare's Othello, Iago says to Othello:

> "Good name in man and woman, dear my lord,
>
> Is the immediate jewel of their souls.
>
> Who steals my purse steals trash;
>
> 'Tis something, nothing;
>
> 'Twas mine, 'tis his, and has been slave to thousands;
>
> But he that filches from me my good name
>
> Robs me of that which not enriches him,
>
> And makes me poor indeed." Act III, scene 3.

Defamation law developed not only as a means of allowing an individual to vindicate his good name, but also for the purpose of obtaining redress for harm caused by such statements. Eldredge, supra, at 5. As the common law developed in this country, apart from the issue of damages, one usually needed only allege an unprivileged publication of false and defamatory matter to state a cause of action for defamation. See, e. g., Re-

---

alternatively decided there was no negligence in this case even if petitioner were regarded as a private figure, and thus the action is precluded by our decision in Gertz v Robert Welch, Inc. 418 US 323, 41 L Ed 2d 789, 94 S Ct 2997 (1974). Although the appellate court noted that "the instant cause does not present any material issue of fact as to negligence or 'actual malice,'" Milkovich v News-Herald, 46 Ohio App 3d 20, 24, 545 NE2d 1320, 1325 (1989), this statement was immediately explained by the court's following statement that the Scott ruling on the opinion issue had accorded respondents absolute immunity from liability. See 46 Ohio App 3d, at 24, 545 NE2d, at 1325. The court never made an evidentiary determination on the issue of respondents' negligence.

[2c, 3c, 4b] Next, respondents concede that the Scott court relied on the United States Constitution as well as the Ohio Constitution in its recognition of an opinion privilege, Brief for Respondent 18, but argue that certain statements made by the court evidenced an intent to independently rest the decision on state-law grounds, see 25 Ohio St 3d, at 244, 496 NE2d, at 701 ("We find the article to be an opinion, protected by Section 11, Article I of the Ohio Constitution . . ."); id., at 245, 496 NE2d, at 702 ("These ideals are not only an integral part of First Amendment freedoms under the federal Constitution but are independently reinforced in Section 11, Article I of the Ohio Constitution . . ."), thereby precluding federal review under Michigan v Long, 463 US 1032, 77 L Ed 2d 1201, 103 S Ct 3469 (1983). We similarly reject this contention. In the Milkovich proceedings below, the Court of Appeals relied completely on Scott in concluding that Diadiun's article was privileged opinion. See 46 Ohio App 3d, at 23-25, 545 NE2d, at 1324-1325. Scott relied heavily on federal decisions interpreting the scope of First Amendment protection accorded defamation defendants, see, e. g., 25 Ohio St 3d, at 244, 496 NE2d, at 701 ("The federal Constitution has been construed to protect published opinions ever since the United States Supreme Court's opinion in Gertz v Robert Welsh, Inc. . . ."), and concluded that "[b]ased upon the totality of circumstances it is our view that Diadiun's article was constitutionally protected opinion both with respect to the federal Constitution and under our state Constitution." Id., at 254, 496 NE2d, at 709. Thus, the Scott decision was at least "interwoven with the federal law," and was not clear on its face as to the court's intent to rely on independent state grounds, yet failed to make a "plain statement . . . that the federal cases . . . [did] not themselves compel the result that the court . . . reached." Long, supra, at 1040-1041, 77 L Ed 2d 1201, 103 S Ct 3469. Under Long, then, federal review is not barred in this case. We note that the Ohio Supreme Court remains free, of course, to address all of the foregoing issues on remand.

statement of Torts § 558 (1938); Gertz

[497 US 13]

v Robert Welch, Inc. 418 US, at 370, 41 L Ed 2d 789, 94 S Ct 2997 (White, J., dissenting) ("Under typical state defamation law, the defamed private citizen had to prove only a false publication that would subject him to hatred, contempt, or ridicule"). The common law generally did not place any additional restrictions on the type of statement that could be actionable. Indeed, defamatory communications were deemed actionable regardless of whether they were deemed to be statements of fact or opinion. See, e. g., Restatement of Torts, supra, §§ 565-567. As noted in the 1977 Restatement (Second) of Torts § 566, Comment *a:*

> "Under the law of defamation, an expression of opinion could be defamatory if the expression was sufficiently derogatory of another as to cause harm to his reputation, so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. . . . The expression of opinion was also actionable in a suit for defamation, despite the normal requirement that the communication be false as well as defamatory. . . . This position was maintained even though the truth or falsity of an opinion—as distinguished from a statement of fact—is not a matter that can be objectively determined and truth is a complete defense to a suit for defamation."

However, due to concerns that unduly burdensome defamation laws could stifle valuable public debate, the privilege of "fair comment" was incorporated into the common law as an affirmative defense to an action for defamation. "The principle of 'fair comment' afford[ed] legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact." 1 F. Harper & F. James, Law of Torts § 5.28, p 456 (1956) (footnote omitted). As this statement implies, comment was generally privileged when it concerned a matter of public concern, was upon true or privileged facts, represented the actual opinion of the speaker, and was not made

[497 US 14]

solely for the purpose of causing harm. See Restatement of Torts, supra, § 606. "According to the majority rule, the privilege of fair comment applied only to an expression of opinion and not to a false statement of fact, whether it was expressly stated or implied from an expression of opinion." Restatement (Second) of Torts, supra, § 566, Comment *a.* Thus under the common law, the privilege of "fair comment" was the device employed to strike the appropriate balance between the need for vigorous public discourse and the need to redress injury to citizens wrought by invidious or irresponsible speech.

[1c] In 1964, we decided in New York Times Co. v Sullivan, 376 US 254, 11 L Ed 2d 686, 84 S Ct 710, 95 ALR2d 1412, that the First Amendment to the United States Constitution placed limits on the application of the state law of defamation. There the Court recognized the need for "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 US, at 279-280, 11 L Ed

2d 686, 84 S Ct 710, 95 ALR2d 1412. This rule was prompted by a concern that, with respect to the criticism of public officials in their conduct of governmental affairs, a state-law "'rule compelling the critic of official conduct to guarantee the truth of all his factual assertions' would deter protected speech." Gertz v Robert Welch, Inc. 418 US, at 334, 41 L Ed 2d 789, 94 S Ct 2997 (quoting New York Times, supra, at 279, 11 L Ed 2d 686, 84 S Ct 710, 95 ALR2d 1412).

Three years later, in Curtis Publishing Co. v Butts, 388 US 130, 18 L Ed 2d 1094, 87 S Ct 1975 (1967), a majority of the Court determined "that the New York Times test should apply to criticism of 'public figures' as well as 'public officials.' The Court extended the constitutional privilege announced in that case to protect defamatory criticism of nonpublic persons 'who are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.'" Gertz, supra, at 336-337, 41 L Ed 2d 789, 94 S Ct 2997

[497 US 15]

(quoting Butts, supra, at 164, 18 L Ed 2d 1094, 87 S Ct 1975 (Warren, C. J., concurring in result)). As Chief Justice Warren noted in concurrence, "[o]ur citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.'" Butts, supra, at 164, 18 L Ed 2d 1094, 87 S Ct 1975. The Court has also determined that both for public officials and public figures, a showing of New York Times malice is subject to a clear and convincing standard of proof. Gertz, supra, at 342, 41 L Ed 2d 789, 94 S Ct 2997.

The next step in this constitutional evolution was the Court's consideration of a private individual's defamation actions involving statements of public concern. Although the issue was initially in doubt, see Rosenbloom v Metromedia, Inc. 403 US 29, 29 L Ed 2d 296, 91 S Ct 1811 (1971), the Court ultimately concluded that the New York Times malice standard was inappropriate for a private person attempting to prove he was defamed on matters of public interest. Gertz v Robert Welch, Inc., supra. As we explained:

> "Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.
>
> . . . . . .
>
> "[More important,] public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual." Id., at 344-345, 41 L Ed 2d 789, 94 S Ct 2997 (footnote omitted).

Nonetheless, the Court believed that certain significant constitutional protections were warranted in this area. First, we held that the States could not impose liability without requiring some showing of fault. See id., at 347-348, 41 L Ed 2d 789, 94 S Ct 2997 ("This approach . . . recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury

[497 US 16]

to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation"). Second, we held that the States could not permit recovery of presumed or punitive damages on less than a showing of New York Times malice. See id., at 350, 41 L Ed 2d 789, 94 S Ct 2997 ("Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship . . .").

Still later, in Philadelphia Newspapers, Inc. v Hepps, 475 US 767, 89 L Ed 2d 783, 106 S Ct 1558 (1986), we held that "the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern." Id., at 777, 89 L Ed 2d 783, 106 S Ct 1558. In other words, the Court fashioned "a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages." Id., at 776, 89 L Ed 2d 783, 106 S Ct 1558. Although recognizing that "requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so," the Court believed that this result was justified on the grounds that "placement by state law of the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result." Id., at 777-778, 89 L Ed 2d 783, 106 S Ct 1558.

We have also recognized constitutional limits on the *type* of speech which may be the subject of state defamation actions. In Greenbelt Cooperative Publishing Assn., Inc. v Bresler, 398 US 6, 26 L Ed 2d 6, 90 S Ct 1537 (1970), a real estate developer had engaged in negotiations with a local city council for a zoning variance on certain of his land, while simultaneously negotiating with the city on other land the city wished to purchase from him. A local newspaper published certain articles stating that some people had characterized the developer's negotiating position as "blackmail," and the developer sued for libel. Rejecting a contention that liability could be premised on the notion that the word "blackmail" implied the developer had committed the actual crime of blackmail, we held that "the imposition of

liability on such a basis was constitutionally impermissible—that as a matter of constitutional law, the word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported in the Greenbelt News Review." Id., at 13, 26 L Ed 2d 6, 90 S Ct 1537. Noting that the published reports "were accurate and full," the Court reasoned that "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable." Id., at 13-14, 26 L Ed 2d 6, 90 S Ct 1537. See also Hustler Magazine, Inc. v Falwell, 485 US 46, 50, 99 L Ed 2d 41, 108 S Ct 876 (1988) (First Amendment precluded recovery under state emotional distress action for ad parody which "could not reasonably have been interpreted as stating actual facts about the public figure involved"); Letter Carriers v Austin, 418 US 264, 284-286, 41 L Ed 2d 745, 94 S Ct 2770 (1974) (use of the word "traitor" in literary definition of a union "scab" not basis for a defamation action under federal labor law since used "in a loose, figurative sense" and was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members").

[1d, 5] The Court has also determined that "in cases raising First Amendment issues . . . an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" Bose Corp. v Consumers Union of United States, Inc. 466 US 485, 499, 80 L Ed 2d 502, 104 S Ct 1949 (1984) (quoting New York Times, 376 US, at 284-286, 11 L Ed 2d 686, 84 S Ct 710, 95 ALR2d 1412). "The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." Harte-Hanks Communications, Inc. v Connaughton, 491 US 657, 685, 105 L Ed 2d 562, 109 S Ct 2678 (1989).

[1e] Respondents would have us recognize, in addition to the established safeguards discussed above, still another First-Amendment-based protection for defamatory statements which are categorized as "opinion" as opposed to "fact." For **[497 US 18]** this proposition they rely principally on the following dictum from our opinion in Gertz:

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." 418 US, at 339-340, 41 L Ed 2d 789, 94 S Ct 2997 (footnote omitted).

Judge Friendly appropriately observed that this passage "has become the opening salvo in all arguments for protection from defamation actions on the ground of opinion, even though the case did not remotely concern the question." Cianci v New Times Publishing Co. 639 F2d 54, 61 (CA2 1980). Read in context, though, the fair meaning of the passage is to equate the word "opinion" in the second sentence with the word "idea" in the first sentence. Under this view, the language was merely a reiteration of Justice Holmes' classic "marketplace of ideas" concept. See Abrams v United States, 250 US 616, 630, 63 L Ed 1173, 40 S Ct 17 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—. . . the best test of truth is the power of the thought to get itself accepted in the competition of the market").

Thus, we do not think this passage from Gertz was intended to create a wholesale defamation exemption for anything that might be labeled "opinion." See Cianci, supra, at 62, n 10 (The "marketplace of ideas" origin of this passage "points strongly to the view that the 'opinions' held to be constitutionally protected were the sort of thing that could be corrected by discussion"). Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of "opinion" may often imply an assertion of objective fact.

If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts

[497 US 19]

upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." As Judge Friendly aptly stated: "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'" See Cianci, supra, at 64. It is worthy of note that at common law, even the privilege of fair comment did not extend to "a false statement of fact, whether it was expressly stated or implied from an expression of opinion." Restatement (Second) of Torts, § 566, Comment a.

Apart from their reliance on the Gertz dictum, respondents do not really contend that a statement such as, "In my opinion John Jones is a liar," should be protected by a separate privilege for "opinion" under the First Amendment. But they do contend that in every defamation case the First Amendment mandates an inquiry into whether a statement is "opinion" or "fact," and that only the latter statements may be actionable. They propose that a number of factors developed by the lower courts (in what we hold was a mistaken reliance on the Gertz dictum) be considered in deciding which is which. But we think the "'breathing space'" which "'[f]reedoms of expression require in order to survive,'" Hepps, 475 US, at 772, 89 L Ed 2d 783, 106 S Ct 1558 (quoting New York Times, supra, at 272, 11 L Ed 2d 686, 84 S Ct 710, 95 ALR2d 1412), is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between "opinion" and fact.

[1f, 6, 7a] Foremost, we think Hepps stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant

[497 US 20]

is involved.[6] Thus, unlike the statement, "In my opinion Mayor Jones is a liar," the statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," would not be actionable. Hepps ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.[7]

---

[6] In Hepps the Court reserved judgment on cases involving nonmedia defendants, see 475 US, at 779, n 4, 89 L Ed 2d 783, 106 S Ct 1558, and accordingly we do the same. Prior to Hepps, of course, where public-official or public-figure plaintiffs were involved, the New York Times rule already required a showing of falsity before liability could result. Id., at 775, 89 L Ed 2d 783, 106 S Ct 1558.

[7] **[7b]** We note that the issue of falsity relates to the *defamatory* facts implied by a statement. For instance, the statement, "I think Jones lied," may be provable as false on two levels. First, that the speaker really did not think Jones had lied but said it anyway, and second that Jones really had not lied. It is, of course, the second level of falsity which would ordinarily serve as the basis for a defamation action, though falsity at the first level may serve to establish malice where that is required for recovery.

[1g] Next, the Bresler-Letter Carriers-Falwell line of cases provides protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual. Falwell, 485 US, at 50, 99 L Ed 2d 41, 108 S Ct 876. This provides assurance that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of our Nation. See id., at 53-55, 99 L Ed 2d 41, 108 S Ct 876.

[1h] The New York Times-Butts-Gertz culpability requirements further ensure that debate on public issues remains "uninhibited, robust, and wide-open." New York Times, 376 US, at 270, 11 L Ed 2d 686, 84 S Ct 710, 95 ALR2d 1412. Thus, where a statement of "opinion" on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth. Similarly, where such a statement involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault

[497 US 21]

as required by Gertz.[8] Finally, the enhanced appellate review required by Bose Corp. provides assurance that the foregoing determinations will be made in a manner so as not to "constitute a forbidden intrusion of the field of free expression." Bose, 466 US, at 499, 80 L Ed 2d 502, 104 S Ct 1949 (quotation omitted).

We are not persuaded that, in addition to these protections, an additional separate constitutional privilege for "opinion" is required to ensure the freedom of expression guaranteed by the First Amendment. The dispositive question in the present case then becomes whether a reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding. We think this question must be answered in the affirmative. As the Ohio Supreme Court itself observed: "[T]he clear impact in some nine sentences and a caption is that [Milkovich] 'lied at the hearing after . . . having given his solemn oath to tell the truth.' " Scott, 25 Ohio St 3d, at 251, 496 NE2d, at 707. This is not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression.

We also think the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false. A determination whether petitioner lied in this instance can be made on a core of objective evidence by comparing, inter alia, petitioner's testimony before the OHSAA board with his subsequent testimony before the trial court. As the Scott court noted regarding the plaintiff in that case: "[W]hether or not H. Don Scott did indeed perjure himself is certainly verifiable by a perjury action with evidence adduced from the transcripts and witnesses present at

[497 US 22]

the

---

[8] **[1i]** Of course, the limitations on presumed or punitive damages established by New York Times and Gertz also apply to the type of statements at issue here.

hearing. Unlike a subjective assertion the averred defamatory language is an articulation of an objectively verifiable event." Id., at 252, 496 NE2d, at 707. So too with petitioner Milkovich.[9]

The numerous decisions discussed above establishing First Amendment protection for defendants in defamation actions surely demonstrate the Court's recognition of the Amendment's vital guarantee of free and uninhibited discussion of public issues. But there is also another side to the equation; we have regularly acknowledged the "important social values which underlie the law of defamation," and recognized that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation." Rosenblatt v Baer, 383 US 75, 86, 16 L Ed 2d 239, 86 S Ct 1170 (1966). Justice Stewart in that case put it with his customary clarity:

> "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.
>
> . . . . .
>
> "The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem.
>
>
>
> Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored." Id., at 92-93, 16 L Ed 2d 239, 86 S Ct 1170 (concurring opinion).

[1j] We believe our decision in the present case holds the balance true. The judgment of the Ohio Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

SEPARATE OPINION

Justice **Brennan,** with whom Justice **Marshall** joins, dissenting.

Since this Court first hinted that the First Amendment provides some manner of protection for statements of opinion,[1] notwithstanding any common-law protection, courts and commentators have struggled with the contours of this protection and its relationship to other doctrines within our First Amendment jurisprudence. Today, for the first time, the Court addresses this question directly and, to my mind, does so cogently and almost entirely correctly. I agree with the Court that under our line of cases culminating in Philadelphia Newspapers, Inc. v Hepps, 475 US 767, 777, 89 L Ed 2d 783, 106 S Ct 1558, (1986), only defamatory statements that are capable of being proved false are subject to liability under state libel law. See ante, at 16, 111 L Ed 2d, at 16.[2] I also agree with the Court that the "statement"

---

[9] In their brief, amici Dow Jones, et al. urge us to view the disputed statements "[a]gainst the background of a high profile controversy in a small community," and says that "[t]hey related to a matter of pressing public concern in a small town." Brief for Dow Jones et al. as Amici Curiae 27. We do not have the same certainty as do amici that people in a "small town" view statements such as these differently from people in a large city. Be that as it may, however, amici err in their factual assumption. Maple Heights is located in Cuyahoga County, Ohio, and in the 1980 census had a population of 29,735. Mentor is located in Lake County, Ohio, and in the 1980 census had a population of 42,065. Lake County adjoins Cuyahoga County on the east, and in the 1980 census had a population of 212,801. Both Maple Heights and Mentor are included in the Cleveland standard consolidated statistical area, which in 1980 had a population of 2,834,062. The high schools of both Mentor and Maple Heights played in the Greater Cleveland Conference.

[1] See, e.g., New York Times Co. v Sullivan, 376 US 254, 292, n 30, 11 L Ed 2d 686, 84 S Ct 710, 95 ALR2d 1412 (1964) ("Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of

that the plaintiff must prove false under Hepps is not invariably the literal phrase published but rather what a reasonable reader would have understood the author to have said. See ante, at 16-17, 111 L Ed 2d, at 16 (discussing Greenbelt Cooperative Publishing Assn., Inc. v Bresler, 398 US 6, 26 L Ed 2d 6, 90 S Ct 1537 (1970); Letter Carriers v Austin, 418 US 264, 41 L Ed 2d 745, 94 S Ct 2770 (1974); Hustler Magazine, Inc. v Falwell, 485 US 46, 99 L Ed 2d 41, 108 S Ct 876 (1988)).

In other words, while the Court today dispels any misimpression that there is a so-called opinion privilege *wholly in addition* to the protections we have already found to be guaranteed by the First Amendment, it determines that a protection for statements of pure opinion is dictated by *existing* First Amendment doctrine. As the Court explains, "full constitutional protection" extends to any statement relating to matters of public concern "that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." Ante, at 20, 111 L Ed 2d, at 19. Among the circumstances to be scrutinized by a court in ascertaining whether a statement purports to state or imply "actual facts about an individual," as shown by the Court's analysis of the statements at issue here, see ante, at 22, 111 L Ed 2d, at 20, and n 9, are the same indicia that lower courts have been relying on for the past decade or so to distinguish between statements of fact and statements of opinion: the type of language used, the meaning of the statement in context, whether the statement is verifiable, and the broader social circumstances in which the statement was made. See, e.g., Potomac Valve & Fitting Inc. v Crawford Fitting Co. 829 F2d 1280 (CA4 1987); Janklow v Newsweek, Inc. 788 F2d 1300 (CA8 1986); Ollman v Evans, 242 US App DC 301, 750 F2d 970 (1984), cert denied, 471

---

fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact"); Gertz v Robert Welch, Inc. 418 US 323, 339-340, 41 L Ed 2d 789, 94 S Ct 2997 (1974) ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas").

[2] The defendant in the Hepps case was a major daily newspaper and, as the majority notes, see ante, at 16, 111 L Ed 2d, at 16, the Court declined to decide whether the rule it applied to the newspaper would also apply to a nonmedia defendant. See 475 US, at 779, n 4, 89 L Ed 2d 783, 106 S Ct 1558. I continue to believe that "such a distinction is 'irreconcilable with the fundamental First Amendment principle that "[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual."' " Id., at 780, 89 L Ed 2d 783, 106 S Ct 1558 (Brennan, J., concurring) (citations omitted).

US 1127, 86 L Ed 2d 278, 105 S Ct 2662 (1985).

[497 US 25]

With all of the above, I am essentially in agreement. I part company with the Court at the point where it applies these general rules to the statements at issue in this case because I find that the challenged statements cannot reasonably be interpreted as either stating or implying defamatory facts about petitioner. Under the rule articulated in the majority opinion, therefore, the statements are due "full constitutional protection." I respectfully dissent.

I

As the majority recognizes, the kind of language used and the context in which it is used may signal readers that an author is not purporting to state or imply actual, known facts. In such cases, this Court has rejected claims to the contrary and found that liability may not attach "as a matter of constitutional law." Ante, at 17, 111 L Ed 2d, at 16. See, e.g., Bresler, supra (metaphor); Letter Carriers, supra (hyperbole); Falwell, supra (parody). In Bresler, for example, we found that Bresler could not recover for being accused of "blackmail" because the readers of the article would have understood the author to mean only that Bresler was manipulative and extremely unreasonable. See ante, at 16-17, 111 L Ed 2d, at 16. In Letter Carriers, we found that plaintiffs could not recover for being accused of being "traitor[s]" because the newsletter's readers would have understood that the author meant that plaintiffs' accurately reported actions were reprehensible and destructive to the social fabric, not that plaintiffs committed treason. See ante, at 17, 111 L Ed 2d, at 16-17.

Statements of belief or opinion are like hyperbole, as the majority agrees, in that they are not understood as actual assertions of fact about an individual, but they may be actionable if they *imply* the existence of false and defamatory facts. See ante, at 18-19, 111 L Ed 2d, at 17-18. The majority provides some general guidance for identifying when statements of opinion imply assertions of fact. But it is a matter worthy of further attention

[497 US 26]

in order "to confine the perimeters of [an] unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." Bose Corp. v Consumers Union of United States, Inc. 466 US 485, 505, 80 L Ed 2d 502, 104 S Ct 1949 (1984). Although statements of opinion *may* imply an assertion of a false and defamatory fact, they do not *invariably* do so. Distinguishing which statements do imply an assertion of a false and defamatory fact requires the same solicitous and thorough evaluation that this Court has engaged in when determining whether particular exaggerated or satirical statements could reasonably be understood to have asserted such facts. See Bresler, supra; Letter Carriers, supra; Falwell, supra. As Justice Holmes observed long ago: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v Eisner, 245 US 418, 425, 62 L Ed 372, 38 S Ct 158 (1918).

For instance, the statement that "Jones is a liar," or the example given by the majority, "In my opinion John Jones is a liar"—standing alone—can reasonably be interpreted as implying that there are facts known to the speaker to cause him to form such an opinion. See ante, at 18-19, 111 L Ed 2d, at 17-18. But a different result must obtain if the speaker's comments had instead been as follows: "Jones' brother once lied to me; Jones just told me he was 25; I've never met Jones before and I don't actually know how old he is or anything else about him, but he looks 16; I think Jones lied about his age just now." In the latter case, there are at least six statements, two of which may arguably be actionable. The first such statement is factual and defamatory and may support a defamation action by Jones' brother. The second statement, however, that "I think Jones lied about his age just now," can be reasonably interpreted in context only as a statement that the speaker infers, from the facts stated, that Jones told a particular lie. It is clear to the listener that the speaker does

not actually know whether Jones lied and does not have any other reasons for thinking he did.[3] Thus, the only fact implied by the second statement is that the speaker drew this inference. If the inference is sincere or nondefamatory, the speaker is not liable for damages.[4]

II

The majority does not rest its decision today on any finding that the statements at issue explicitly state a false and defamatory fact. Nor could it. Diadiun's assumption that Milkovich must have lied at the court hearing is patently conjecture.[5] The majority finds Diadiun's statements actionable, however, because it concludes that these statements imply a factual assertion that Milkovich perjured himself at the judicial proceeding. I disagree. Diadiun not only reveals the facts upon which he is relying but he makes it clear at which point he runs out of facts and is simply guessing. Read in context, the statements cannot reasonably be interpreted as implying such an assertion as fact. See ante, at 5-7, n 2, 111 L Ed 2d, at 9-10 (reproducing the column).

---

[3] The Restatement (Second) of Torts § 566, Comment c (1977), makes a similar observation. It explains that a statement that "I think C must be an alcoholic" is potentially libelous because a jury might find that it implies the speaker knew undisclosed facts to justify the statement. In contrast, it finds that the following statement could not be found to imply any defamatory facts:

"A writes to B about his neighbor C: 'He moved in six months ago. He works downtown, and I have seen him during that time only twice, in his backyard around 5:30 seated in a deck chair with a portable radio listening to a news broadcast, and with a drink in his hand. I think he must be an alcoholic.' "

Yet even though clear disclosure of a comment's factual predicate precludes a finding that the comment implies other defamatory facts, this does not signify that a statement, preceded by only a partial factual predicate or none at all, necessarily implies other facts. The operative question remains whether reasonable readers would have actually interpreted the statement as implying defamatory facts. See ante, at 20, 111 L Ed 2d, at 18; see generally Note, 13 Wm. Mitchell L Rev 545 (1987); Comment, 74 Calif L Rev 1001 (1986); Zimmerman, Curbing the High Price of Loose Talk, 18 UCDL Rev 359 (1985).

[4] See ante, at 20, n 7, 111 L Ed 2d, at 18 (noting that under Philadelphia Newspapers, Inc. v Hepps, 475 US 767, 89 L Ed 2d 783, 106 S Ct 1558 (1986), "the issue of falsity relates to the defamatory facts *implied* by a statement" (emphasis changed)). Hepps mandates protection for speech that does not actually state or imply false and defamatory facts—independently of the Bresler-Letter Carriers-Falwell line of cases. Implicit in the constitutional rule that a plaintiff must prove a statement false to recover damages is a requirement to determine first what statement was actually made. The proof that Hepps requires from the plaintiff hinges on what the statement can reasonably be interpreted to mean. For instance, if Riley tells his friends that Smith cheats at cards and Smith then proves that he did not rob a convenience store, Smith cannot recover damages for libel on that basis because he has proved the wrong assertion false. Likewise, in the example in text, Jones cannot recover for defamation for the statement "I think Jones lied about his age just now" by producing proof that he did not lie about his age because, like Smith, he would have proved the wrong assertion false. The assertion Jones must prove false is that the speaker had, in fact, drawn the inference that Jones lied.

Diadiun begins the column by noting that, on the day before, a Court of Common Pleas had overturned the decision by the Ohio High School Athletic Association (OHSAA) to suspend the Maple Heights wrestling team from that year's state tournament. He adds that the reversal was based on due process grounds. Diadiun emphasizes to the audience that he was present at the wrestling meet where the brawl that led to the team's suspension took place and that he was present at the hearing before the OHSAA. He attributes the brawl to Maple Heights coach Milkovich's wild gestures, ranting and egging the crowd on against the competing team from Mentor. He then describes Milkovich's testimony before the OHSAA, characterizing it as deliberate misrepresentation

"attempting not only to convince the board of [his] own innocence, but, incredibly, shift the blame of the affair to Mentor." Ante, at 6, n 2, 111 L Ed 2d, at 10. Diadiun then quotes statements allegedly made by Milkovich to the commissioners to the effect that his wrestlers had not been involved in the fight and his gestures had been mere shrugs.

At that point in the article, the author openly begins to surmise. Diadiun says that it *"seemed"* that Milkovich's and another official's story contained enough contradictions and obvious untruths that the OHSAA board was able to see through it and that *"[p]robably"* the OHSAA's suspension of the Maple Heights team reflected displeasure as much at the testimony as at the melee. Ante, at 7, n 2, 111 L Ed 2d, at 10 (emphasis added). Then Diadiun guesses that by the time of the court hearing, the two officials *"apparently* had their version of the incident polished and reconstructed, and the judge *apparently* believed them." Ibid. (emphasis added). For the first time, the column quotes a third party's version of events. The source, an OHSAA commissioner, is described—in evident contrast to Diadiun—as having attended the proceeding. The column does not quote any testimony from the court proceeding, nor does it describe what Milkovich said in court. There is only a vague statement from the OHSAA commissioner that the testimony "sounded pretty darned unfamiliar."[6] For the first time, Diadiun fails

---

[5] Conjecture, when recognizable as such, alerts the audience that the statement is one of belief, not fact. The audience understands that the speaker is merely putting forward a hypothesis. Although the hypothesis involves a factual question, it is understood as the author's "best guess." Of course, if the speculative conclusion is preceded by stated factual premises, and one or more of them is false and defamatory, an action for libel may lie *as to them.* But the speculative conclusion itself is actionable only if it implies the existence of another false and defamatory fact.

[6] The commissioner is quoted as having said: " 'I can say that some of the stories told to the judge sounded pretty darned unfamiliar . . . . It certainly sounded different from what they told us.' " Ante, at 7, n 2, 111 L Ed 2d, at 10. This quotation might also be re-

[497 US 30]

to claim any firsthand knowledge, after stressing that he had personally attended both the meet and the OHSAA hearing. After noting again that the judge ruled in Milkovich's and Maple Heights' favor, Diadiun proclaims: "Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth." Ibid.

No reasonable reader could understand Diadiun to be impliedly asserting—as fact—that Milkovich had perjured himself. Nor could such a reader infer that Diadiun had further information about Milkovich's court testimony on which his belief was based. It is plain from the column that Diadiun did not attend the court hearing. Diadiun also clearly had no detailed second-hand information about what Milkovich had said in court. Instead, what suffices for "detail" and "color" are quotations from the OHSAA hearing—old news compared to the court decision which prompted the column—and a vague quotation from an OHSAA commissioner. Readers could see that Diadiun was focused on the court's reversal of the OHSAA's decision and was angrily supposing what must have led to it.[7]

[497 US 31]

Even the insinuation that Milkovich had repeated, in court, a more plausible version of the misrepresen-

---

garded as a stated factual premise on which Diadiun's speculation is based. However, Milkovich did not complain of the quotation in his pleadings. In any event, it is unlikely that it would be found defamatory. Diadiun had already characterized the testimony of the two officials before the OHSAA as "obvious untruths." Thus, the commissioner's alleged assertion that the testimony in court was different is quite nebulous. It might indicate that the officials told the truth in court, in contrast to the version given to the commissioners, or that the officials discussed entirely different issues, rather than that they told a new lie.

[7] Both state and federal courts have found that audiences can recognize conjecture that neither states nor implies any assertions of fact, just as they can recognize hyperbole. For example, in Potomac Valve & Fitting, Inc. v Crawford Fitting Co. 829 F2d 1280, 1290 (CA4 1987), the court found that a disparaging statement about a product test in an industry newsletter, set forth following a list of seven observations about the test's methodology, "readily appears to be nothing more than the author's personal inference from the test results. The premises are explicit, and the reader is by no means required to share [the author's] conclusion." For the same reason, the court in Dunlap v Wayne, 105 Wash 2d 529, 540, 716 P2d 842, 849 (1986), concluded: "Arguments for actionability disappear when the audience members know the facts underlying an assertion and can judge the truthfulness of the allegedly defamatory statement themselves." See also National Assn. of Government Employees, Inc. v Central Broadcasting Corp. 379 Mass 220, 226, 396 NE2d 996, 1000 (1979) (finding that, as listeners were told the facts upon which a radio talk show host based her conclusion, they "could make up their own minds and generate their own opinions or ideas which might or might not accord with [the host's]").

The common-law doctrine of fair comment was also premised on such an observation. Where the reader knew or was told the factual foundation for a comment and could therefore independently judge whether the comment was reasonable, a defendant's unreasonable comment was held to defame "'himself rather than the subject of his remarks.'" Hill, Defamation and Privacy Under the First Amendment, 76 Colum L Rev 1205, 1229 (1976) (quoting Popham v Pickburn, 158 Eng Rep 730, 733 (Ex 1862) (Wilde, B.)). "As Thomas Jefferson observed in his first Inaugural Address . . . error of opinion need not and ought not be corrected by the courts 'where reason is left free to combat it.'" Potomac, supra, at 1288-1289, quoting Thomas Jefferson's first Inaugural Address (The Complete Jefferson 385 (S. Padover ed 1943)).

tations he had made at the OHSAA hearing is preceded by the cautionary term "apparently"—an unmistakable sign that Diadiun did not know what Milkovich had actually said in court. "[C]autionary language or interrogatories of this type put the reader on notice that what is being read is opinion and thus weaken any inference that the author possesses knowledge of damaging, undisclosed facts. . . . In a word, when the reasonable reader encounters cautionary language, he tends to 'discount that which follows.'" Ollman v Evans, 242 US App DC, at 314, 750 F2d, at 983, quoting Burns v McGraw-Hill Broadcasting Co. 659 P2d 1351, 1360 (Colo 1983). See also B. Sanford, Libel and Privacy: The Prevention and Defense of Litigation 145 (1987) (explaining that many courts have found that words like "apparent" reveal "that the assertion is qualified or speculative and is not to be understood as a declaration of fact"); Information Control Corp. v Genesis One Computer Corp. 611 F2d 781, 784 (CA9 1980) (explaining that a statement phrased in language of apparency "is less likely to be understood as a statement of

[497 US 32]

fact rather than as a statement of opinion"); Gregory v McDonnell Douglas Corp. 17 Cal 3d 596, 603, 552 P2d 425, 429 (1976) (finding a letter "cautiously phrased in terms of apparency" did not imply factual assertions); Stewart v Chicago Title Ins. Co. 151 Ill App 3d 888, 894, 503 NE2d 580, 583 (1987) (finding a letter "couched in language of opinion rather than firsthand knowledge" did not imply factual assertions). Thus, it is evident from what Diadiun actually wrote that he had no unstated reasons for concluding that Milkovich perjured himself.

Furthermore, the tone and format of the piece notify readers to expect speculation and personal judgment. The tone is pointed, exaggerated, and heavily laden with emotional rhetoric and moral outrage. Diadiun never says, for instance, that Milkovich committed perjury. He says that "[a]nyone who attended the meet . . . knows in his heart" that Milkovich lied—obvious hyperbole as Diadiun does not purport to have researched what everyone who attended the meet knows in his heart.

The format of the piece is a signed editorial column with a photograph of the columnist and the logo "TD Says." Even the headline on the page where the column is continued—"Diadiun says Maple told a lie," ante, at 4, 111 L Ed 2d, at 8—reminds readers that they are reading one man's commentary. While signed columns may certainly include statements of fact, they are also the "well recognized home of opinion and comment." Mr. Chow of New York v Ste. Jour Azur S. A., 759 F2d 219, 227 (CA2 1985). Certain formats—editorials, reviews, political cartoons, letters to the editor—signal the reader to anticipate a departure from what is actually known by the author as fact. See Ollman v Evans, supra, at 317, 750 F2d, at 986 ("The reasonable reader who peruses [a] column on the editorial or Op-Ed page is fully aware that the statements found there are not 'hard' news like those printed on the front page or elsewhere in the news sections of the newspaper"); R. Smolla, Law of Defamation § 6.12(4), n 252 (1990) (collecting

[497 US 33]

cases); Zimmerman, Curbing the High Price of Loose Talk, 18 UCDL Rev 359, 442 (1985) (stressing the need to take into account "the cultural common sense of the ordinary listener or reader").[8]

III

Although I agree with the majority that statements must be scrutinized for implicit factual assertions, the majority's scrutiny in this case does not "hol[d] the balance true," ante, at 23, 111 L Ed 2d, at 20, between protection of individual reputation and freedom of speech. The statements complained of neither state nor imply a false assertion of fact, and, under the rule the Court reconfirms today, they should be found not libel " 'as a matter of constitutional law.' " Ante, at 17, 111 L Ed 2d, at 16, quoting Bresler, 398 US, at 13, 26 L Ed 2d 6, 90 S Ct 1537. Readers of Diadiun's column are signaled repeatedly that the author does not actually know what Milkovich said at the court hearing and that the author is surmising, from factual premises made explicit in the column, that Milkovich must have lied in court.[9]

Like the "imaginative expression" and the "rhetorical hyperbole" which the Court finds have "traditionally added much to the discourse of our Nation," ante, at 18, 111 L Ed 2d, at 19, conjecture is intrinsic to "the free flow of ideas and opinions on matters of public interest and concern" that is at "the heart of the

---

[8] The readers of Diadiun's column would also have been alerted to regard any implicit claim of impartiality by Diadiun with skepticism because Diadiun's newspaper is published in the county in which Mentor High School—home to the team that was allegedly mauled at the wrestling meet—is located. Where readers know that an author represents one side in a controversy, they are properly warned to expect that the opinions expressed may rest on passion rather than factual foundation. See, e.g., Potomac Valve & Fitting Inc. v Crawford Fitting Co. 829 F2d, at 1290 (explaining that the contents of a company's newsletter would be understood as reflecting the professional interests of the company rather than as "a dispassionate and impartial assessment" of a test of a competitor's product); Information Control Corp. v Genesis One Computer Corp. 611 F2d 781, 784 (CA9 1980) (recognizing that statements in the early weeks of litigation by one side about the other were likely to include unsubstantiated charges, but that these "are highly unlikely to be understood by their audience as statements of fact").

[9] Milkovich does not challenge the accuracy of any of Diadiun's stated premises. Nor does he complain or proffer proof that Diadiun had not, in fact, concluded from the stated premises that Milkovich must have lied in court. There is, therefore, no call to consider under what circumstances an insincere speculation would constitute a false and defamatory statement under Philadelphia Newspapers, Inc. v Hepps, 475 US 767, 89 L Ed 2d 783, 106 S Ct 1558 (1986). However, I would think that documentary or eyewitness testimony that the speaker did not believe his own professed opinion would be required before a court would be permitted to decide that there was sufficient evidence to find that the statement was false and submit the question to a jury. Without such objective evidence, a jury's judgment might be too influenced by its view of what was said. As we have long recognized, a jury "is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks,' . . . which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail." Monitor Patriot Co. v Roy, 401 US 265, 277, 28 L Ed 2d 35, 91 S Ct 621 (1971) (quoting New York Times, 376 US, at 270, 11 L Ed 2d 686, 84 S Ct 710, 95 ALR2d 1412). See also Bose Corp. v Consumers Union of United States, Inc. 466 US 485, 510-511, and n 29, 80 L Ed 2d 502, 104 S Ct 1949 (1984) (discussing the risks of submitting various questions to juries where freedom of speech is at stake); Gertz, 418 US, at 349, 41 L Ed 2d 789, 94 S Ct 2997 (expressing concern about juries punishing unpopular opinion rather than compensating individuals for injuries sustained by the publication of a false fact); R. Smolla, Law of Defamation §§ 6.05(3)(a)-(c) (1990); Zimmerman, 18 UCDL Rev, at 430.

First Amendment." Falwell, 485 US, at 50, 99 L Ed 2d 41, 108 S Ct 876. The public and press regularly examine the activities of those who affect our lives. "One of the perogatives of American citizenship is the right to criticize men and measures." Id., at 51, 99 L Ed 2d 41, 108 S Ct 876 (quoting Baumgartner v United States, 322 US 665, 673-674, 88 L Ed 1525, 64 S Ct 1240 (1944)). But often only some of the facts are known, and solely through insistent prodding—through conjecture as well as research—can important public questions be subjected to the "uninhibited, robust, and wide-open" debate to which this country is profoundly committed. New York Times Co. v Sullivan, 376 US 254, 270, 11 L Ed 2d 686, 84 S Ct 710, 95 ALR2d 1412 (1964).

Did NASA officials ignore sound warnings that the Challenger Space Shuttle would explode? Did Cuban-American

leaders arrange for John Fitzgerald Kennedy's assassination? Was Kurt Waldheim a Nazi officer? Such questions are matters of public concern long before all the facts are unearthed, if they ever are. Conjecture is a means of fueling a national discourse on such questions and stimulating public pressure for answers from those who know more. " 'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.' " Id., at 269, 11 L Ed 2d 686, 84 S Ct 710, 95 ALR2d 1412 (quoting Stromberg v California, 283 US 359, 369, 75 L Ed 1117, 51 S Ct 532, 73 ALR 1484 (1931)).

What may be more disturbing to some about Diadiun's conjecture than, say, an editorial in 1960 speculating that Francis Gary Powers was in fact a spy, despite the Government's initial assurances that he was not, is the naiveté of Diadiun's conclusion. The basis of the court decision that is the subject of Diadiun's column was that Maple Heights had been denied its right to due process by the OHSAA. Diadiun, as it happens, not only knew this but included it in his column. But to anyone who knows what "due process" means, it does not follow that the court must have believed some lie about what happened at the wrestling meet, because what happened at the meet would not have been germane to the questions at issue. There may have been testimony about what happened, and that testimony may have been perjured, but to anyone who understands the patois of the legal profession there is no reason to assume—from the court's decision—that such testimony must have been given.

Diadiun, therefore, *is* guilty. He is guilty of jumping to conclusions, of benightedly assuming that court decisions are always based on the merits, and of looking foolish to lawyers. He is not, however, liable for defamation. Ignorance, without more, has never served to defeat freedom of speech. "The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are

offered.' " New York Times, supra, at 271, 11 L Ed 2d 686, 84 S Ct 710, 95 ALR2d 1412 (quoting NAACP v Button, 371 US 415, 445, 9 L Ed 2d 405, 83 S Ct 328 (1963)).

I appreciate this Court's concern with redressing injuries to an individual's reputation. But as long as it is clear to the reader that he is being offered conjecture and not solid information, the danger to reputation is one we have chosen to tolerate in pursuit of "'individual liberty [and] the common quest for truth and the vitality of society as a whole.'" Falwell, supra, at 50-51, 99 L Ed 2d 41, 108 S Ct 876 (quoting Bose Corp., 466 US, at 503-504, 80 L Ed 2d 502, 104 S Ct 1949). Readers are as capable of independently evaluating the merits of such speculative conclusions as they are of evaluating the merits of pure opprobrium. Punishing such conjecture protects reputation only at the cost of expunging a genuinely useful mechanism for public debate. "In a society which takes seriously the principle that government rests upon the consent of the governed, freedom of the press must be the most cherished tenet." Edwards v National Audubon Society, Inc. 556 F2d 113, 115 (CA2), cert denied sub nom. Edwards v New York Times Co. 434 US 1002, 54 L Ed 2d 498, 98 S Ct 643 (1977).

It is, therefore, imperative that we take the most particular care where freedom of speech is at risk, not only in articulating the rules mandated by the First Amendment, but also in applying them. "'Whatever is added to the field of libel is taken from the field of free debate.'" New York Times, supra, at 272, 11 L Ed 2d 686, 84 S Ct 710, 95 ALR2d 1412 (quoting Sweeney v Patterson, 76 US App DC 23, 24, 128 F2d 457, 458, cert denied, 317 US 678, 87 L Ed 544, 63 S Ct 160 (1942)). Because I would affirm the Ohio Court of Appeals' grant of summary judgment to respondents, albeit on somewhat different reasoning, I respectfully dissent.

[497 US 37]

JAMES A. COLLINS, Director, Texas Department of Criminal Justice, Institutional Division, Petitioner

v

CARROLL F. YOUNGBLOOD

497 US 37, 111 L Ed 2d 30, 110 S Ct 2715

[No. 89-742]

Argued March 19, 1990. Decided June 21, 1990.

Decision: Ex post facto clause of Federal Constitution (Art I, § 10) held not violated by application to convicted person of new Texas statute which allowed reformation of jury verdict assessing unauthorized punishment.

SUMMARY

An accused was convicted in a Texas court of aggravated sexual abuse, and a jury imposed the punishment of life imprisonment plus a $10,000 fine. After the accused's conviction and sentence were affirmed by the Texas Court of Criminal Appeals, the accused applied for a writ of habeas corpus in the Texas District Court and argued that (1) the Texas Code of Criminal Procedure did not authorize the imposition of a fine in addition to a term of imprisonment for the accused's offense, and (2) thus, under a 1983 decision of the Court of Criminal Appeals in another case—which decision had been to the effect that Texas law did not give appellate courts the authority to reform improper verdicts which included punishments unauthorized by law—the judgment and sentence were void, and the accused was entitled to a new trial. In April 1985, the District Court, feeling bound by the 1983 precedent, recommended that the writ of habeas corpus be granted. Before the habeas corpus application was considered by the Court of Criminal Appeals, which has the exclusive power under Texas law to grant writs of habeas corpus, a new Texas statute became effective, allowing an appellate court to reform an improper verdict that had assessed a punishment not authorized by law. The Court of Criminal Appeals, relying on the new statute, (1) reformed the verdict in the accused's case by ordering the deletion of the $10,000 fine, and (2) denied the accused's request for a new trial. The accused then sought a writ of habeas corpus from the United States District Court for the Eastern District of Texas and argued that the

Briefs of Counsel, p 844, infra.

retroactive application of the new Texas statute violated the ex post facto clause of Art I, § 10 of the United States Constitution, but the Federal District Court concluded that there had been no ex post facto violation, since (1) the accused's punishment had not been increased, but actually decreased, and (2) neither the elements of the offense nor the ultimate facts necessary to establish guilt had been changed. On appeal, the United States Court of Appeals for the Fifth Circuit, reversing, (1) relied on a statement in Thompson v Utah (1898) 170 US 343, 42 L Ed 1061, 18 S Ct 620, to the effect that retroactive procedural statutes violate the ex post facto clause unless they leave untouched all the substantial protections with which existing law surrounds the person accused of crime; (2) ruled that the accused's right to a new trial under the 1983 Court of Criminal Appeals decision was such a substantial protection; and (3) therefore ordered that a writ of habeas corpus be issued (882 F2d 956).

On certiorari, the United States Supreme Court reversed. In an opinion by Rehnquist, Ch. J., joined by White, Blackmun, O'Connor, Scalia, and Kennedy, JJ., it was held—expressly overruling the court's two prior ex post facto decisions in Thompson v Utah, supra, and Kring v Missouri (1883) 107 US 221, 27 L Ed 506, 2 S Ct 443, to the extent that the two decisions were inconsistent with the court's holding in the case at hand—that the application of the new Texas statute to the accused was not prohibited by the ex post facto clause of Art I, § 10, because the Texas statute did not (1) punish as a crime an act previously committed which was innocent when done; (2) make more burdensome the punishment for a crime, after its commission; or (3) deprive one charged with a crime of any defense available according to the law at the time the act was committed.

Stevens, J., joined by Brennan and Marshall, JJ., concurring in the judgment, expressed the view that, while the new Texas statute did not violate the ex post facto clause of Art I, § 10, such a conclusion was consistent with the court's prior precedents, including Thompson v Utah and Kring v Missouri, because (1) under those precedents, ex post facto analysis ought to focus on the impact of the procedural change in Texas law upon the right belonging to the accused when the offense was committed; and (2) in the case at hand, neither the accused's right to a fair trial nor the accused's right to be protected against unauthorized or excessive punishment had been impaired "in the slightest" by the new Texas rule.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Constitutional Law §§ 78, 82, 83 — ex post facto law — reformation of improper jury sentencing verdict — making past offense criminal

1a-1c. With respect to an accused who has been convicted in a state criminal trial of aggravated sexual abuse and on whom the jury has imposed a punishment of life imprisonment plus a fine, the application to the accused of a new state statute

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

5 Am Jur 2d, Appeal and Error § 938; 16A Am Jur 2d, Constitutional Law §§ 634-654

USCS, Constitution, Art I, § 10

US L Ed Digest, Constitutional Law §§ 78, 82, 83

Index to Annotations, Abuse of Persons; Appeal and Error; Criminal Law; Ex Post Facto Laws; Sentence and Punishment; Vacation and Modification of Judgment or Verdict

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

United States Supreme Court's views as to retroactive effect of its own decisions announcing new rules. 65 L Ed 2d 1219.

Supreme Court's views as to what constitutes an ex post facto law prohibited by Federal Constitution. 53 L Ed 2d 1146.

What issues will the Supreme Court consider, though not, or not properly, raised by the parties. 42 L Ed 2d 946.

Comment Note.—Retroactive or merely prospective operation of new rule adopted by court in overruling precedent—federal cases. 14 L Ed 2d 992.

Power of court to increase severity of unlawful sentence—modern status. 28 ALR4th 147.

Retrial on greater offense following reversal of plea-based conviction of lesser offense. 14 ALR4th 970.

Propriety of increased punishment on new trial for same offense. 12 ALR3d 978.

Comment Note.—Prospective or retroactive operation of overruling decision. 10 ALR3d 1371.

Conviction of lesser offense as bar to prosecution for greater on new trial. 61 ALR2d 1141.

which was passed after the accused's crime, and which allowed the reformation of the improper jury sentencing verdict in the accused's case, does not violate the ex post facto clause of Art I, § 10 of the United States Constitution—where the new statute authorized a state appellate court to reform an improper verdict that assessed a punishment not authorized by law, and where a state appellate court, relying on the new statute in state habeas corpus proceedings, denied the accused's request for a new trial and instead reformed the verdict by ordering the deletion of the fine—because the new state statute does not (1) punish as a crime an act previously committed which was innocent when done; (2) make more burdensome the punishment for a crime, after its commission; or (3) deprive one charged with a crime of any defense available according to the law at the time the act was committed. (Stevens, Brennan, and Marshall, JJ., dissented in part from this holding.)

Appeal §§ 1087.5(2), 1088, 1092, 1321, 1333 — habeas corpus — jurisdiction of Supreme Court — failure to raise issue — petition for certiorari — briefs — oral argument

2. On certiorari to review a Federal Court of Appeals' order that a writ of habeas corpus be granted to an accused who had been convicted and sentenced in a state court, the United States Supreme Court, having granted certiorari to consider the merits of the respondent accused's claim that the application of a new state statute to the accused violated the ex post facto clause in Art I, § 10 of the United States Constitution, will proceed to consider the merits of the claim—even though the Supreme Court, because the accused is before the court on collateral review, is faced with a threshold question whether the relief sought by the accused would constitute a "new rule" which would not apply retroactively—given that (1) the state did not address retroactivity in its petition for certiorari or its briefs on the merits; (2) when counsel was asked about the issue at oral argument, counsel answered that the state had chosen not to rely on the "new rule" retroactivity doctrine; and (3) although the "new rule" retroactivity doctrine is grounded in important considerations of federal-state relations, the doctrine is not "jurisdictional" in the sense that the Supreme Court, despite a limited grant of certiorari, must raise and decide the issue on the Supreme Court's own motion.

Courts § 777.5; Habeas Corpus § 41 — new rule — retroactive application

3. For purposes of determining whether the federal habeas corpus relief sought by an accused who has been convicted and sentenced in a state criminal trial would constitute a "new rule" which would not be applied retroactively, retroactivity, generally speaking, is properly treated as a threshold question, for, once a new rule is applied to the accused in the case announcing the new rule, evenhanded justice requires that the new rule be applied retroactively to all who are similarly situated.

Constitutional Law § 74 — ex post facto clause — penal statutes

4a, 4b. The prohibition on ex post facto laws in Art I, § 10 of the United States Constitution applies to only penal statutes.

Constitutional Law §§ 17, 76, 78, 79, 83 — ex post facto clause — history — changing situation of accused — making past offenses criminal — procedure — punishment

5a-5g. Although the Latin phrase "ex post facto" literally encompasses any law passed "after the fact," the federal constitutional prohibition on ex post facto laws applies to only penal statutes which disadvantage the offender affected by them, in the following four categories—(1) every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and that punishes such action, (2) every law that aggravates a crime, or makes it greater than it was, when committed, (3) every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed, and (4) every law that alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commission of the offense, in order to convict the offender; the "evidence" category, however, is not intended to prohibit the application of new evidentiary rules in trials for crimes committed before the changes; the ex post facto clause in Art I, § 10 of the United States Constitution prohibits any statute which (1) punishes as a crime an act previously committed which was innocent when done, (2) makes more burdensome the punishment for a crime, after its commission, or (3) deprives one charged with a crime of any defense available according to law at the time the act was committed; such a formulation is faithful to the best knowledge of the original understanding of the ex post facto clause at the time the Constitution was adopted—that legislatures may not retroactively alter the definitions of crimes or increase the punishment for criminal acts; a legislature, by simply labeling a law "procedural," does not thereby immunize the law from scrutiny under the ex post facto clause, because subtle ex post facto violations are no more permissible than overt ones; the ex post facto prohibition which may not be evaded, however, is the prohibition defined by the four categories, and references in prior United States Supreme Court decisions to "substantial protections" and "personal rights" should not be read to adopt without explanation an undefined enlargement of the ex post facto clause; the ex post facto clause cannot be read to include, in addition to the four defined categories, any change which alters the situation of a party to the party's disadvantage. (Stevens, Brennan, and Marshall, JJ., dissented in part from this holding.)

Constitutional Law §§ 78, 83 — ex post facto clause — making past offenses criminal — punishment

6a-6c. Although the ex post facto clause in Art I, § 10 of the United States Constitution prohibits any new statute which deprives one charged with a crime of any defense available according to law at the time the act was committed, the term "defense" is linked to the prohibition on alterations in the legal definition of the offense or the nature or amount of the punishment imposed for the offense's commission; a law that abolishes an affirmative defense of justification or excuse contravenes Art I, § 10, because such a law expands the scope of a criminal prohibition after the act is done; a reference, however, in the "defense" context, to laws relating to the offense or its consequences is simply shorthand for legal changes altering the definition of an offense or increasing a punishment. (Stevens, Brennan, and Marshall, JJ., dissented in part from this holding.)

Constitutional Law § 82; Jury § 2 — ex post facto clause — right to jury trial

7. The ex post facto clause in Art I, § 10 of the United States Constitution does not prevent a state from taking away a criminal defendant's right to jury trial under the United States Constitution's Sixth Amendment, because, although the right to jury trial provided by the Sixth Amendment is a "substantial" one, it is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the ex post facto clause. (Stevens, Brennan, and Marshall, JJ., dissented from this holding.)

Jury § 34 — number of jurors — criminal case

8a, 8b. The United States Constitution's Sixth Amendment guarantee of a right to jury trial in criminal cases does not require a jury panel of 12 persons.

SYLLABUS BY REPORTER OF DECISIONS

Respondent was convicted in a Texas state court of aggravated sexual abuse and sentenced to life imprisonment and a $10,000 fine. After his conviction and sentence were affirmed on direct appeal, he applied for a writ of habeas corpus in state court, arguing that Texas law did not authorize both a fine and prison term for his offense, and thus that his judgment and sentence were void and he was entitled to a new trial. The court, bound by a State Court of Criminal Appeals' decision, recommended that the writ be granted. Before the writ was considered by the Court of Criminal Appeals however, a new statute was passed allowing an appellate court to reform an improper verdict assessing a punishment not authorized by law. Thus, the Court of Criminal Appeals reformed the verdict by ordering that the fine be deleted and denied the request for a new trial. Arguing that the new Texas law's retroactive application violated the Ex Post Facto Clause of Art 1, § 10, of the Federal Constitution, respondent filed a writ of habeas corpus in Federal District Court, which was denied. The Court of Appeals reversed. Relying on the statement in Thompson v Utah, 170 US 343, 42 L Ed 1061, 18 S Ct 620, that retroactive procedural statutes violate the Ex Post Facto Clause unless they "leave untouched all the substantial protections with which existing law surrounds the . . . accused," the court held that respondent's right to a new trial under former Texas law was a "substantial protection."

Held:

1. Although the rule of Teague v Lane, 489 US 288, 103 L Ed 2d 334, 109 S Ct 1060—which prohibits the retroactive application of new rules to cases on collateral review—is grounded in important considerations of federal-state relations, it is not jurisdictional in the sense that this Court, despite a limited grant of certiorari, *must* raise and decide the issue sua sponte. Since Texas has chosen not to rely on Teague, the merits of respondent's claim will be considered.

2. The application of the Texas

statute to respondent is not prohibited by the Ex Post Facto Clause.

(a) The definition of an ex post facto law as one that (1) punishes as a crime an act previously committed, which was innocent when done, (2) makes more burdensome the punishment for a crime, after its commission, or (3) deprives one charged with a crime of any defense available according to law at the time when the act was committed, Beazell v Ohio, 269 US 167, 70 L Ed 216, 46 S Ct 68, is faithful to this Court's best knowledge of the original understanding of the Clause: Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts. Respondent concedes that Texas' statute does not fall within the Beazell categories, since it is a procedural change in the law. However, he errs in arguing that this Court's decisions have not limited the Clause's scope to those categories, but have stated more broadly that retroactive legislation contravenes the Clause if it deprives an accused of a "substantial protection" under law existing at the time of the crime, and that the new trial guaranteed by Texas law is such a protection. When cases have described as "procedural" those changes that do not violate the Clause even though they work to the accused's disadvantage, see, e. g., Beazell, supra, at 171, 70 L Ed 216, 46 S Ct 68 it is logical to presume that "procedural" refers to changes in the procedures by which a criminal case is adjudicated as opposed to substantive changes in the law. The "substantial protection" discussion in Beazell, Duncan v Missouri, 152 US 377, 382-383, 38 L Ed 485, 14 S Ct 570, and Malloy v South Carolina, 237 US 180, 183, 59 L Ed 905, 35 S Ct 507, has imported confusion into the Clause's interpretation and should be read to mean that a legislature does not immunize a law from scrutiny under the Clause simply by labeling the law "procedural." It should not be read to adopt without explanation an undefined enlargement of the Clause.

(b) Kring v Missouri, 107 US 221, 27 L Ed 506, 2 S Ct 443, and Thompson v Utah, supra, are inconsistent with the understanding of the term "ex post facto law" at the time the Constitution was adopted, rely on reasoning that this Court has not followed since Thompson was decided, and have caused confusion in state and lower federal courts about the Clause's scope. Kring and Thompson are therefore overruled.

882 F2d 956, reversed.

Rehnquist, C. J., delivered the opinion of the Court, in which White, Blackmun, O'Connor, Scalia, and Kennedy, JJ., joined. Stevens, J., filed an opinion concurring in the judgment, in which Brennan and Marshall, JJ., joined.

APPEARANCES OF COUNSEL

Charles A. Palmer argued the cause for petitioner.
Jon R. Farrar argued the cause for respondent.
Briefs of Counsel, p 844, infra.

OPINION OF THE COURT

[497 US 39]

Chief Justice **Rehnquist** delivered the opinion of the Court.

[1a] The question presented in this case is whether the application of a Texas statute, which was passed after respondent's crime and which allowed the reformation of an improper jury verdict in respondent's case, violates the Ex Post Facto Clause of Art I, § 10. We hold that it does not.

Respondent Carroll Youngblood was convicted in a Texas court of aggravated sexual abuse. The jury imposed punishment of life imprisonment and a fine of $10,000. After his conviction and sentence were affirmed by the Texas Court of Criminal Appeals, Youngblood applied for a writ of habeas corpus in the State District Court. He argued that the Texas Code of Criminal Procedure did not authorize a fine in addition to a term of imprisonment for his offense, and, thus, under the decision of the Court of Criminal Appeals in Bogany v State, 661 SW2d 957 (1983), the judgment and sentence were void, and he was entitled to a new trial.[1] In April 1985, the District Court, feeling bound by Bogany, recommended that the writ be granted.

Before the habeas application was considered by the Texas Court of Criminal Appeals, which has the exclusive power under Texas law to grant writs of habeas corpus, see Tex Code Crim Proc Ann, Art 11.07 (Vernon 1977 and Supp 1990), a new Texas statute designed to modify the Bogany

decision became effective. Article 37.10(b), as of June 11, 1985, allows an appellate court to reform an improper verdict that assesses a punishment not authorized by law. Tex Code Crim Proc Ann, Art 37.10(b) (Vernon Supp 1990); see Ex parte Johnson, 697 SW2d 605 (Tex Crim App 1985). Relying on that statute, the Court of Criminal Appeals reformed the verdict in Youngblood's case by ordering deletion of the $10,000 fine and denied his request for a new trial.

Youngblood then sought a writ of habeas corpus from the United States District Court for the Eastern District of Texas, arguing that the retroactive application of Art 37.10(b) violated the Ex Post Facto Clause of Art I, § 10, of the Federal Constitution. The District Court concluded that since Youngblood's "punishment . . . was not increased (but actually decreased), and the elements of the offense or the ultimate facts necessary to establish guilt were not changed," there was no ex post facto violation. App to Pet for Cert C-6.

The Court of Appeals reversed. Youngblood v Lynaugh, 882 F2d 956 (CA5 1989). It relied on the statement in this Court's decision in Thompson v Utah, 170 US 343, 42 L Ed 1061, 18 S Ct 620 (1898), that retroactive procedural statutes violate the Ex Post Facto Clause unless they "'leave untouched all the substantial protections with which existing law surrounds the person accused of crime,'" Lynaugh, supra, at 959 (quoting 170 US, at 352, 42 L Ed 1061, 18 S Ct 620). It held that Youngblood's right to a new trial under the Bogany decision was such a "substantial protection," and therefore ordered that a writ of habeas corpus be issued. We granted certiorari. 493 US 1001, 107 L Ed 2d 555, 110 S Ct 560 (1989).

---

[1] In Bogany, the Texas Court of Criminal Appeals held that a jury verdict which included a punishment unauthorized by law was void at its inception and had to be set aside. It concluded that Texas law at that time did not give appellate courts authority to reform such verdicts.

[2, 3] Because respondent is before us on collateral review, we are faced with a threshold question whether the relief sought by Youngblood would constitute a "new rule," which would not apply retroactively under our decisions in Teague v Lane, 489 US 288, 103 L Ed 2d 334, 109 S Ct 1060 (1989), and Butler v McKellar, 494 US 407, 108 L Ed 2d 347, 110 S Ct 1212 (1990). Generally speaking, "[r]etroactivity is

properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." Teague, supra, at 300, 103 L Ed 2d 334, 109 S Ct 1060. The State of Texas, however, did not address retroactivity in its petition for certiorari or its briefs on the merits, and when asked about the issue at oral argument, counsel answered that the State had chosen not to rely on Teague. Tr of Oral Arg 4-5. Although the Teague rule is grounded in important considerations of federal-state relations, we think it is not "jurisdictional" in the sense that this Court, despite a limited grant of certiorari, *must* raise and decide the issue sua sponte. Cf. Patsy v Board of Regents of Fla. 457 US 496, 515, n 19, 73 L Ed 2d 172, 102 S Ct 2557 (1982) (Eleventh Amendment defense need not be raised and decided by the Court on its own motion). We granted certiorari to consider the merits of respondent's ex post facto claim, and we proceed to do so.

[4a, 5a] Although the Latin phrase "ex post facto" literally encompasses any law passed "after the fact," it has long been recognized by this Court that the constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them. Calder v Bull, 3 Dall 386, 390-392, 1 L Ed 648 (1798) (opinion of Chase, J.); id., at 396, 1 L Ed 648 (opinion of Paterson, J.); id., at 400, 1 L Ed 648 (opinion of Iredell, J.). See Miller v Florida, 482 US 423, 430, 96 L Ed 2d 351, 107 S Ct 2446 (1987).[2] As early opinions in this Court explained, "ex post facto law" was a term of art with an established meaning at the time of the framing of the Constitution. Calder, 3 Dall, at 391, 1 L Ed 648 (opinion of Chase, J.); id., at 396, 1 L Ed 648 (opinion of Paterson, J.). Justice Chase's now familiar opinion in Calder expounded those legislative

acts which in his view implicated the core concern of the Ex Post Facto Clause:

> "1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime,* or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment,* and inflicts a *greater punishment,* than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence,* and receives less, or different, testimony, than the law required at the time of the commission of the

---

[2] **[4b]** Although there has been some debate within the Court about the accuracy of the historical discussion in Calder v Bull, see Satterlee v Matthewson, 2 Pet 380, 381, 7 L Ed 458 (1829) (note by Justice Johnson), the Court has consistently adhered to the view expressed by Justices Chase, Paterson, and Iredell in Calder that the Ex Post Facto Clause applies only to penal statutes.

> offense, *in order to convict the offender.*" Id., at 390, 1 L Ed 648 (emphasis in original).

[5b, 6a] Early opinions of the Court portrayed this as an exclusive definition of ex post facto laws. Fletcher v Peck, 6 Cranch 87, 138, 3 L Ed 162 (1810); Cummings v Missouri, 4 Wall 277, 325-326, 18 L Ed 356 (1867); id., at 391, 1 L Ed 648 (Miller, J., dissenting) ("This exposition of the nature of ex post facto laws has never been denied, nor has any court or any commentator on the Constitution added to the classes of laws here set forth, as coming within that clause"); Gut v State, 9 Wall 35, 38, 19 L Ed 573 (1870). So well accepted were these principles that the Court in Beazell v Ohio, 269 US 167, 70 L Ed 216, 46 S Ct 68 (1925), was able to confidently summarize the meaning of the Clause as follows:

> "It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto." Id., at 169-170, 70 L Ed 216, 46 S Ct 68.

See also Dobbert v Florida, 432 US 282, 292, 53 L Ed 2d 344, 97 S Ct 2290 (1977).[3]

[5d] The Beazell formulation is faithful to our best knowledge of the original understanding of the Ex Post Facto Clause: Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts. Several early State Constitutions employed this definition of the term, and they appear to have been a basis for the Framers' understanding of the provision. See The Federalist No. 44, p 301 (J. Cooke ed 1961) (J. Madison); 2 M. Farrand, Records of the Federal Convention of 1787, p 376 (1911); Calder, 3 Dall, at 391-392, 1 L Ed 648 (opinion of Chase, J.); id., at 396-397, 1 L Ed 648 (opinion of Paterson, J.). The Constitutions of Maryland and North Carolina, for example, declared that "retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore no ex post facto law ought to be made." See Constitution of Maryland, Declaration of Rights, Art XV (1776); Constitution of North Carolina, Declaration of Rights, Art XXIV (1776). Other State Constitutions, though not using the phrase "ex post facto," included similar articles. See Declaration of Rights and Fundamental Rules of the Delaware State § 11 (1776); Constitution or Form of Government for the Commonwealth of Massachusetts, Declaration of Rights, Art XXIV (1780).

---

[3] **[5c]** The Beazell definition omits the reference by Justice Chase in Calder v Bull, 3 Dall 386, 1 L Ed 648 (1798) to alterations in the "legal rules of evidence." See also, Hopt v Utah, 110 US 574, 590, 28 L Ed 262, 4 S Ct 202 (1884) (approving procedural changes "leaving untouched the nature of the crime and the amount or degree of proof essential to conviction"). As cases subsequent to Calder make clear, this language was not intended to prohibit the application of new evidentiary rules in trials for crimes committed before the changes. Thompson v Missouri, 171 US 380, 386-387, 43 L Ed 204, 18 S Ct 922 (1898) (rejecting ex post facto challenge to retroactive application of statute making admissible handwritten documents as handwriting exemplars); Hopt, supra, at 588-590, 28 L Ed 262, 4 S Ct 202 (upholding retroactive application of statute making felons competent to testify).

[497 US 44]

Another historical reference, Blackstone's Commentaries, which was discussed by the Framers during debates on the Ex Post Facto Clause, see 2 M. Farrand, Records of the Federal Convention of 1787, p 448-449 (1911), and deemed an authoritative source of the technical meaning of the term in Calder, see 3 Dall, at 391, 1 L Ed 648 (opinion of Chase, J.); id., at 396, 1 L Ed 648 (opinion of Paterson, J.), buttresses this understanding. According to Blackstone, a law is ex post facto "when after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it." 1 W. Blackstone, Commentaries * 46. Although increased punishments are not mentioned explicitly in the historical sources, the Court has never questioned their prohibition, apparently on the theory that "[t]he enhancement of a crime, or penalty, seems to come within the same mischief as the creation of a crime or penalty." Calder, supra, at 397, 1 L Ed 648 (opinion of Paterson, J.). The Beazell definition, then, is faithful to the use of the term "ex post facto law" at the time the Constitution was adopted.

[1b, 5e] Respondent concedes that Tex Code Crim Proc Ann, Art 37.10(b) (Vernon Supp 1990), does not fall within any of the Beazell categories and, under that definition, would not constitute an ex post facto law as applied to him. The new statute is a procedural change that allows reformation of improper verdicts. It does not alter the definition of the crime of aggravated sexual abuse, of which Youngblood was convicted, nor does it increase the punishment for which he is eligible as a result of that conviction. Nevertheless, respondent maintains that this Court's decisions have not limited the scope of the Ex Post Facto Clause to the finite Beazell categories, but have stated more broadly that retroactive legislation contravenes Art I, § 10, if it deprives an accused of a "substantial protection" under law existing at the time of the crime. He argues that the new trial guaranteed him by former Texas law is such a protection.

[497 US 45]

Several of our cases have described as "procedural" those changes which, even though they work to the disadvantage of the accused, do not violate the Ex Post Facto Clause. Dobbert v Florida, supra, at 292-293, and n 6, 53 L Ed 2d 344, 97 S Ct 2290; Beazell v Ohio, 269 US, at 171, 70 L Ed 216, 46 S Ct 68; Mallett v North Carolina, 181 US 589, 597, 45 L Ed 1015, 21 S Ct 730 (1901). While these cases do not explicitly define what they mean by the word "procedural," it is logical to think that the term refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes. Respondent correctly notes, however, that we have said that a procedural change may constitute an ex post facto violation if it "affect[s] matters of substance," Beazell, supra, at 171, 70 L Ed 216, 46 S Ct 68, by depriving a defendant of "substantial protections with which the existing law surrounds the person accused of crime," Duncan v Missouri, 152 US 377, 382-383, 38 L Ed 485, 14 S Ct 570 (1894), or arbitrarily infringing upon "substantial personal rights." Malloy v South Carolina, 237 US 180, 183, 59 L Ed 905, 35 S Ct 507 (1915); Beazell, supra, at 171, 70 L Ed 216, 46 S Ct 68.

We think this language from the cases cited has imported confusion into the interpretation of the Ex Post Facto Clause. The origin of the rather amorphous phrase, "substantial protections," appears to lie in a 19th-century treatise on constitutional law by Professor Thomas Cooley. T. Cooley, Constitutional Limitations * 272. According to Cooley, who notably assumed the Calder construction of the Ex Post Facto Clause to be correct, Constitutional Limitations * 265, a legislature "may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime." Id., at * 272.

This Court's decision in Duncan v Missouri, supra, subsequently adopted that phraseology:

> "[A]n ex post facto law is one which imposes a punishment for an act which was not punishable at the time it was committed; or an additional punishment to that then
>
> **[497 US 46]**
>
> prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required; or, in short, in relation to the offence or its consequences, alters the situation of a party to his disadvantage; but the prescribing of different modes or procedure and the abolition of courts and creation of new ones, *leaving untouched all the substantial protections with which the existing law surrounds the person accused of crime,* are not considered within the constitutional inhibition. Cooley Const Lim (5th ed) 329." Id., at 382-383, 38 L Ed 485, 14 S Ct 570 (other citations omitted) (emphasis added).

Later, in Malloy v South Carolina, supra, we stated that even with regard to procedural changes, the Ex Post Facto Clause was "intended to secure substantial personal rights against arbitrary and oppressive legislative action." Id., at 183, 59 L Ed 905, 35 S Ct 507. We repeated that recognition in Beazell itself, while also emphasizing that the provision was "not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance." Beazell, supra, at 171, 70 L Ed 216, 46 S Ct 68.

[5f] We think the best way to make sense out of this discussion in the cases is to say that by simply labeling a law "procedural," a legislature does not thereby immunize it from scrutiny under the Ex Post Facto Clause. See Gibson v Mississippi, 162 US 565, 590, 40 L Ed 1075, 16 S Ct 904 (1896). Subtle ex post facto violations are no more permissible than overt ones. In Beazell, supra, we said that the constitutional prohibition is addressed to laws, "whatever their form," which make innocent acts criminal, alter the nature of the offense, or increase the punishment. Id., at 170, 70 L Ed 216, 46 S Ct 68. But the prohibition which may not be evaded is the one defined by the Calder categories. See Duncan, supra, at 382, 38 L Ed 485, 14 S Ct 570; Malloy, supra, at 183-184, 59 L Ed 905, 35 S Ct 507. The references in Duncan and Malloy to "substantial protections" and "personal rights" should not be read to adopt without explanation an undefined enlargement of the Ex Post Facto Clause.

[497 US 47]

Two decisions of this Court, relied upon by respondent, do not fit into this analytical framework. In Kring v Missouri, 107 US 221, 27 L Ed 506, 2 S Ct 443 (1883), the Court said "it is not to be supposed that the opinion in [Calder v Bull] undertook to define, by way of exclusion, all the cases to which the constitutional provision would be applicable." Id., at 228, 27 L Ed 506, 2 S Ct 443. It defined an ex post facto law, inter alia, as one which, "'in relation to the offence or its consequences, alters the situation of a party to his disadvantage.'" Id., at 228-229, 27 L Ed 506, 2 S Ct 443 (quoting United States v Hall, 26 F Cas 84, 86 (No. 15,285) (D Pa 1809)) (emphasis deleted). And in Thompson v Utah, 170 US 343, 42 L Ed 1061, 18 S Ct 620 (1898), the Court held that a change in Utah law reducing the size of juries in criminal cases from 12 persons to 8 deprived Thompson of "a substantial right involved in his liberty" and violated the Ex Post Facto Clause. Id., at 352, 42 L Ed 1061, 18 S Ct 620.

Neither of these decisions, in our view, is consistent with the understanding of the term "ex post facto law" at the time the Constitution was adopted. Nor has their reasoning been followed by this Court since Thompson was decided in 1898. These cases have caused confusion in state and lower federal courts about the scope of the Ex Post Facto Clause, as exemplified by the opinions of the District Court and Court of Appeals in this case. See also Murphy v Kentucky, 465 US 1072, 1073, 79 L Ed 2d 751, 104 S Ct 1427 (1984) (White, J., dissenting from denial of certiorari) (noting "the evident confusion among lower courts concerning the application of the Ex Post Facto Clause to changes in rules of evidence and procedure"); United States v Kowal, 596 F Supp 375, 377 (Conn 1984) (Supreme Court jurisprudence applying ex post facto prohibition to retroactive procedural changes "is not all of one piece"); L. Tribe, American Constitutional Law 638 (2d ed 1988) (procedural changes upheld by the Court "can hardly be distinguished in any functional way from those invalidated").

[6b] The earlier decision, Kring v Missouri, was a capital case with a lengthy procedural history. Kring was charged with first-degree murder, but pursuant to a plea agreement, he

[497 US 48]

pleaded guilty to second-degree murder. The plea was accepted by the prosecutor and the trial court, and he was sentenced to 25 years in prison. He appealed the judgment, however, on the ground that his plea agreement provided for a sentence of no more than 10 years. The State Supreme Court reversed the judgment and remanded for further proceedings. In the trial court, Kring refused to withdraw his guilty plea to second-degree murder and refused to renew his plea of not guilty to first-degree murder, insisting instead that the acceptance of his earlier plea constituted an acquittal on the greater charge. The trial court, over Kring's objection, directed a general plea of not guilty to be entered, and upon retrial, he was convicted of first-degree murder and sentenced to death.

At the time the crime was committed, Missouri law provided that a defendant's plea of guilty to second-degree murder, if accepted by the prosecutor and the court, served as an acquittal of the charge of first-degree murder. After the crime, but before Kring made his plea, a new Missouri Constitution abrogated that rule. The State was thus free, as a matter of Missouri law, to retry Kring for first-degree murder after his conviction and the 25-year sentence for second-degree murder were vacated. The Supreme Court of Missouri held that the new law did not violate the Ex Post Facto Clause, because it effected only a change in criminal procedure.

This Court reversed by a vote of 5 to 4. As support for the view that Calder did not define an exclusive list of legislative acts falling within the constitutional prohibition, Justice Miller's opinion for the Court quoted a jury charge given by Justice Washington sitting in the District Court: " '[A]n ex post facto law is one which, in its operation, makes that criminal which was not so at the time the action was performed; or which increases the punishment, *or, in short, which, in relation to the offence or its consequences, alters the situation of a party to his disadvantage.'* " Kring, supra, at 228-229, 27 L Ed 506, 2 S Ct 443 **[497 US 49]** (quoting United States v Hall, supra, at 86) (emphasis in original). Applying that test, the Court concluded that because the new Missouri Constitution denied Kring the benefit of an implied acquittal which the previous law provided, it "altered the situation to his disadvantage," and his conviction for first-degree murder was void. Kring, supra, at 235-236, 27 L Ed 506, 2 S Ct 443.

The Court's departure from Calder's explanation of the original understanding of the Ex Post Facto Clause was, we think, unjustified. The language in the Hall case, heavily relied upon in Kring and repeated in other decisions thereafter, does not support a more expansive definition of ex post facto laws.

In Hall, a vessel owner was sued by the United States for forfeiture of an embargo bond obliging him to deliver certain cargo to Portland. As a legal excuse, the defendant argued that a severe storm had disabled his vessel and forced him to land in Puerto Rico, where he was forced by the Puerto Rican government to sell the cargo. In dicta, Justice Washington hypothesized that, according to the law in effect at the time Hall forfeited the cargo, an "unavoidable accident" was an affirmative defense to a charge of failing to deliver cargo. His jury instruction then explained that a subsequent law imposing an additional requirement for the affirmative defense—that the vessel or cargo actually *be lost at sea* as a result of the unavoidable accident—would deprive Hall of a defense of his actions available at the time he sold the cargo and thus be an invalid ex post facto law.

[5g, 6c] This analysis is consistent with the Beazell framework. A law that abolishes an affirmative defense of justification or excuse contravenes Art I, § 10, because it expands the scope of a criminal prohibition after the act is done. It appears, therefore, that Justice Washington's reference to laws "relat[ing] to the offence or its consequences," was simply shorthand for legal changes altering the definition of an offense or increasing a punishment. His jury charge should not be read to mean that the Constitution prohibits retrospective **[497 US 50]** laws, other than those encompassed by the Calder categories, which "alte[r] the situation of a party to his disadvantage." Nothing in the Hall case supports the broad construction of the ex post facto provision given by the Court in Kring.

It is possible to reconcile Kring with the numerous cases which have held that "procedural" changes do not result in ex post facto violations by saying that the change in Missouri law did take away a "defense" available to the defendant under the old procedure. But this use of the word "defense" carries a meaning quite different from that which appears in the quoted language from Beazell, where the term was linked to the prohibition on alterations in "the legal definition of the offense" or "the nature or amount of the punishment imposed for its commission." Beazell, 269 US, at 169-170, 70 L Ed 216, 46 S Ct 68. The "defense" available to Kring under earlier Missouri law was not one related to the definition of the crime, but was based on the law regulating the effect of guilty pleas. Missouri had not changed any of the elements of the crime of murder, or the matters which might be pleaded as an excuse or justification for the conduct underlying such a charge; it had changed its law respecting the effect of a guilty plea to a lesser included offense. The holding in Kring can only be justified if the Ex Post Facto Clause is thought to include not merely the Calder categories, but any change which "alters the situation of a party to his disadvantage." We think such a reading of the Clause departs from the meaning of the Clause as it was understood at the time of the adoption of the Constitution, and is not supported by later cases. We accordingly overrule Kring.

The second case, Thompson v Utah, must be viewed in historical context. Thompson was initially charged with his crime—grand larceny committed by stealing a calf—in 1895, when Utah was a Territory. He was tried by a jury of 12 persons and convicted. A new trial was subsequently granted, however, and in the meantime Utah was admitted

into the Union as a State. The Constitution of the State of Utah provided that juries in noncapital cases would consist of 8 persons, not 12, and Thompson was retried and convicted by a panel of eight.

This Court reversed the conviction. It reasoned first that while Utah was a Territory, the Sixth Amendment applied to actions of the territorial government and guaranteed Thompson a right to a 12-person jury. 170 US, at 349-350, 42 L Ed 1061, 18 S Ct 620. The Court then held that "the State did not acquire upon its admission into the Union the power to provide, in respect of felonies committed within its limits while it was a Territory, that they should be tried otherwise than by a jury such as is provided by the Constitution of the United States." Id., at 350-351, 42 L Ed 1061, 18 S Ct 620. Because the State Constitution "deprive[d] him of a substantial right involved in his liberty" and "materially alter[ed] the situation to his disadvantage," the Court concluded that Thompson's conviction was prohibited by the Ex Post Facto Clause. Id., at 352-353, 42 L Ed 1061, 18 S Ct 620.

[7, 8a] The result in Thompson v Utah foreshadowed our decision in Duncan v Louisiana, 391 US 145, 20

L Ed 2d 491, 88 S Ct 1444 (1968), which held that the Sixth Amendment right to trial by jury—then believed to mean a jury of 12, see, e. g., Patton v United States, 281 US 276, 288-289, 74 L Ed 854, 50 S Ct 253, 70 ALR 263 (1930)—was incorporated and made applicable by the Fourteenth Amendment against the States. The Court held that since Utah was a territory when Thompson's crime was committed, and therefore obligated to provide a 12-person jury by the Sixth Amendment, the Ex Post Facto Clause prevented the State from taking away that substantial right from him when it became a State and was no longer bound by the Sixth Amendment as then interpreted. The right to jury trial provided by the Sixth Amendment is obviously a "substantial" one, but it is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the Ex Post Facto Clause. To the extent that Thompson v Utah

rested on the Ex Post Facto Clause and not the Sixth Amendment, we overrule it.[4]

[1c] The Texas statute allowing reformation of improper verdicts does not punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with crime of any defense available according to law at the time when the act was committed. Its application to respondent therefore is not prohibited by the Ex Post Facto Clause of Art I, § 10.

The judgment of the Court of Appeals is reversed.

SEPARATE OPINION

Justice **Stevens,** with whom Justice **Brennan** and Justice **Marshall** join, concurring in the judgment.

The "Ex Post Facto" Clause of the Constitution[1] has been construed to embrace any law that deprives a person accused of crime of a "substantial protection" that the law afforded at the time of the alleged offense. Thus, the Clause prohibits not only the retroactive creation of new criminal offenses and more harsh penalties, but also substantial changes in procedure that are designed to protect the defendant from a wrongful conviction. The question in this case is whether a law that changed a postconviction remedy for an erroneous sentence—by conforming it to the law in effect at the time of the offense instead of affording the defendant a new trial on all issues—effected a "substantial" deprivation within the meaning of our cases. I agree with the Court's conclusion

that the new law did not violate the Ex Post Facto Clause, but I believe that conclusion is entirely consistent with our precedents.

---

[4] **[8b]** The Court's holding in Thompson v Utah, 170 US 343, 42 L Ed 1061, 18 S Ct 620 (1898), that the Sixth Amendment requires a jury panel of 12 persons is also obsolete. Williams v Florida, 399 US 78, 26 L Ed 2d 446, 90 S Ct 1893 (1970).

[1] Art I, § 10, of the Constitution provides in part:

"No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

I

Respondent committed a crime that was punishable by a maximum sentence of life imprisonment and was convicted on March 17, 1982. Under Texas law, it was the jury's task to impose sentence as well as to determine guilt or innocence. By consequence of a faulty instruction, respondent was improperly sentenced to life imprisonment and a fine of $10,000. The following year, in Bogany v State, 661 SW2d 957 (1983), the Texas Court of Criminal Appeals held in a somewhat similar case that the fine was not authorized by law, and that no reviewing court had authority to correct such an erroneous sentence. Instead, the entire judgment was deemed "void" and the defendant was entitled to a new trial.[2] Understandably, the Texas Legislature recognized that corrective legislation was in order, for it is difficult to understand why an error in sentencing should necessitate a second trial on the issue of guilt or innocence.

Theoretically, the legislature might have remedied the situation in either of two ways. It might have authorized a punishment of both life imprisonment and a $10,000 fine for respondent's offense or, alternatively, it might have authorized a court to correct the sentence by eliminating the fine. The former option would plainly have violated the Ex Post Facto Clause because it would have increased respondent's punishment beyond the penalty authorized at the time of his offense. The second option, which the Texas Legislature adopted, is not subject to that defect; nor does it criminalize previously innocent conduct or make any change in the procedures used to convict or to sentence respondent. It created a new remedy designed to conform respondent's sentence to that authorized by law at the time of his offense. Such legislation does not violate the Ex Post Facto Clause.

The argument to the contrary is based on our cases holding that the Clause applies to procedural, as well as substantive, changes that deprive a defendant of "substantial personal rights" and a claim that respondent's right to a new trial after an erroneous sentence was such a right. The argument misreads our precedents and overlooks the critical importance of evaluating the procedural right at issue by reference to the time of the offense.

II

In Kring v Missouri, 107 US 221,

---

[2] At the time of respondent's offense, it apparently was well established under Texas law that, as a general proposition, when a criminal jury rendered a verdict not authorized by law the verdict was void at its inception. See, e.g., Ex parte McIver, 586 SW2d 851, 854 (Tex Crim App 1979); Ocker v State, 477 SW2d 288, 290 (Tex Crim App 1972). However, until the Court of Criminal Appeals decided Bogany, there was some doubt both as to whether that general rule would apply to the error in this case and as to whether the sentence imposed by the jury in this case was in fact unlawful. See, e.g., Adams v State, 642 SW2d 211, 213-214 (Tex App 1982) (reforming jury's sentence); Bogany v State, 646 SW2d 663, 664-665 (Tex App) (stating that jury's sentence could be reformed), rev'd, 661 SW2d 957 (Tex Crim App 1983); id., at 960 (McCormick, J., dissenting) (contending that supplementary fine was authorized by law). For purposes of this opinion, I assume that both the substantive limitation upon respondent's sentence and the procedural limitation on the remedial powers of reviewing courts were law at the time that respondent's offense was committed.

27 L Ed 506, 2 S Ct 443 (1883), the Court rejected the argument that the Ex Post Facto Clause has no application to procedural changes. At the time of Kring's offense, Missouri law provided that the acceptance of a plea of guilty to second-degree murder constituted an acquittal of first-degree murder. A subsequent amendment to the Missouri Constitution abrogated that rule and Kring was thereafter convicted of first-degree murder and sentenced to death. The Missouri Supreme Court held that there was no violation of the Ex Post Facto Clause because the retroactive

amendment was merely a procedural change.[3] This Court's reversal of that holding demonstrates that the Clause applies to some procedural changes, but our decision rested on the fact that the change had deprived the defendant of a complete defense to the charge of first-degree murder and to the imposition of the death penalty. We wrote:

> "Whatever may be the essential nature of the change, it is one which, to the defendant, involves the difference between life and death, and the retroactive character of the change cannot be denied." Id., at 224, 27 L Ed 506, 2 S Ct 443.
>
> "In the case before us the Constitution of Missouri so changes the rule of evidence, that what was conclusive evidence of innocence of the higher grade of murder when the crime was committed, namely, a judicial conviction for a lower grade of homicide, is not received as evidence at all, or, if received, is given no weight in behalf of the offender. It also changes the punishment, for, whereas the law as it stood when the homicide was committed was that, when convicted of murder in the second degree, he could never be tried or punished by death for murder in the first degree, the new law enacts
>
>
>
> that he may be so punished, notwithstanding the former conviction." Id., at 228, 27 L Ed 506, 2 S Ct 443.

Thompson v Utah, 170 US 343, 42 L Ed 1061, 18 S Ct 620 (1898), involved an offense committed while Utah was a territory, but the case was tried after Utah became a State. At the time of the offense, the defendant was entitled to a trial by a 12-person jury, but under the new State's law only 8 jurors were required. We held that this retrospective procedural change deprived Thompson of "a substantial right belonging to him when the offense was committed," and therefore violated the Ex Post Facto Clause.

---

[3] The Missouri Supreme Court relied upon the reasoning of the St. Louis Court of Appeals. See State v Kring, 74 Mo 612, 631 (1881). The relevant passage from the Court of Appeals opinion was quoted (and then disavowed) by this Court in Kring v Missouri, 107 US 221, 223-224, 27 L Ed 506, 2 S Ct 443 (1883):

" 'Formerly it was held in Missouri (State v Ross, 29 Mo 32) that, when a conviction is had of murder in the second degree on an indictment charging murder in the first degree, if this be set aside, the defendant cannot again be tried for murder in the first degree. A change introduced by sect 23 of art 2 of the Constitution of 1875 has abrogated this rule. On the oral argument something was said by counsel for the defendant to the effect that under the old rule defendant could not be put on his trial for murder in the first degree, and that he could not be affected by the change of the constitutional provision, the crime having been committed whilst the old constitution was in force. There is, however, nothing in this; this change is a change not in crimes, but in criminal procedure, and such changes are not ex post facto. Gut v State, 9 Wall 35 [19 L Ed 573]; Cummings v Missouri, 4 id. 326 [18 L Ed 356].' "

> "We are of opinion that the State did not acquire upon its admission into the Union the power to provide, in respect of felonies committed within its limits while it was a Territory, that they should be tried otherwise than by a jury such as is provided by the Constitution of the United States. When Thompson's crime was committed, it was his constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons. To hold that a State could deprive him of his liberty by the concurrent action of a court and eight jurors, would recognize the power of the State not only to do what the United States in respect of Thompson's crime could not, at any time, have done by legislation, but to take from the accused a substantial right belonging to him when the offence was committed.
>
> "It is not necessary to review the numerous cases in which the courts have determined whether particular statutes come within the constitutional prohibition of ex post facto laws. It is sufficient now to say that a statute belongs to that class which by its necessary operation and 'in its relation to the offence, or its consequences, alters the situation of the accused to his disadvantage.' United States v Hall, 2 Wash CC 366; Kring v Missouri, 107 US 221, 228 [27 L Ed 506, 2 S Ct 443]; Medley, Petitioner, 134 US
>
>
>
> 160, 171 [33 L Ed 835, 10 S Ct 384]. Of course, a statute is not of that class unless it materially impairs the right of the accused to have the question of his guilt determined according to the law as it was when the offence was committed." Id., at 350-351, 42 L Ed 1061, 18 S Ct 620.

In Beazell v Ohio, 269 US 167, 70 L Ed 216, 46 S Ct 68 (1925), we made it clear that the question whether a particular procedural change has a sufficiently drastic impact on a defendant to be characterized as "substantial" is a matter of degree. In that case we held that the rule applied in Kring and Thompson did not preclude the retrospective application of a rule allowing two codefendants to be tried jointly for a noncapital offense. We summarized our earlier cases construing the Ex Post Facto Clause and explained:

> "The constitutional prohibition and the judicial interpretation of it rest upon the notion that laws, whatever their form, which purport to make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive, and that the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislative enactment, after the fact, to the disadvantage of the accused." 269 US, at 170, 70 L Ed 216, 46 S Ct 68.
>
> "And there may be procedural changes which operate to deny to the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition. Kring v

> Missouri, 107 US 221 [27 L Ed 506, 2 S Ct 443]; Thompson v Utah, 170 US 343 [42 L Ed 1061, 18 S Ct 620]. But it is now well settled that statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited." Ibid.
>
> **[497 US 58]**
>
> "Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree. But the constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, see Malloy v South Carolina, 237 US 180, 183 [59 L Ed 905, 35 S Ct 507], and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance." Id., at 171, 70 L Ed 216, 46 S Ct 68.

III

The foregoing cases make it clear that the mere fact that this case involves a procedural change in Texas law is not sufficient to exclude it from the coverage of the Ex Post Facto Clause. But it is equally clear that our analysis should focus on the impact of the change upon the "right belonging to [the defendant] when the offense was committed." Thompson, 170 US, at 351, 42 L Ed 1061, 18 S Ct 620. In this case, neither the defendant's right to a fair trial nor his right to be protected against unauthorized or excessive punishment has been impaired in the slightest by the new Texas rule.

This conclusion follows immediately from an observation which is both sensible and evident from precedent: A procedural protection is likely to be substantial, when viewed from the time of the commission of the offense, only if it affects the modes of procedure by which a valid conviction or sentence may be imposed. The claims in Kring and Thompson both satisfy this threshold test. In Kring, the procedural change—which deprived Kring of a defense based upon an earlier trial or plea—made it easier for the State to obtain a first-degree murder charge against a defendant who had never been subject to any valid conviction for the crime in question, much less a valid conviction for first-degree murder. In Thompson, the reduction in the size of the jury made it easier for the State to obtain a unanimous verdict

[497 US 59]

against a defendant who, before the verdict, likewise had not been convicted.

Mallett v North Carolina, 181 US 589, 45 L Ed 1015, 21 S Ct 730 (1901), is, however, distinguishable from Kring and Thompson because it fails to meet the threshold test. In Mallett, a valid conviction had been obtained against the defendant. Under the defendant's theory in that case, however, the State would have been prohibited from relying upon this conviction because it had been vacated by an intermediate appellate court. Although the North Carolina Supreme Court reinstated the conviction, Mallett claimed that it lacked power to do so. At the time Mallett committed his crime, the State was prohibited by state law from appealing the adverse decisions of intermediate appellate courts in criminal cases. This restriction had been removed, but Mallett contended that the State had thereby enacted an ex post facto law. As the case came to this Court, it was conceded that Mallett was convicted after a trial which afforded him all the procedural and substantive protections guaranteed by North Carolina law at the time he committed his offense. Nevertheless, according to Mallett's theory, the State was prohibited from relying upon his conviction because of the combination of an intervening—and, for this Court's purposes, erroneous—appellate decision and a restriction upon the State's access to the appellate processes. Not surprisingly, we rejected this claim.

This case is comparable to Mallett. Respondent does not claim that he was denied any procedural protections relevant to the determination of his guilt or innocence. Nor does he claim that his life sentence was unauthorized by law or that it was the consequence of improper procedures. Finally, he does not argue that he has been deprived of any avenue of review for correcting errors that may have vitiated the validity of his conviction or sentence. For example, respondent does not contend—and we do not see how he could plausibly contend—that the State has deprived him of any opportunity to challenge his conviction on the ground that the improper sentencing instruction somehow infected the jury's deliberations about his guilt or about the propriety of life imprisonment. Respondent instead claims, as did the defendant in Mallett, that an unrelated error must bar the State from relying upon his concededly valid conviction, and predicates this claim solely on a restriction upon the State's access to appellate—or, more precisely in this case, postconviction—remedies.[4] Unlike the defendants in Thompson and Kring, Youngblood wishes to have a new trial according to the same procedures, regulated by the same laws, open to the same evidence, and capped by the same sentencing limitations that resulted in his conviction and his life sentence.[5]

Obviously, as our decision in Beazell itself makes clear, a procedural protection does not become substantial merely because it meets the low threshold that I have discussed. It does, however, become insubstantial by failing to do so. Whatever else may be said of the factors that determine whether a procedural protection affects substantial rights, it is difficult to imagine how a retroactive law could, when viewed from the standpoint of the date the offense was committed, implicate substantial rights of any defendant if the law does no more than expand the flexibility of postconviction processes available to the State with respect to a defendant [497 US 61] who is subject to a valid conviction and sentence. Indeed, respondent has barely even attempted to articulate any justification for the Texas procedure that the legislature abolished. The mere possibility of a capricious and unlikely windfall is not the sort of procedural protection that could reasonably be judged substantial from the perspective of the defendant at the time the offense was committed.

---

[4] In Mallett v North Carolina, 181 US 589, 45 L Ed 1015, 21 S Ct 730 (1901), the unrelated intervening error was an incorrect decision by the intermediate appellate court; in this case, it was the imposition of a supplementary fine in addition to the life sentence. In Mallett, the restriction upon the review process prohibited the State from taking an appeal; in this case, it prohibits the courts from saving the conviction and sentence by removing the improper supplement.

[5] Indeed, this case is a fortiori by comparison to Mallett. In that case, the defendant would benefit from an evidentiary exclusion at the secondary trial, although that exclusion would be entirely the consequence of the appellate court's incorrect interpretation of state law and not a consequence of the trial procedures established by North Carolina law in effect at the time of the offense. By contrast, in this case the procedures at the second trial would be in all relevant respects identical.

Accordingly, I concur in the Court's judgment, but not in its opinion.

[497 US 62]

CYNTHIA RUTAN, et al., Petitioners

v

REPUBLICAN PARTY OF ILLINOIS et al. (No. 88-1872)

MARK FRECH, et al., Petitioners

v

CYNTHIA RUTAN et al. (No. 88-2074)

497 US 62, 111 L Ed 2d 52, 110 S Ct 2729, reh den 497 US 1050, 111 L Ed 2d 828, 111 S Ct 13

[Nos. 88-1872 and 88-2074]

Argued January 16, 1990. Decided June 21, 1990.

Decision: Federal Constitution's First Amendment held to forbid basing decisions as to promotion, transfer, recall after layoff, and hiring of low-level public employees on party affiliation and support.

SUMMARY

The Governor of Illinois, a Republican, issued an executive order in 1980 that prohibited state officials from hiring any employee, filling any vacancy, creating any new position, or taking any similar action without the Governor's express permission. Five persons, alleging that the Governor had created a political patronage system to limit state employment and beneficial employment-related decisions to those who were supported by the Republican Party, brought suit under 42 USCS § 1983 in the United States District Court for the Central District of Illinois against the Governor, the Republican Party of Illinois, and various state and Republican Party officials. Specifically, claims of discrimination in violation of the Federal Constitution's First and Fourteenth Amendments were asserted in the suit by (1) a state rehabilitation counselor who alleged that because she did not work for or support the Republican Party, she was repeatedly denied promotions to supervisory positions for which she was qualified; (2) a state road-equipment operator who claimed that he was (a) denied a promotion because he did not have the support of the local Republican Party, and (b) denied a transfer to an office nearer to his home because of opposition from

Briefs of Counsel, p 845, infra.

the Republican Party chairmen in the counties in which he worked and to which he requested a transfer; (3) a former state garage worker who alleged that, because he had voted in a Democratic primary and did not have the support of the Republican Party, he was not recalled after a layoff, although his fellow employees were recalled; (4) a former state dietary manager who alleged that because of his party affiliation, he was not recalled after a layoff, and that he later obtained a lower-paying government position only after receiving support from the chairman of the local Republican Party; and (5) a job applicant who alleged that he had been repeatedly denied state employment as a prison guard because he did not have the support of Republican Party officials. The District Court dismissed the complaint with prejudice, under Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a claim upon which relief could be granted (641 F Supp 249). On appeal, the United States Court of Appeals for the Seventh Circuit (1) held that patronage practices violate the First Amendment when they are the substantial equivalent of dismissal from employment, (2) affirmed the District Court's dismissal of the job applicant's claim, on the ground that patronage hiring does not violate the First Amendment, and (3) reversed and remanded with respect to the remaining claims (848 F2d 1396, on rehearing en banc 868 F2d 943).

On certiorari, the United States Supreme Court affirmed in part, reversed in part, and remanded. In an opinion by Brennan, J., joined by White, Marshall, Blackmun, and Stevens, JJ., it was held that (1) it is an impermissible infringement on the First Amendment rights of low-level public employees for government officials to base such employees' promotions, transfers, and recalls after layoffs on the political affiliation or support of such employees—regardless of whether such employees have a legal entitlement to promotion, transfer, or recall after layoff—because such patronage practices (a) impose significant penalties for the exercise of First Amendment rights, and (b) are not narrowly tailored to further vital government interests; (2) for similar reasons, the First Amendment rights of applicants for low-level public positions are violated—regardless of whether the applicants have a claim of right to such employment—where their employment applications are set aside because they have chosen not to support a particular party; (3) with respect to the appropriate constitutional standard by which to measure alleged patronage practices in government employment, not only those employment decisions that are the substantial equivalent of dismissal violate a public employee's First Amendment rights; and (4) each of the five complaining parties stated a claim upon which relief might properly be granted.

Stevens, J., concurring, joined the court's opinion and expressed the view that (1) denying a state governor the power to require every state employee, and every applicant for state employment, to pledge allegiance and service to the political party in power does not amount to adoption of a civil service system, (2) mere longevity cannot immunize from federal constitutional review state conduct, such as political patronage, that would otherwise violate the First Amendment, and (3) the court's decision in Elrod v Burns

(1976) 427 US 347, 49 L Ed 2d 547, 96 S Ct 2673, in which it was held that patronage dismissals are prohibited under the First Amendment, was firmly grounded in previous decisions of the court.

Scalia, J., joined by Rehnquist, Ch. J., and Kennedy, J., and joined in part (as to points 2 and 3 below), by O'Connor, J., dissenting, expressed the view that (1) when a practice not expressly prohibited by the text of the Federal Constitution's Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, the Supreme Court has no proper basis for striking down such a practice; (2) even accepting the court's mode of analysis, the court's decisions limiting patronage were wrong, because (a) a less-than-strict standard of scrutiny applies in determining the validity of the government's management of its internal operations, (b) the governmental advantages of patronage can reasonably be deemed to outweigh its coercive effects, and (c) the desirability of patronage is a policy question to be decided by the people's representatives; and (3) even if the Supreme Court decisions invalidating patronage dismissals were correctly decided, those decisions should not have been extended beyond their facts.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Constitutional Law § 940 — First Amendment — public employees — patronage — promotions — transfers — recalls after layoffs

1a-1e. It is an impermissible infringement on the rights of low-level public employees under the Federal Constitution's First Amendment for government officials to base such employees' promotions, transfers, and recalls after layoffs on the political affiliation or support of such employees—regardless of whether such employees have a legal entitlement to promotion, transfer, or recall after layoff—because (1) such patronage practices impose significant penalties for the exercise of rights guaranteed by the First Amendment, given that employees who do not compromise their beliefs stand to lose (a) the considerable increases in pay and job satisfaction attendant to promotions, (b) the hours and maintenance expenses that are consumed

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

16A Am Jur 2d, Constitutional Law § 545; 45A Am Jur 2d, Job Discrimination § 232; 63A Am Jur 2d, Public Officers and Employees §§ 232, 252

USCS, Constitution, Amendments 1, 14; 42 USCS § 1983

RIA Employment Discrimination Coordinator ¶ 110,113

US L Ed Digest, Constitutional Law § 940; Pleading § 179

Index to Annotations, Discharge from Employment or Office; Layoffs; Patronage; Politics and Political Matters; Promotion of Employee; Public Officers and Employees; Transfer of Employee

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Public employee's right of free speech under Federal Constitution's First Amendment—Supreme Court cases. 97 L Ed 2d 903.

Supreme Court's views regarding the First Amendment right of association as applied to the advancement of political beliefs. 67 L Ed 2d 859.

The Supreme Court and the First Amendment right of association. 33 L Ed 2d 865.

Dismissal of, or other adverse personnel action relating to, public employee for political patronage reasons as violative of First Amendment. 70 ALR Fed 371.

by long daily commutes, and (c) even their jobs if they are not rehired after a layoff; and (2) such practices are not narrowly tailored to further vital government interests, so as to be permissible under the First Amendment, given that (a) a government's interest in securing effective employees can be met by discharging, demoting, or transferring staff members whose work is deficient, (b) a government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views, (c) political parties are nurtured by other, less intrusive, and equally effective methods, and (d) rather than preserving the democratic process, patronage impairs the electoral process by discouraging free political expression by public employees. (Scalia, J., Rehnquist, Ch. J., and O'Connor and Kennedy, JJ., dissented from this holding.)

Constitutional Law § 940 — First Amendment — public employees — patronage hiring

2a-2f. With respect to low-level public employment, patronage hiring —a government's practice of making hiring decisions based on party affiliation and support—violates the Federal Constitution's First Amendment, because (1) the denial of government employment through patronage hiring is a serious privation that imposes burdens of constitutional magnitude on free speech and association, given that (a) a state job provides regular paychecks, health insurance, and other benefits, (b) there may be openings with the state when business in the private sector is slow, and (c) there are occupations for which the government is a major—or the only—source of employment, (2) conditioning hiring decisions on political belief and association constitutes an unconstitutional condition, unless the government has a vital interest in doing so, and (3) there is no vital governmental interest in conditioning hiring decisions on political belief and association, for the same reasons that the government lacks justification for patronage promotions, transfers, or recalls after layoffs; thus, the First Amendment rights of an applicant for public employment are violated —regardless of whether the applicant has a claim of right to such employment—where his employment application is set aside because he has chosen not to support a particular party. (Scalia, J., Rehnquist, Ch. J., and O'Connor and Kennedy, JJ., dissented from this holding.)

Appeal § 1293 — presumptions — truth of pleaded allegations

3a, 3b. For purposes of the United States Supreme Court's review, on certiorari, of cases in which the question is limited to whether the allegations of the petitioners state a cognizable claim under the Federal Constitution's First Amendment that is sufficient to withstand the respondents' motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Supreme Court must assume that the petitioners' well-pleaded allegations are true.

Constitutional Law § 940 — First Amendment — public employees

4a, 4b. Regardless of whether less-than-strict scrutiny is appropriate in determining the propriety of government conduct when the government takes measures to insure the proper functioning of its internal operations, such a rule has no relevance to the propriety of government conduct that involves restrictions on government employees' freedom of association and speech under the Federal Constitution's First Amendment. (Scalia, J., Rehnquist, Ch. J., and O'Connor and Kennedy, JJ., dissented from this holding.)

Constitutional Law § 940 — First Amendment — public employees — political patronage

5. With respect to the appropriate constitutional standard by which to measure alleged patronage practices in government employment, not only those employment decisions that are the substantial equivalent of dismissal violate a public employee's rights under the Federal Constitution's First Amendment; such a test is unduly restrictive, because it fails to recognize that there are deprivations less harsh than dismissal that nevertheless press state employees and applicants for employment to conform their beliefs and associations to some state-selected orthodoxy.

Constitutional Law § 940 — First Amendment — public employees — patronage

6a, 6b. The Federal Constitution's First Amendment protects state employees not only from patronage dismissal, but even from an act of retaliation as trivial as failing to hold a birthday party for a public employee when such an act is intended to punish the employee for exercising free speech rights.

Constitutional Law § 940 — First Amendment — public employees

7. Although the Federal Constitution's First Amendment is not a tenure provision that protects public employees from actual or constructive discharge, the First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or not to believe and associate.

Constitutional Law § 940; Pleading § 179 — First Amendment — public employees — patronage — promotions — transfers — recalls after layoffs

8a, 8b. Claims upon which relief may be granted under 42 USCS § 1983, for violations of the Federal Constitution's First and Fourteenth Amendments, are stated by the allegations of (1) a state rehabilitation counselor who alleges that because she did not work for or support a particular political party, she was repeatedly denied promotions to supervisory positions for which she was qualified; (2) a state road-equipment operator who alleges that he was (a) denied a promotion because he did not have the support of the local party in question, and (b) denied a transfer to an office nearer to his home because of opposition from the party chairmen in the counties in which he worked and to which he requested a transfer; (3) a former state garage worker who alleges that, because he had voted in another party's primary and did not have the support of the party in question, he was not recalled after a layoff, although his fellow employees were recalled; and (4) a former state dietary manager who alleges that because of his party affiliation, he was not recalled after a layoff, and that he later obtained a lower-paying government position only after receiving support from the chairman of the local party in question. (Scalia, J., Rehnquist, Ch. J., and O'Connor and Kennedy, JJ., dissented from this holding.)

Constitutional Law § 925 — First Amendment

9. What the Federal Constitution's First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly.

Constitutional Law § 940; Pleading §§ 103, 179 — First Amendment — denial of state employment — patronage — dismissal

10a, 10b. A person who alleges that he had been repeatedly denied state employment as a prison guard because he did not have the support of officials of a particular political party, and that such denials violated his rights under the Federal Constitution's First Amendment, states a First Amendment claim upon which relief may be granted, and a Federal District Court's dismissal of such a complaint is improper. (Scalia, J., Rehnquist, Ch. J., and O'Connor and Kennedy, JJ., dissented from this holding.)

SYLLABUS BY REPORTER OF DECISIONS

The Illinois Governor issued an executive order instituting a hiring freeze, whereby state officials are prohibited from hiring any employee, filling any vacancy, creating any new position, or taking any similar action without the Governor's "express permission." Petitioners in No. 88-1872 and cross-respondents in No. 88-2074—an applicant for employment, employees who had been denied promotions or transfers, and former employees who had not been recalled after layoffs—brought suit in the District Court, alleging that, by means of the freeze, the Governor was operating a political patronage system; that they had suffered discrimination in state employment because they had not been Republican Party supporters; and that this discrimination violates the First Amendment. The District Court dismissed the complaint for failure to state a claim upon which relief could be granted. The Court of Appeals affirmed in part and reversed in part. Noting that Elrod v Burns, 427 US 347, 49 L Ed 2d 547, 96 S Ct 2673, and Branti v Finkel, 445 US 507, 63 L Ed 2d 574, 100 S Ct 1287, had found that the patronage practice of discharging public employees on the basis of their political affiliation violates the First Amendment, the court held that other patronage practices violate the Amendment only when they are the "substantial equivalent of a dismissal," i.e., when they would lead reasonable persons to resign. The court concluded, based on Wygant v Jackson Bd. of Education, 476 US 267, 90 L Ed 2d 260, 106 S Ct 1842, that rejecting an employment application did not impose a hardship comparable to the loss of a job. Thus, it dismissed the hiring claim, but remanded the others for further proceedings.

Held: The rule of Elrod and Branti extends to promotion, transfer, recall, and hiring decisions based on party affiliation and support, and petitioners and cross-respondents have stated claims upon which relief may be granted.

(a) Promotions, transfers, and recalls based on political affiliation or support are an impermissible infringement on public employees' First Amendment rights. Even though petitioners and cross-respondents have no legal entitlement to the promotions, transfers, and recalls, the government may not rely on a basis that infringes their constitutionally protected interests to deny them these valuable benefits. Perry v Sindermann, 408 US 593, 597, 33 L Ed 2d 570, 92 S Ct 2694. Significant penalties are imposed on those employees who exercise their First Amendment rights. Those who do not compromise their beliefs stand to lose the considerable increases in pay and job satisfaction attendant to promotions, the shorter commuting hours and lower maintenance expenses incident to transfers to more convenient work locations, and even the jobs themselves in the case of recalls. As in Elrod and Branti, these patronage practices are not narrowly tailored to serve vital government interests. A government's interest in securing effective employees can be met by discharging, demoting, or transferring persons whose work is deficient, and its interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing high-level employees on the basis of their political views. Likewise, the "preservation of the democratic process" is not furthered by these patronage decisions, since political parties are nurtured by other, less intrusive and equally effective methods, and since patronage decidedly impairs the elective process by discouraging public employees' free political expression.

(b) The standard used by the Court of Appeals to measure alleged patronage practices in government employment is unduly restrictive because it fails to recognize that there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy.

(c) Patronage hiring places burdens on free speech and association similar to those imposed by patronage promotions, transfers, and recalls. Denial of a state job is a serious privation, since such jobs provide financial, health, and other benefits; since there may be openings with the State when business in the private sector is slow; and since there are occupations for which the government is the sole or major employer. Under this Court's sustained precedent, conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so. See, e.g., Branti, supra, at 515-516, 63 L Ed 2d 574, 100 S Ct 1287. There is no such government interest here, for the same reasons that the government lacks justification for patronage promotions, transfers, and recalls. It is inappropriate to rely on Wygant to distinguish hiring from dismissal in this context, since that case was concerned with the least harsh means of remedying past wrongs and did not question that *some* remedy was permissible when there was sufficient evidence of past discrimination. Here, however, it is unnecessary to consider whether not being hired is less burdensome than being discharged, because the government is not pressed to do *either* on the basis of political affiliation.

868 F2d 943, affirmed in part, reversed in part, and remanded.

Brennan, J., delivered the opinion of the Court, in which White, Marshall, Blackmun, and Stevens, JJ., joined. Stevens, J., filed a concurring opinion. Scalia, J., filed a dissenting opinion, in which Rehnquist, C.J., and Kennedy, J., joined, and in which O'Connor, J., joined as to Parts II and III.

APPEARANCES OF COUNSEL

Mary Lee Leahy argued the cause for petitioners and cross-respondents.

Thomas P. Sullivan argued the cause for respondents and cross-petitioners.

Briefs of Counsel, p 845, infra.

OPINION OF THE COURT

Justice **Brennan** delivered the opinion of the Court.

[1a, 2] To the victor belong only those spoils that may be constitutionally obtained. Elrod v Burns, 427 US 347, 49 L Ed 2d 547, 96 S Ct 2673 (1976), and Branti v Finkel, 445 US 507, 63 L Ed 2d 574, 100 S Ct 1287 (1980), decided that the First Amendment forbids government officials to discharge or threaten to discharge public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved.

Today we are asked to decide the constitutionality of several related political patronage practices—whether promotion, transfer, recall, and hiring decisions involving low-level public employees may be constitutionally based on party affiliation and support. We hold that they may not.

I

[3a] The petition and cross-petition before us arise from a lawsuit protesting certain employment policies and practices instituted by Governor James Thompson of Illinois.[1] On November 12, 1980, the Governor issued an executive order proclaiming a hiring freeze for every agency, bureau, board, or commission subject to his control. The order prohibits state officials from hiring any employee, filling any vacancy, creating any new position, or taking any similar action. It affects approximately 60,000 state positions. More than 5,000 of these become available each year as a result of resignations, retirements, deaths, expansions, and reorganizations. The order proclaims that "*no* exceptions" are permitted without the Governor's "express permission after submission of appropriate requests to [his] office." Governor's Executive Order No. 5 (Nov.

---

[1] **[3b]** The cases come to us in a preliminary posture, and the question is limited to whether the allegations of petitioners Rutan et al. state a cognizable First Amendment claim sufficient to withstand respondents' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Therefore, for purposes of our review we must assume that petitioners' well-pleaded allegations are true. Berkovitz v United States, 486 US 531, 540, 100 L Ed 2d 531, 108 S Ct 1954 (1988).

Three of the five original plaintiffs who brought the lawsuit—Rutan, Taylor, and Moore—are petitioners in No. 88-1872, and we refer to them as "petitioners." The defendants in the lawsuit are various Illinois and Republican Party officials. We refer to them as "respondents" because they are the respondents in No. 88-1872. They are also the cross-petitioners in No. 88-2074. Four of the five original plaintiffs—Rutan, Taylor, Standefer, and O'Brien—are named as cross-respondents in No. 88-2074.

12, 1980), Brief for Petitioners and Cross-Respondents 11 (emphasis added).

Requests for the Governor's "express permission" have allegedly become routine. Permission has been granted or withheld through an agency expressly created for this purpose, the Governor's Office of Personnel (Governor's Office). Agencies have been screening applicants under Illinois' civil service system, making their personnel choices, and submitting them as requests to be approved or disapproved by the Governor's Office. Among the employment decisions for which approvals have been required are new hires, promotions, transfers, and recalls after layoffs.

By means of the freeze, according to petitioners and cross-respondents, the Governor has been using the Governor's Office to operate a political patronage system to limit state employment and beneficial employment-related decisions to those who are supported by the Republican Party. In reviewing an agency's request that a particular applicant be approved for a particular position, the Governor's Office has looked at whether the applicant voted in Republican primaries in past election years, whether the applicant has provided financial or other support to the Republican Party and its candidates, whether the applicant has promised to join and work for the Republican Party in the future, and whether the applicant has the support of Republican Party officials at state or local levels.

Five people (including the three petitioners) brought suit against various Illinois and Republican Party officials in the United States District Court for the Central District of Illinois.[2] They alleged that they had suffered discrimination with respect to state employment because they had not been supporters of the State's Republican Party and that this discrimination violates the First Amendment. Cynthia B.

Rutan has been working for the State since 1974 as a rehabilitation counselor. She claims that since 1981 she has been repeatedly denied promotions to supervisory positions for which she was qualified because she had not worked for or supported the Republican Party. Franklin Taylor, who operates road equipment for the Illinois Department of Transportation, claims that he was denied a promotion in 1983 because he did not have the support of the local Republican Party. Taylor also maintains that he was denied a transfer to an office nearer to his home because of opposition from the Republican Party chairmen in the counties in which he worked and to which he requested a transfer. James W. Moore claims that he has been repeatedly denied state employment as a prison guard because he did not have the support of Republican Party officials.

The two other plaintiffs, before the Court as cross-respondents, allege that they were not recalled after layoffs because they lacked Republican credentials. Ricky Standefer was a state garage worker who claims that he was not recalled, although his fellow employees were, because he had voted in a Democratic primary and did not have the support of the Republican Party. Dan O'Brien, formerly a dietary manager with the mental health department, contends that he was not recalled after a layoff because of his party affiliation and that he later obtained a lower paying position with the corrections department only after receiving support from the chairman of the local Republican Party.

---

[2] The five originally brought this action both individually and on behalf of those similarly situated. The Seventh Circuit, noting that the District Court had failed to address the class-action questions, reviewed the case as one brought by individuals only. 868 F2d 943, 947 (1989). We therefore have only the claims of the individuals before us.

The District Court dismissed the complaint with prejudice, under Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief could be granted. 641 F Supp 249 (CD Ill 1986). The United States Court of Appeals for the Seventh Circuit initially issued a panel opinion, 848 F2d 1396 (1988), but then reheard the appeal en banc. The court affirmed the District Court's decision in part and reversed in part. 868 F2d 943 (1989). Noting that this Court had previously determined that the patronage practice of discharging

public employees on the basis of their political affiliation violates the First Amendment, the Court of Appeals held that other patronage practices violate the First Amendment only when they are the "substantial equivalent of a dismissal." Id., at 955. The court explained that an employment decision is equivalent to a dismissal when it is one that would lead a reasonable person to resign. Ibid. The court affirmed the dismissal of Moore's claim because it found that basing hiring decisions on political affiliation does not violate the First Amendment, but remanded the remaining claims for further proceedings.[3]

Rutan, Taylor, and Moore petitioned this Court to review the constitutional standard set forth by the Seventh Circuit and the dismissal of Moore's claim. Respondents cross-petitioned this Court, contending that the Seventh Circuit's remand of four of the five claims was improper because the employment decisions alleged here do not, as a matter of law, violate the First Amendment. We granted certiorari, 493 US 807, 107 L Ed 2d 17, 110 S Ct 48 (1989), to decide the important question whether the First Amendment's proscription of patronage dismissals recognized in Elrod v Burns, 427 US 347, 49 L Ed 2d 547, 96 S Ct 2673 (1976), and Branti v Finkel, 445 US 507, 63 L Ed 2d 574, 100 S Ct 1287 (1980), extends to promotion, transfer, recall, or hiring decisions involving public employment positions for which party affiliation is not an appropriate requirement.

II

A

In Elrod, supra, we decided that a newly elected Democratic sheriff could not constitutionally engage in the patronage practice of replacing certain office staff with members of

his own party "when the existing employees lack or fail to obtain requisite support from, or fail to affiliate with, that party." Id., at 351, 373. (plurality opinion), and 375

---

[3] The Seventh Circuit explained that Standefer's and O'Brien's claims might be cognizable if there were a formal or informal system of rehiring employees in their positions, 868 F2d, at 956-957, but expressed considerable doubt that Rutan and Taylor would be able to show that they suffered the "substantial equivalent of a dismissal" by being denied promotions and a transfer. Id., at 955-956.

(Stewart, J., joined by Blackmun, J., concurring in judgment), 49 L Ed 2d 547, 96 S Ct 2673. The plurality explained that conditioning public employment on the provision of support for the favored political party "unquestionably inhibits protected belief and association." Id., at 359, 49 L Ed 2d 547, 96 S Ct 2673. It reasoned that conditioning employment on political activity pressures employees to pledge political allegiance to a party with which they prefer not to associate, to work for the election of political candidates they do not support, and to contribute money to be used to further policies with which they do not agree. The latter, the plurality noted, had been recognized by this Court as "tantamount to coerced belief." Id., at 355, 49 L Ed 2d 547, 96 S Ct 2673 (citing Buckley v Valeo, 424 US 1, 19, 46 L Ed 2d 659, 96 S Ct 612 (1976)). At the same time, employees are constrained from joining, working for, or contributing to the political party and candidates of their own choice. Elrod, supra, at 355-356, 49 L Ed 2d 547, 96 S Ct 2673. "[P]olitical belief and association constitute the core of those activities protected by the First Amendment," the plurality emphasized. 427 US, at 356, 49 L Ed 2d 547, 96 S Ct 2673. Both the plurality and the concurrence drew support from Perry v Sindermann, 408 US 593, 33 L Ed 2d 570, 92 S Ct 2694 (1972), in which this Court held that the State's refusal to renew a teacher's contract because he had been publicly critical of its policies imposed an unconstitutional condition on the receipt of a public benefit. See Elrod, supra, at 359 (plurality opinion) and 375 (Stewart, J., concurring in judgment), 49 L Ed 2d 547, 96 S Ct 2673; see also Branti, supra, at 514-516, 63 L Ed 2d 574, 100 S Ct 1287.

[4a] The Court then decided that the government interests generally asserted in support of patronage fail to justify this burden on First Amendment rights because patronage dismissals are not the least restrictive means for fostering those interests. See Elrod, supra, at 372-373, 49 L Ed 2d 547, 96 S Ct 2673 (plurality opinion) and 375, 49 L Ed 2d 547, 96 S Ct 2673 (Stewart, J., concurring in judgment). The plurality acknowledged that a government has a significant interest in ensuring that it has effective and efficient employees. It expressed **[497 US 70]** doubt, however, that "mere difference of political persuasion motivates poor performance" and concluded that, in any case, the government can ensure employee effectiveness and efficiency through the less drastic means of discharging staff members whose work is inadequate. 427 US, at 365-366, 49 L Ed 2d 547, 96 S Ct 2673. The plurality also found that a government can meet its need for politically loyal employees to implement its policies by the less intrusive measure of dismissing, on political grounds, only those employees in policymaking positions. Id., at 367, 49 L Ed 2d 547, 96 S Ct 2673. Finally, although the plurality recognized that preservation of the democratic process "may in some instances justify limitations on First Amendment freedoms," it concluded that the "process functions as well without the practice, perhaps even better." Patronage, it explained, "can result in the entrenchment of one or a few parties to the exclusion of others" and "is a very effective impediment to the associational and speech freedoms which are essential to a meaningful system of democratic government." Id., at 368-370, 49 L Ed 2d 547, 96 S Ct 2673.[4]

Four years later, in Branti, supra, we decided that the First Amendment prohibited a newly appointed public defender, who was a Democrat, from discharging assistant public defenders because they did not have the support of the Democratic Party. The Court rejected an attempt to distinguish the case from Elrod, deciding that it was immaterial whether the public defender had attempted to coerce employees to change political parties or had only dismissed them on the basis of their private political beliefs. We explained that conditioning continued public employment on an employee's having obtained support from a particular political party violates the First Amendment because of "the coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one's job." 445 US, at 516, 63 L Ed 2d 574, 100 S Ct 1287. "In sum," we said, "there is no requirement that dismissed employees prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance." Id., at 517, 63 L Ed 2d 574, 100 S Ct 1287. To prevail, we concluded, public employees need show only that they were discharged because they were not affiliated with or sponsored by the Democratic Party. Ibid.[5]

B

[1b] We first address the claims of the four current or former employees. Respondents urge us to view Elrod and Branti

as inapplicable because the patronage dismissals at issue in those cases are different in kind from failure to promote, failure to transfer, and failure to recall after layoff. Respondents initially contend that the employee petitioners' and cross-respondents First Amendment rights have not been infringed because they have no entitlement to promotion, transfer, or rehire. We rejected just such an argument in Elrod, 427 US, at 359-360, 49 L Ed 2d 547, 96 S Ct 2673 (plurality opinion) and 375, 49 L Ed 2d 547, 96 S Ct 2673 (Stewart, J., concurring in judgment), and Branti, 445 US, at 514-515, 63 L Ed 2d 574, 100 S Ct 1287, as both cases involved state workers who were employees at will with no legal entitlement to continued employment. In Perry, 408 US, at 596-598, 33 L Ed 2d 570, 92 S Ct 2694, we held explicitly that the plaintiff teacher's lack of a contractual or tenure right to re-employment was immaterial to his First Amendment claim. We explained the viability of his First Amendment claim as follows:

---

[4] **[4b]** Justice Scalia's lengthy discussion of the appropriate standard of review for restrictions the government places on the constitutionally protected activities of its employees to ensure efficient and effective operations, see post, at 94-102, 111 L Ed 2d, at 79-85, is not only questionable, it offers no support for his conclusion that patronage practices pass muster under the First Amendment. The interests that Justice Scalia regards as potentially furthered by patronage practices are not interests that the government has in its capacity as an employer. Justice Scalia describes the possible benefits of patronage as follows: "patronage stabilizes political parties and prevents excessive political fragmentation," post, at 104, 111 L Ed 2d, at 85-86; patronage is necessary to strong, disciplined party organizations, post, at 104-105, 111 L Ed 2d, at 85-86; patronage "fosters the two-party system," post, at 106, 111 L Ed 2d, at 87; and patronage is "a powerful means of achieving the social and political integration of excluded groups," post, at 108, 111 L Ed 2d, at 88. These are interests the government might have in the structure and functioning of society as a whole. That the government attempts to use public employment to further such interests does not render those interests employment related. Therefore, even were Justice Scalia correct that less-than-strict scrutiny is appropriate when the government takes measures to ensure the proper functioning of its internal operations, such a rule has no relevance to the restrictions on freedom of association and speech at issue in this case.

[5] Branti v Finkel, 445 US 507, 63 L Ed 2d 574, 100 S Ct 1287 (1980), also refined the exception created by Elrod v Burns, 427 US 347, 49 L Ed 2d 547, 96 S Ct 2673 (1976), for certain employees. In Elrod, we suggested that policymaking and confidential employees probably could be dismissed on the basis of their political views. Id., at 367 (plurality opinion) and 375 (Stewart, J., concurring in judgment), 49 L Ed 2d 547, 96 S Ct 2673. In Branti, we said that a State demonstrates a compelling interest in infringing First Amendment rights only when it can show that "party affiliation is an appropriate requirement for the effective performance of the public office involved." Branti, supra, at 518, 63 L Ed 2d 574, 100 S Ct 1287. The scope of this exception does not concern us here as respondents concede that the five employees who brought this suit are not within it.

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, *there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.* For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' Speiser v Randall, 357 US 513, 526 [2 L Ed 2d 1460, 78 S Ct 1332] [(1958)]. Such interference with constitutional rights is impermissible." Id., at 597, 33 L Ed 2d 570, 92 S Ct 2694 (emphasis added).

Likewise, we find the assertion here that the employee petitioners and cross-respondents had no legal entitlement to promotion, transfer, or recall beside the point.

[497 US 73]

Respondents next argue that the employment decisions at issue here do not violate the First Amendment because the decisions are not punitive, do not in any way adversely affect the terms of employment, and therefore do not chill the exercise of protected belief and association by public employees.[6] This is not credible. Employees who find themselves in dead-end positions due to their political backgrounds *are* adversely affected. They will feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold, in order to progress up the career ladder. Employees denied transfers to workplaces reasonably close to their homes until they join and work for the Republican Party will feel a daily pressure from their long commutes to do so. And employees who have been laid off may well feel compelled to engage in whatever political activity is necessary to regain regular paychecks and positions corresponding to their skill and experience.[7]

---

[6] Respondents' reliance on Johnson v Transportation Agency, Santa Clara County, 480 US 616, 94 L Ed 2d 615, 107 S Ct 1442 (1987), to this effect is misplaced. The question in Johnson was whether the Santa Clara County affirmative-action program violated the antidiscrimination requirement of Title VII of the Civil Rights Act of 1964. In that context, we said that the denial of a promotion did not unsettle any legitimate, firmly rooted expectations. We did not dispute, however, that it placed a burden on the person to whom the promotion was denied. We considered Johnson's expectations in discussing whether the plan unnecessarily trammeled the rights of male employees—i.e., whether its goal was pursued with an excessive, rather than reasonable, amount of dislocation. Our decision that promotion denials are not such an imposition that Title VII prevented Santa Clara from considering gender in order to redress past discrimination does not mean that promotion denials are not enough of an imposition to pressure employees to affiliate with the favored party.

The same First Amendment concerns that underlay our decisions in Elrod, supra, and Branti, supra, are implicated here. Employees who do not compromise their beliefs stand to lose the considerable increases in pay and job satisfaction attendant to promotions, the hours and maintenance expenses that are consumed by long daily commutes, and even their jobs if they are not rehired after a "temporary" layoff. These are significant penalties and are imposed for the exercise of rights guaranteed by the First Amendment. Unless these patronage practices are narrowly tailored to further vital government interests, we must conclude that they impermissibly encroach on First Amendment freedoms. See Elrod, supra, at 362-363 (plurality opinion) and 375 (Stewart, J., concurring in judgment), 49 L Ed 2d 547, 96 S Ct 2673; Branti, 445 US, at 515-516, 63 L Ed 2d 574, 100 S Ct 1287.

We find, however, that our conclusions in Elrod, supra, and Branti, supra, are equally applicable to the patronage practices at issue here. A government's interest in securing effective employees can be met by discharging, demoting, or transferring staff members whose work is deficient. A government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views. See Elrod, supra, at 365-368, 49 L Ed 2d 547, 96 S Ct 2673 (plurality opinion); Branti, supra, at 518, and 520, n 14, 63 L Ed 2d 574, 100 S Ct 1287. Likewise, the "preservation of the democratic process" is no more furthered by the patronage promotions, transfers, and rehires at issue here than it is by patronage dismissals. First, "political parties are nurtured by other, less intrusive and equally effective methods." Elrod, supra, at 372-373, 49 L Ed 2d 547, 96 S Ct 2673 (plurality opinion). Political parties have already survived the substantial decline in patronage employment practices in this century. See Elrod, supra, at 369, and n 23, 49 L Ed 2d 547, 96 S Ct 2673 (plurality opinion); see also L. Sabato, Goodbye to Good-time Charlie 67 (2d ed 1983) ("The number of patronage positions has significantly decreased in virtually every state"); Congressional Quarterly Inc., State Government,

CQ's Guide to Current Issues and Activities 134 (T. Beyle ed 1989-1990) ("Linkage[s] between political parties and government office-holding . . . have died out under the pressures of varying forces [including] the declining influence of election workers when compared to media and money-intensive campaigning, such as the distribution of form letters and advertising"); Sorauf, Patronage and Party, 3 Midwest J Pol Sci 115, 118-120 (1959) (many state and local parties have thrived without a patronage system). Second, patronage decidedly impairs the elective process by discouraging free political expression by public employees. See Elrod, 427 US, at 372, 49 L Ed 2d 547, 96 S Ct 2673 (plurality opinion) (explaining that the proper functioning of a democratic system "is indispensably dependent on the unfettered judgment of each citizen on matters of political concern"). Respondents, who include the Governor of Illinois and other state officials, do not suggest any other overriding government interest in favoring Republican Party supporters for promotion, transfer, and rehire.

---

[7] The complaint in this case states that Dan O'Brien was driven to do exactly this. After being rejected for recall by the Governor's Office, he allegedly pursued the support of a Republican Party official, despite his previous interest in the Democratic Party.

[1c, 5, 6a, 7] We therefore determine that promotions, transfers, and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees. In doing so, we reject the Seventh Circuit's view of the appropriate constitutional standard by which to measure alleged patronage practices in government employment. The Seventh Circuit proposed that only those employment decisions that are the "substantial equivalent of a dismissal" violate a public employee's rights under the First Amendment. 868 F2d, at 954-957. We find this test unduly restrictive because it fails to recognize that there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy. See Elrod, supra, at 356-357, 49 L Ed 2d 547, 96 S Ct 2673 (plurality opinion); West Virginia Bd. of Education v Barnette, 319 US 624, 642, 87 L Ed 1628, 63 S Ct 1178, 147 ALR 674 (1943).[8]

[497 US 76]

The First Amendment is not a tenure provision, protecting public employees from actual or constructive discharge. The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate.

[1d, 8a] Whether the four employees were in fact denied promotions, transfers, or rehires for failure to affiliate with and support the Republican Party is for the District Court to decide in the first instance. What we decide today is that such denials are irreconcilable with the Constitution and that the allegations of the four employees state claims under 42 USC § 1983 (1982 ed) [42 USCS § 1983] for violations of the First and Fourteenth Amendments. Therefore, although we affirm the Seventh Circuit's judgment to reverse the District Court's dismissal of these claims and remand them for further proceedings, we do not adopt the Seventh Circuit's reasoning.

---

[8] The Seventh Circuit's proffered test was not based on that court's determination that other patronage practices do not burden the free exercise of First Amendment rights. Rather, the court chose to defer to the political process in an area in which it felt this Court had not yet spoken clearly. 868 F2d, at 953-954. The court also expressed concern that the opposite conclusion would open state employment to excessive interference by the Federal Judiciary. Ibid. We respect but do not share this concern.

[6b] Our decision does not impose the Federal Judiciary's supervision on any state government activity that is otherwise immune. The federal courts have long been available for protesting unlawful state employment decisions. Under Title VII, 42 USC §§ 2000e(a), (f), and 2000e-2(a) (1982 ed) [42 USCS §§ 2000e(a), (f), and 2000e-2(a)], it is a violation of federal law to discriminate in any way in state employment (excepting certain high-level positions) on the basis of race, color, religion, sex, or national origin. Moreover, the First Amendment, as the court below noted, already protects state employees not only from patronage dismissals but also from "even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights." 868 F2d, at 954, n 4.

C

[2b] Petitioner James W. Moore presents the closely related question whether patronage hiring violates the First Amendment.

[497 US 77]

Patronage hiring places burdens on free speech and association similar to those imposed by the patronage practices discussed above. A state job is valuable. Like most employment, it provides regular paychecks, health insurance, and other benefits. In addition, there may be openings with the State when business in the private sector is slow. There are also occupations for which the government is a major (or the only) source of employment, such as social workers, elementary school teachers, and prison guards. Thus, denial of a state job is a serious privation.

Nonetheless, respondents contend that the burden imposed is not of constitutional magnitude.[9] Decades of decisions by this Court belie such a claim. We premised Torcaso v Watkins, 367 US 488, 6 L Ed 2d 982, 81 S Ct 1680 (1961), on our understanding that loss of a job opportunity for failure to compromise one's convictions states a constitutional claim. We held that Maryland could not refuse an appointee a commission for the position of notary public on the ground that he refused to declare his belief in God, because the required oath "unconstitutionally invades the appellant's freedom of belief and religion." Id., at 496, 6 L Ed 2d 982, 81 S Ct 1680. In Keyishian v Board of Regents of Univ. of New York, 385 US 589, 609-610, 17 L Ed 2d 629, 87 S Ct 675 (1967), we held a law affecting appointment and retention of teachers invalid because it premised employment on an unconstitutional restriction of political belief and association. In Elfbrandt v Russell, 384 US 11, 19, 16 L Ed 2d 321, 86 S Ct 1238 (1966), we struck down a loyalty oath which was a prerequisite for public employment.

[2c, 9] Almost half a century ago, this Court made clear that the government "may not enact a regulation providing that no Republican . . . shall be appointed to federal office." Public Workers v Mitchell, 330 US 75, 100, 91 L Ed 754, 67 S Ct 556 (1947). What the

[497 US 78]

First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly. See Perry, 408 US, at 597, 33 L Ed 2d 570, 92 S Ct 2694 (citing Speiser v Randall, 357 US 513, 526, 2 L Ed 2d 1460, 78 S Ct 1332 (1958)); see supra, at 72, 111 L Ed 2d, at 65. Under our sustained precedent, conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so. See Elrod, 427 US, at 362-363, 49

---

[9] **[2d]** To the extent that respondents also argue that Moore has not been penalized for the exercise of protected speech and association rights because he had no claim of right to employment in the first place, that argument is foreclosed by Perry v Sindermann, 408 US 593, 597, 33 L Ed 2d 570, 92 S Ct 2694 (1972). See supra, at 72, 111 L Ed 2d, at 65.

L Ed 2d 547, 96 S Ct 2673 (plurality opinion) and 375, 49 L Ed 2d 547, 96 S Ct 2673 (Stewart, J., concurring in judgment); Branti, 445 US, at 515-516, 63 L Ed 2d 574, 100 S Ct 1287; see also Sherbert v Verner, 374 US 398, 10 L Ed 2d 965, 83 S Ct 1790 (1963) (unemployment benefits); Speiser v Randall, supra (tax exemption). We find no such government interest here, for the same reasons that we found that the government lacks justification for patronage promotions, transfers, or recalls. See supra, at 71-76, 111 L Ed 2d, at 65-68.

The court below, having decided that the appropriate inquiry in patronage cases is whether the employment decision at issue is the substantial equivalent of a dismissal, affirmed the trial court's dismissal of Moore's claim. See 868 F2d, at 954. The Court of Appeals reasoned that "rejecting an employment application does not impose a hardship upon an employee comparable to the loss of [a] job." Ibid., citing Wygant v Jackson Bd of Education, 476 US 267, 90 L Ed 2d 260, 106 S Ct 1842 (1986) (plurality opinion). Just as we reject the Seventh Circuit's proffered test, see supra at 75-76, 111 L Ed 2d, at 67, we find the Seventh Circuit's reliance on Wygant to distinguish hiring from dismissal unavailing. The court cited a passage from the plurality opinion in Wygant explaining that school boards attempting to redress past discrimination must choose methods that broadly distribute the disadvantages imposed by affirmative-action plans among innocent parties. The plurality said that race-based layoffs placed too great a burden on individual members of the nonminority race, but suggested that discriminatory hiring was permissible, under certain circumstances, even though it burdened white applicants, because the burden was less intrusive than the loss of an existing job.

Id., at 282-284, 90 L Ed 2d 260, 106 S Ct 1842. See also id., at 294-295, 90 L Ed 2d 260, 106 S Ct 1842 (White, J., concurring in judgment).

Wygant has no application to the question at issue here. The plurality's concern in that case was identifying the least harsh means of remedying past wrongs. It did not question that *some* remedy was permissible when there was sufficient evidence of past discrimination. In contrast, the Governor of Illinois has not instituted a remedial undertaking. It is unnecessary here to consider whether not being hired is less burdensome than being discharged, because the government is not pressed to do *either* on the basis of political affiliation. The question in the patronage context is not which penalty is more acute but whether the government, without sufficient justification, is pressuring employees to discontinue the free exercise of their First Amendment rights.

[2e, 10a] If Moore's employment application was set aside because he chose not to support the Republican Party, as he asserts, then Moore's First Amendment rights have been violated. Therefore, we find that Moore's complaint was improperly dismissed.

III

[1e, 2f, 8b, 10b] We hold that the rule of Elrod and Branti extends to promotion, transfer, recall, and hiring decisions based on party affiliation and support and that all of the petitioners and cross-respondents have stated claims upon which relief may be granted. We affirm the Seventh Circuit insofar as it remanded Rutan's, Taylor's, Standefer's, and O'Brien's claims. However, we reverse the Circuit Court's decision to uphold the dismissal of Moore's claim. All five claims are remanded for proceedings consistent with this opinion.

It is so ordered.

SEPARATE OPINIONS

Justice **Stevens,** concurring.

While I join the Court's opinion, these additional comments are prompted by three propositions advanced by Justice Scalia in his dissent. First, he implies that prohibiting imposition

of an unconstitutional condition upon eligibility for government employment amounts to adoption of a civil service system. Second, he makes the startling assertion that a long history of open and widespread use of patronage practices immunizes them from constitutional scrutiny. Third, he assumes that the decisions in Elrod v Burns, 427 US 347, 49 L Ed 2d 547, 96 S Ct 2673 (1976), and Branti v Finkel, 445 US 507, 63 L Ed 2d 574, 100 S Ct 1287 (1980), represented dramatic departures from prior precedent.

Several years before either Elrod or Branti was decided, I had occasion as a judge on the Court of Appeals for the Seventh Circuit to evaluate each of these propositions. Illinois State Employees Union, Council 34, Am. Federation of State, Cty., and Municipal Employees, AFL-CIO v Lewis, 473 F2d 561 (1972), cert denied, 410 US 928, 35 L Ed 2d 590, 93 S Ct 1364 (1973). With respect to the first, I wrote:

> "Neither this court nor any other may impose a civil service system upon the State of Illinois. The General Assembly has provided an elaborate system regulating the appointment to specified positions solely on the basis of merit and fitness, the grounds for termination of such employment, and the procedures which must be followed in connection with hiring, firing, promotion, and retirement. A federal court has no power to establish any such employment code.
>
> "However, recognition of plaintiffs' claims will not give every public employee civil service tenure and will not require the state to follow any set procedure or to assume the burden of explaining or proving the grounds for every termination. It is the former employee who has the burden of proving that his discharge was motivated by an impermissible consideration. It is true, of course, that a prima facie case may impose a burden of explanation on the State. But the burden of proof will remain with the plaintiff employee and we must assume that the trier of fact will be able to differentiate between those discharges which are politically motivated and
>
>
>
> those which are not. There is a clear distinction between the grant of tenure to an employee—a right which cannot be conferred by judicial fiat—and the prohibition of a discharge for a particular impermissible reason. The Supreme Court has plainly identified that distinction on many occasions, most recently in Perry v

Sindermann, 408 US 593 [33 L Ed 2d 570, 92 S Ct 2694] (1972).

> "Unlike a civil service system, the Fourteenth Amendment to the Constitution does not provide job security, as such, to public employees. If, however, a discharge is motivated by considerations of race, religion, or punishment of constitutionally protected conduct, it is well settled that the State's action is subject to federal judicial review. There is no merit to the argument that recognition of plaintiffs' constitutional claim would be tantamount to foisting a civil service code upon the State." 473 F2d, at 567-568 (footnotes and citations omitted).

Denying the Governor of Illinois the power to require every state employee, and every applicant for state employment, to pledge allegiance and service to the political party in power is a far cry from a civil service code. The question in this case is simply whether a Governor may adopt a rule that would be plainly unconstitutional if enacted by the General Assembly of Illinois.[1]

Second, Justice Scalia asserts that "when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down." Post, at 95, 111 L Ed 2d, at 80; post, at 102, 111 L Ed 2d, at 85 (a "clear and continuing tradition of our people"

deserves "*dispositive* effect"). The argument that traditional practices are immune from constitutional scrutiny is advanced in two plurality opinions that Justice Scalia has authored, but not by any opinion joined by a majority of the Members of the Court.[2]

In the Lewis case, I noted the obvious response to this position: "[I]f the age of a pernicious practice were a sufficient reason for its continued acceptance, the constitutional attack on racial discrimination would, of course, have been doomed to failure." 473 F2d, at 568, n 14. See, e.g., Brown v Board of Education, 347 US 483, 98 L Ed 873, 74 S Ct 686, 38 ALR 1180 (1954).[3] I then added

this comment on the specific

---

[1] Despite Justice Scalia's imprecise use of the term, post, at 114, 111 L Ed 2d, at 92, the legal issue presented in this litigation is plainly not a "political question." See Elrod v Burns, 427 US 347, 351-353, 49 L Ed 2d 547, 96 S Ct 2673 (1976) (plurality opinion); Illinois State Employees Union, Council 34, Am. Federation of State, Cty., and Municipal Employees, AFL-CIO v Lewis, 473 F2d 561, 566-567 (1972), cert denied, 410 US 928, 35 L Ed 2d 590, 93 S Ct 1364 (1973).

[2] See Michael H. v Gerald D., 491 US 110, 105 L Ed 2d 91, 109 S Ct 2333 (1989) (plurality opinion); Burnham v Superior Court of California, Marin County, 495 US 604, 109 L Ed 2d 631, 110 S Ct 2105 (1990) (plurality opinion). Justice Scalia's additional reliance on Bowers v Hardwick, 478 US 186, 92 L Ed 2d 140, 106 S Ct 2841 (1986), post, at 103, 111 L Ed 2d, at 85, is misplaced because in that case the Court used a history of state criminal prohibitions to support its refusal to extend the doctrine of substantive due process to previously unprotected conduct. The question in this case is whether mere longevity can immunize from constitutional review state conduct that would otherwise violate the First Amendment.

[3] Ironically, at the time of the adoption of the Bill of Rights, the party system itself was far from an "accepted political nor[m]." Post, at 95, 111 L Ed 2d, at 80. Our founders viewed it as a pathology:

> "Political discussion in eighteenth-century England and America was pervaded by a kind of anti-party cant. Jonathan Swift, in his Thoughts on Various Subjects, had said that 'Party is the madness of many, for the gain of the few.' This maxim, which was repeated on this side of the Atlantic by men like John

application of that argument to patronage practices:

> "Finally, our answer to the constitutional question is not foreclosed by the fact that the 'spoils system has been entrenched in American history for almost two hundred years.' Alomar v Dwyer, 447 F2d 482, 483 (2d Cir 1971). For most of that period it was assumed, without serious question or debate, that since a public employee has no constitutional right to his job, there can be no valid constitutional objection to his summary removal. See Bailey v Richardson, 86 US App DC 248, 182 F2d 46, 59 (1950), affirmed per curiam by an equally divided Court, 341 US 918 [95 L Ed 1352, 71 S Ct 669]; Adler v Board of Education, 342 US 485 [96 L Ed 517, 72 S Ct 380, 27 ALR2d 472] [(1952)]. But as Mr. Justice Marshall so forcefully stated in 1965 when he was a circuit judge, 'the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.' Keyishian v Board of Regents, 345 F2d 236, 239 (2d Cir 1965). The development of constitutional law subsequent to the Supreme Court's unequivocal repudiation of the line of cases ending with Bailey v
>
>
>
> Richardson and Adler v Board of Education is more relevant than the preceding doctrine which is now 'universally rejected.'" 473 F2d, at 568 (footnotes and citations omitted).

With respect to Justice Scalia's view that until Elrod v Burns was decided in 1976, it was unthinkable that patronage could be unconstitutional, see post, at 96-97, 111 L Ed 2d, at 81, it seems appropriate to point out again not only that my views in Lewis antedated Elrod by several years, but, more importantly, that they were firmly grounded in several decades of decisions of this Court. As explained in Lewis:

Adams and William Paterson, plainly struck a deep resonance in the American mind. Madison and Hamilton, when they discussed parties or factions (for them the terms were usually interchangeable) in The Federalist, did so only to arraign their bad effects. In the great debate over the adoption of the Constitution both sides spoke ill of parties. The popular sage, Franklin (who was not always consistent on the subject), gave an eloquent warning against factions and 'the infinite mutual abuse of parties, tearing to pieces the best of characters.' George Washington devoted a large part of his political testament, the Farewell Address, to stern warnings against 'the baneful effects of the Spirit of Party.' His successor, John Adams, believed that 'a division of the republic into two great parties . . . . is to be dreaded as the greatest political evil under our Constitution.' Similar admonitions can be found in the writings of the arch-Federalist Fisher Adams and the 'philosopher of Jeffersonian democracy,' John Taylor of Caroline. If there was one point of political philosophy upon which these men, who differed on so many things, agreed quite readily, it was their common conviction about the baneful effects of the spirit of party." R. Hofstadter, The Idea of a Party System 2-3 (1969) (footnote omitted).

Our contemporary recognition of a state interest in protecting the two major parties from damaging intraparty feuding or unrestrained factionalism, see, e.g., Storer v Brown, 415 US 724, 39 L Ed 2d 714, 94 S Ct 1274 (1974); post, at 106-107, 111 L Ed 2d, at 87-88, has not disturbed our protection of the rights of individual voters and the role of alternative parties in our government. See, e.g., Anderson v Celebrezze, 460 US 780, 793, 75 L Ed 2d 547, 103 S Ct 1564 (1983) (burdens on new or small parties and independent candidates impinge on associational choices); Williams v Rhodes, 393 US 23, 32, 21 L Ed 2d 24, 89 S Ct 5 (1968) (there is "no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them").

"[In 1947] a closely divided Supreme Court upheld a statute prohibiting federal civil service employees from taking an active part in partisan political activities. United Public Workers v Mitchell, 330 US 75 [91 L Ed 754, 67 S Ct 556]. The dissenting Justices felt that such an abridgment of First Amendment rights could not be justified. The majority, however, concluded that the government's interests in not compromising the quality of public service and in not permitting individual employees to use their public offices to advance partisan causes were sufficient to justify the limitation on their freedom.

"There was no dispute within the Court over the proposition that the employees' interests in political action were protected by the First Amendment. The Justices' different conclusions stemmed from their different appraisals of the sufficiency of the justification for the restriction. That justification—the desirability of political neutrality in the public service and the avoidance of the use of the power and prestige of government to favor one party or the other—would condemn rather than support the alleged conduct of defendant in this case. Thus, in dicta, the Court unequivocally stated that the Legislature could not require allegiance to a particular political faith as a condition of public employment:

"'Appellants urge that federal employees are protected by the Bill of Rights and that Congress may not "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work." None would deny such limitations on Congressional power but, because there are some limitations it does not follow that a prohibition against acting as ward leader or worker at the polls is invalid.' 330 US 75, 100 [91 L Ed 754, 67 S Ct 556].

"In 1952 the Court quoted that dicta in support of its holding that the State of Oklahoma could not require its employees to profess their loyalty by denying past association with Communists. Wieman v Updegraff, 344 US 183, 191-192 [97 L Ed 216, 73 S Ct 215]. That decision did not recognize any special right to public employment; rather, it rested on the impact of the requirement on the citizen's First Amendment rights. We think it unlikely that the Supreme Court would consider these plaintiffs' interest in freely associating with members of the Democratic Party less worthy of protection than the Oklahoma employees' interest in associating with Communists or former Communists.

"In 1961 the Court held that a civilian cook could be summarily excluded from a naval gun factory. Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v McElroy, 367 US 886 [6 L Ed 2d 1230, 81 S Ct 1743]. The government's interest in maintaining the security of the military installation outweighed the cook's interest in working at a particular location. Again, however, the Court explicitly assumed that the sovereign could not deny employment for the reason that the citizen was a member of a particular political party or religious faith—'that she could not have been kept out because she was a Democrat or a Methodist.' 367 US at 898 [6 L Ed 2d 1230, 81 S Ct 1743].

"In 1968 the Court held that 'a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.' Pickering v Board of Education, 391 US 563, 574 [20 L Ed 2d 811, 88 S Ct 1731]. The Court noted that although criminal sanctions 'have a somewhat different impact on the exercise of the right to freedom of speech from dismissal from employment, it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech.' Ibid. The holding in Pickering was a natural sequel to Mr. Justice Frankfurter's comment in dissent in Shelton v Tucker that a scheme to terminate the employment of teachers solely because of their membership in unpopular organizations would run afoul of the Fourteenth Amendment. 364 US 479, 496 [5 L Ed 2d 231, 81 S Ct 247] [(1969)].

"In 1972 the Court reaffirmed the proposition that a nontenured public servant has no constitutional right to public employment, but nevertheless may not be dismissed for exercising his First Amendment rights. Perry v Sindermann, 408 US 593 [33 L Ed 2d 570, 92 S Ct 2694]. The Court's explanation of its holding is pertinent here:

" 'For at least a quarter century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not act. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Speiser v Randall, 357 US 513, 526 [2 L Ed 2d 1460, 78 S Ct 1332]. Such interference with constitutional rights is impermissible.'

" 'We have applied this general principle to denials of tax exemptions, Speiser v Randall, supra, unemployment benefits, Sherbert v Verner, 374 US 398, 404-405 [10 L Ed 2d 965, 83 S Ct 1790] [(1963)], and welfare payments, Shapiro v Thompson, 394 US 618, 627 n 6 [22 L Ed 2d 600, 89 S Ct 1322] [(1969)]; Graham v Richardson, 403 US 365, 374 [29 L Ed 2d 534, 91 S Ct 1848] [(1971)]. But, most often, we have applied the principle to denials of public employment. United Public Workers v Mitchell, 330 US 75, 100 [91 L Ed 754, 67 S Ct 556] [(1947)]; Wieman v Updegraff, 344 US 183, 192 [97 L Ed 216, 73 S Ct 215 (1952)]; Shelton v Tucker, 364 US 479, 485-486 [5 L Ed 2d 231, 81 S Ct 247 (1960)]; Torcaso v Watkins, 367 US 488,

> 495-496 [6 L Ed 2d 982, 81 S Ct 1680 (1961)]; Cafeteria and Restaurant Workers, etc. v McElroy, 367 US 886, 894 [6 L Ed 2d 1230, 81 S Ct 1743] [(1961)]; Cramp v Board of Public Instruction, 368 US 278, 288 [7 L Ed 2d 285, 82 S Ct 275] [(1961)]; Baggett v Bullitt, 377 US 360 [12 L Ed 2d 377, 84 S Ct 1316] [(1964)]; Elfbrandt v Russell, 384 US [11,] 17 [16 L Ed 2d 321, 86 S Ct 1238] [(1966)]; Keyishian v Board of Regents, 385 US 589, 605-606 [17 L Ed 2d 629, 87 S Ct 675] [(1967)]; Whitehill v Elkins, 389 US 54 [19 L Ed 2d 228, 88 S Ct 184] [(1967)]; United States v Robel, 389 US 258 [19 L Ed 2d 508, 88 S Ct 419] [(1967)]; Pickering v Board of Education, 391 US 563, 568 [20 L Ed 2d 811, 88 S Ct 1731] [(1968)]. We have applied the principle regardless of the public employee's contractual or other claim to a job. Compare Pickering v Board of Education, supra, with Shelton v Tucker, supra.'
>
> " 'Thus the respondent's lack of a contractual or tenure "right" to reemployment for the 1969-1970 academic year is immaterial to his free speech claim. . . .' 408 US at 597 [33 L Ed 2d 570, 92 S Ct 2694].
>
> "This circuit has given full effect to this principle." 473 F2d, at 569-572 (footnotes and citations omitted).

See also American Federation of State, Cty. and Municipal Employees, AFL-CIO v Shapp, 443 Pa 527, 537-545, 280 A2d 375, 379-383 (1971) (Barbieri, J., dissenting).

To avoid the force of the line of authority described in the foregoing passage, Justice Scalia would weigh the supposed general state interest in patronage hiring against the

aggregated interests of the many employees affected by the practice. This defense of patronage obfuscates the critical distinction between partisan interest and the public interest.[4] It assumes that governmental power

---

[4] Although Justice Scalia's defense of patronage turns on the benefits of fostering the two-party system, post, at 106-107, 111 L Ed 2d, at 87, his opinion is devoid of reference to meaningful evidence that patronage practices have played a significant role in the preservation of the two-party system. In each of the examples that he cites—"the Boss Tweeds, the Tammany Halls, the Pendergast Machines, the Byrd Machines, and the Daley Machines," post, at 93, 111 L Ed 2d, at 79—patronage practices were used solely to protect the power of an entrenched majority. See Laycock, Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights, 99 Yale LJ 1711, 1722 (1990) (describing the "hopelessness of contesting elections" in Chicago's "one-party system" when "half a dozen employees of the city and of city contractors were paid with public funds to work [a precinct] for the other side"); Johnson, Successful Reform Litigation: The Shakman Patronage Case, 64 Chi-Kent L Rev 479, 481 (1988) (the "massive Democratic patronage employment system" maintained a "noncompetitive political system" in Cook County in the 1960's).

Without repeating the Court's studied rejection of the policy arguments for patronage practices in Elrod, 427 US, at 364-373, 49 L Ed 2d 547, 96 S Ct 2673, I note only that many commentators agree more with Justice Scalia's admissions of the systemic costs of patronage practices—the "financial corruption, such as salary kickbacks and partisan political activity on government-paid time," the reduced efficiency of government, and the undeniable constraint upon the expression of views by employees, post, at 108-110, 111 L Ed 2d, at 88-89—than with his belief that patronage is necessary to political stability and integration of powerless groups. See, e.g., G. Pomper, Voters, Elections, and Parties 282-304 (1988) (multiple causes of party decline); D. Price, Bringing Back the Parties 22-25 (1984) (same); Comment, 41 U Chi L Rev 297, and public resources—in [497 US 89] this case employment opportunities—may appropriately be used to subsidize partisan activities even when the political affiliation of the employee or the job applicant is entirely unrelated to his or her public service.[5] The premise on which this position rests would justify the use of public funds to compensate party members for their campaign work, or, conversely, a legislative enactment denying public employment to nonmembers of the majority party. If such legislation is unconstitutional—as it clearly would be—an equally pernicious rule promulgated by the executive must also be invalid.

Justice Scalia argues that distinguishing "inducement and compulsion" reveals that a patronage system's impairment of the speech and associational rights of employees and would-be employees is insignificant. Post, at 109-110, 111 L Ed 2d, at 89. This analysis contradicts the harsh reality of party discipline that is the linchpin of his theory of patronage. Post, at 105, 111 L Ed 2d, at 86 (emphasizing the "link between patronage and party discipline, and between that and party success").[6] More importantly, [497 US 90] it rests on the long-rejected fallacy that a privilege may be burdened by unconstitutional

---

319-328 (1974) (same); Wolfinger, Why Political Machines Have Not Withered Away and Other Revisionist Thoughts, 34 J Politics 365, 398 (1972) (absence of machine politics in California); J. James, American Political Parties in Transition 85 (1974) (inefficient and antiparty effects of patronage); Johnston, Patrons and Clients, Jobs and Machines: A Case Study of the Uses of Patronage, 73 Am Pol Sci Rev 385 (1979) (same); Grimshaw, The Political Economy of Machine Politics, 4 Corruption and Reform 15 (1989) (same); Comment, 49 U Chi L Rev 181, 197-200 (1982) (same); Freedman, Doing Battle with the Patronage Army: Politics, Courts and Personnel Administration in Chicago, 48 Pub Admin Rev 847 (1988) (race and machine politics).

Incidentally, although some might suggest that Jacob Arvey was "best known as the promoter of Adlai Stevenson," post, at 104, 111 L Ed 2d, at 86, that connection is of interest only because of Mr. Arvey's creative and firm leadership of the powerful political organization that was subsequently led by Richard J. Daley. M. Tolchin & S. Tolchin, To the Victor 36 (1971).

[5] Neither Justice Scalia nor any of the parties suggests that party affiliation is relevant to any of the positions at stake in this litigation—rehabilitation counselor, road equipment operator, prison guard, dietary manager, and temporary garage worker. Reliance on the difficulty of precisely dividing the positions in which political affiliation is relevant to the quality of public service from those in which it is not an appropriate requirement of the job is thus inapposite. See post, at 110-114, 111 L Ed 2d, at 90-92. Difficulty in deciding borderline cases does not justify imposition of a loyalty oath in the vast category of positions in which it is irrelevant.

[6] The iron fist inside the velvet glove of Justice Scalia's "inducements" and "influences" is apparent from his own descriptions of the essential features of a patronage system. See, e.g., post, at 109, 111 L Ed 2d, at 89 (the worker may "urge *within the organization* the adoption of any political position; but if that position is rejected he must vote and work for the party nonetheless"); post, at 105, 111 L Ed 2d, at 86 (quoting M. Tolchin & S. Tolchin, To the Victor, at 123 (reporting that Montclair, New Jersey, Democrats provide fewer services than Cook County, Illinois, Democrats, while "the rate of issue participation is much higher among Montclair Democrats who are not bound by the fear displayed by the Cook County committeemen")); post, at 105, 111 L Ed 2d, at 86 (citing W. Grimshaw, The Political Economy of Machine Politics, 4 Corruption and Reform 15, 30 (1989) (reporting that Mayor Daley "sacked" a black committeeman for briefly withholding support for a school board nominee whom civil rights activists opposed)).

Of course, we have firmly rejected any requirement that aggrieved employees "prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance." Branti, 445 US 507, 517, 63 L Ed 2d 574, 100 S Ct 1287 (1980). What is at issue in these cases is not whether an employee is actually coerced conditions. See, e.g., Perry v Sindermann, 408 US 593, 597, 33 L Ed 2d 570, 92 S Ct 2694 (1972). There are a few jobs for which an individual's race or religion may be relevant, see Wygant v Jackson Bd. of Education, 476 US 267, 314-315, 90 L Ed 2d 260, 106 S Ct 1842 (1986) (Stevens, J., dissenting); there are many jobs for which political affiliation is relevant to the employee's ability to function effectively as part of a given administration. In those cases—in other words, cases in which "the efficiency of the public service," Public Workers v Mitchell, 330 US 75, 101, 91 L Ed 754, 67 S Ct 556 (1947), would be advanced by hiring workers who are loyal to the Governor's party—such hiring is permissible under the holdings in Elrod and Branti. This case, however, concerns jobs in which race, religion, and political affiliation are all equally and entirely irrelevant to the public service to be performed. When an individual has

been denied employment for an impermissible reason, it is unacceptable to balance the constitutional rights of the individual against the political interests of the party in power. It seems to be obvious that the government may not discriminate against particular individuals in hopes of advancing partisan interests through the misuse[7] of public funds.

The only systemic consideration permissible in these circumstances is not that of the controlling party, but that of the aggregate of burdened individuals. By impairing individuals' freedoms of belief and association, unfettered patronage practices undermine the "free functioning of the electoral process." Elrod, 427 US, at 356, 49 L Ed 2d 547, 96 S Ct 2673. As I wrote in 1972:

> "Indeed, when numbers are considered, it is appropriate not merely to consider the rights of a particular janitor who may have been offered a bribe from the public treasury to obtain his political surrender, but also the impact on the body politic as a whole when the free political choice of millions of public servants is inhibited or

---

or merely influenced, but whether the attempt to obtain his or her support through "party discipline" is legitimate. To apply the relevant question to Justice Scalia's example, post, at 109-110, 111 L Ed 2d, at 89, the person who attempts to bribe a public official is guilty of a crime regardless of whether the official submits to temptation; likewise, a political party's attempt to maintain loyalty through allocation of government resources is improper regardless of whether any employee capitulates.

[7] I use the term "misuse" deliberately because the entire rationale for patronage hiring as an economic incentive for partisan political activity rests on the assumption that the patronage employee filling a government position must be paid a premium to reward him for his partisan services. Without such a premium, the economic incentive rationale on which Justice Scalia relies does not exist. It has been clear to Congress and this Court for over a century that refusal to contribute "may lead to putting good men out of the service, liberal payments may be made the ground for keeping poor ones in," and "the government itself may be made to furnish indirectly the money to defray the expenses of keeping the political party in power that happens to have for the time being the control of the public patronage." Ex parte Curtis, 106 US 371, 375, 27 L Ed 232, 1 S Ct 381 (1882) (upholding constitutionality of Act of Aug. 15, 1876, § 6, ch 287, 19 Stat 169, prohibiting nonappointed federal employees from requesting or receiving any thing of value for political purposes).

Petitioners Rutan and Taylor both allege that they are more qualified than the persons who were promoted over them.

manipulated by the selective award of public benefits. While the patronage system is defended in the name of democratic tradition, its paternalistic impact on the political

process is actually at war with the deeper traditions of democracy embodied in the First Amendment." Lewis, 473 F2d, at 576.[8]

The tradition that is relevant in this case is the American commitment to examine and reexamine past and present practices against the basic principles embodied in the Constitution. The inspirational command by our President in 1961 is entirely consistent with that tradition: "Ask not what your country can do for you—ask what you can do for your country." This case involves a contrary command: "Ask not what job applicants can do for the State—ask what they can do for our party." Whatever traditional support may remain for a command of that ilk, it is plainly an illegitimate excuse for the practices rejected by the Court today.

Justice **Scalia,** with whom The **Chief Justice** and Justice **Kennedy** join, and with whom Justice **O'Connor** joins as to Parts II and III, dissenting.

Today the Court establishes the constitutional principle that party membership is not a permissible factor in the dispensation of government jobs, except those jobs for the performance of which party affiliation is an "appropriate requirement." Ante, at 64, 111 L Ed 2d, at 60. It is hard to say precisely (or even generally) what that exception means, but if there is any category of jobs for whose performance party affiliation is not an appropriate requirement, it is the job of being a judge, where

partisanship is not only unneeded but positively undesirable. It is, however, rare that a federal administration of one party will appoint a judge from another party. And it has always been rare. See Marbury v Madison, 1 Cranch 137, 2 L Ed 60 (1803). Thus, the new principle that the Court today announces will be enforced by a corps of judges (the Members of this Court included) who overwhelmingly owe their office to its violation. Something must be wrong here, and I suggest it is the Court.

The merit principle for government employment is probably the most favored in modern America, having been widely adopted by civil service legislation at both the state and federal levels. But there is another point of view, described in characteristically Jacksonian fashion by an eminent practitioner of the patronage system, George Washington Plunkitt of Tammany Hall:

"I ain't up on sillygisms, but I

---

[8] A decade later, in Anderson v Celebrezze, 460 US, at 794, 75 L Ed 2d 547, 103 S Ct 1564, this Court decided that a law burdening independent candidates, by "limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group," would burden associational choices and thereby "threaten to reduce diversity and competition in the marketplace of ideas." We concluded that "the primary values protected by the First Amendment—'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,' New York Times Co. v Sullivan, 376 US 254, 270 [11 L Ed 2d 686, 84 S Ct 710, 95 ALR2d 1412] (1964)—are served when election campaigns are not monopolized by the existing political parties." Ibid.

> can give you some arguments that nobody can answer.
>
> "First, this great and glorious country was built up by political parties; second, parties can't hold together if their workers don't get offices when they win; third, if the parties go to pieces, the government they built up must go to pieces, too; fourth, then there'll be hell to pay." W. Riordon, Plunkitt of Tammany Hall 13 (1963).

It may well be that the Good Government Leagues of America were right, and that Plunkitt, James Michael Curley, and their ilk were wrong; but that is not entirely certain. As the merit principle has been extended and its effects increasingly felt; as the Boss Tweeds, the Tammany Halls, the Pendergast Machines, the Byrd Machines, and the Daley Machines have faded into history; we find that political leaders at all levels increasingly complain of the helplessness of elected government, unprotected by "party discipline," before the demands of small and cohesive interest groups.

The choice between patronage and the merit principle—or, to be more realistic about it, the choice between the desirable mix of merit and patronage principles in widely varying federal, state, and local political contexts—is not so clear that I would be prepared, as an original matter, to chisel a single, inflexible prescription into the Constitution. Fourteen years ago, in Elrod v Burns, 427 US 347, 49 L Ed 2d 547, 96 S Ct 2673 (1976), the Court did that. Elrod was limited however, as was the later decision of Branti v Finkel, 445 US 507, 63 L Ed 2d 574, 100 S Ct 1287 (1980), to patronage firings, leaving it to state and federal legislatures to determine when and where political affiliation could be taken into account in hirings and promotions. Today the Court makes its constitutional civil service reform absolute, extending to all decisions regarding government employment. Because the First Amendment has never been thought to require this disposition, which may well have disastrous consequences for our political system, I dissent.

I

The restrictions that the Constitution places upon the government in its capacity as lawmaker, i.e., as the regulator of private conduct, are not the same as the restrictions that it places upon the government in its capacity as employer. We have recognized this in many contexts, with respect to many different constitutional guarantees. Private citizens perhaps cannot be prevented from wearing long hair, but policemen can. Kelley v Johnson, 425 US 238, 247, 47 L Ed 2d 708, 96 S Ct 1440 (1976). Private citizens cannot have their property searched without probable cause, but in many circumstances government employees can. O'Connor v Ortega, 480 US 709, 723, 94 L Ed 2d 714, 107 S Ct 1492 (1987) (plurality opinion); id., at 732, 94 L Ed 2d 714, 107 S Ct 1492 (Scalia, J., concurring in judgment). Private citizens cannot be punished for refusing to provide the government information that may incriminate them, but government employees can be dismissed when the incriminating information that they refuse to provide relates to the performance of their jobs. Gardner v Broderick, 392 US 273, 277-278, 20 L Ed 2d 1082, 88 S Ct 1913 (1968). With regard to freedom of speech in particular: Private citizens cannot be punished for speech of merely private concern, but government employees can be fired for that reason. Connick v Myers, 461 US 138, 147, 75 L Ed 2d 708, 103 S Ct 1684 (1983). Private citizens cannot be punished for partisan political activity, but federal and state employees can be dismissed and otherwise punished for that reason. Public Workers v Mitchell, 330 US 75, 101, 91 L Ed 754, 67 S Ct 556 (1947); Civil Service Comm'n v Letter Carriers, 413 US 548, 556, 37 L Ed 2d 796, 93 S Ct 2880 (1973); Broadrick v Oklahoma, 413 US 601, 616-617, 37 L Ed 2d 830, 93 S Ct 2908 (1973).

Once it is acknowledged that the Constitution's prohibition against laws "abridging the freedom of speech" does not apply to laws enacted in the government's capacity as employer in the same way that it does to laws enacted in the government's capacity as regulator of private conduct, it may sometimes be difficult to assess what employment practices are permissible and what are not. That seems to me not a difficult question, however, in the present context. The provisions of the Bill of Rights were designed to restrain transient majorities from impairing long-recognized personal liberties. They did not create by implication novel individual rights overturning accepted political norms. Thus, when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.[1] Such a venerable and accepted tradition is not to

be laid on the examining table and scrutinized for its conformity to some abstract principle of First Amendment adjudication devised by this Court. To the contrary, such traditions are themselves the stuff out of which the Court's principles are to be formed. They are, in these uncertain areas, the very points of reference by which the legitimacy or illegitimacy of *other* practices is to be figured out. When it appears that the latest "rule," or "three-part test," or "balancing test" devised by the Court has placed us on a collision course with such a landmark practice, it is the former that must be recalculated by us, and not the latter that must be abandoned by our citizens. I know of no other way to formulate a constitutional jurisprudence that reflects, as it should, the principles adhered to, over time, by the American people, rather than those favored by the personal (and necessarily shifting) philosophical dispositions of a majority of this Court.

---

[1] The customary invocation of Brown v Board of Education, 347 US 483, 98 L Ed 873, 74 S Ct 686, 38 ALR2d 1180 (1954), as demonstrating the dangerous consequences of this principle, see ante, at 82, 111 L Ed 2d, at 71 (Stevens, J., concurring), is unsupportable. I argue for the role of tradition in giving content only to *ambiguous* constitutional text; no tradition can supersede the Constitution. In my view the Fourteenth Amendment's requirement of "equal protection of the laws," combined with the Thirteenth Amendment's abolition of the institution of black slavery, leaves no room for doubt that laws treating people differently because of their race are invalid. Moreover, even if one does not regard the Fourteenth Amendment as crystal clear on this point, a tradition of *unchallenged* validity did not exist with respect to the practice in Brown. To the contrary, in the 19th century the principle of "separate-but-equal" had been vigorously opposed on constitutional grounds, litigated up to this Court, and upheld only over the dissent of one of our historically most respected Justices. See Plessy v Ferguson, 163 US 537, 555-556, 41 L Ed 256, 16 S Ct 1138 (1896) (Harlan, J., dissenting).

I will not describe at length the claim of patronage to landmark status as one of our accepted political traditions. Justice Powell discussed it in his dissenting opinions in Elrod and Branti. Elrod, 427 US, at 378-379, 49 L Ed 2d 547, 96 S Ct 2673; Branti, 445 US, at 522, n 1, 63 L Ed 2d 574, 100 S Ct 1287. Suffice it to say that patronage was, without any thought that it could be unconstitutional, a basis for government employment from the earliest days of the Republic until Elrod—and has continued unabated *since* Elrod, to the extent still permitted by that unfortunate decision. See, e.g., D. Price, Bringing Back the Parties 24, 32 (1984); Gardner, A Theory of the Spoils System, 54 Public Choice 171, 181 (1987); Toinet & Glenn, Clientelism and Corruption in the "Open" Society: The Case of the United States, in Private Patronage and Public Power 193, 202 (C. Clapham ed

1982). Given that unbroken tradition regarding the application of an ambiguous constitutional text, there was in my view no basis for holding that patronage-based dismissals violated the First Amendment—much less for holding, as the Court does today, that even patronage hiring does so.[2]

II

Even accepting the Court's own mode of analysis, however, and engaging in "balancing" a tradition that ought to be part of the scales, Elrod, Branti, and today's extension of them seem to me wrong.

A

The Court limits patronage on the ground that the individual's interest in uncoerced belief and expression outweighs the systemic interests invoked to justify the practice. Ante,

at 68-72, 111 L Ed 2d, at 62-65. The opinion indicates that the government may prevail only if it proves that the practice is "narrowly tailored to further vital government interests." Ante, at 74, 111 L Ed 2d, at 66.

That strict-scrutiny standard finds

---

[2] Justice Stevens seeks to counteract this tradition by relying upon the supposed "unequivocal repudiation" of the right-privilege distinction. Ante, at 83, 111 L Ed 2d, at 72. That will not do. If the right-privilege distinction was once used to explain the practice, and if that distinction is to be repudiated, then one must simply devise some other theory to explain it. The order of precedence is that a constitutional theory must be wrong if its application contradicts a clear constitutional tradition; not that a clear constitutional tradition must be wrong if it does not conform to the current constitutional theory. On Justice Stevens' view of the matter, this Court examines a historical practice, endows it with an intellectual foundation, and later, by simply undermining that foundation, relegates the constitutional tradition to the dustbin of history. That is not how constitutional adjudication works. Cf. Burnham v Superior Court of California, Marin County, 495 US 604, 109 L Ed 2d 631, 110 S Ct 2105 (1990) (opinion of Scalia, J.). I am not sure, in any event, that the right-privilege distinction has been as unequivocally rejected as Justice Stevens supposes. It has certainly been recognized that the fact that the government need not confer a certain benefit does not mean that it can attach any conditions whatever to the conferral of that benefit. But it remains true that certain conditions can be attached to benefits that cannot be imposed as prescriptions upon the public at large. If Justice Stevens chooses to call this something other than a right-privilege distinction, that is fine and good—but it is in any case what explains the nonpatronage restrictions upon federal employees that the Court continues to approve, and there is no reason why it cannot support patronage restrictions as well.

no support in our cases. Although our decisions establish that government employees do not lose all constitutional rights, we have consistently applied a lower level of scrutiny when "the governmental function operating . . . [is] not the power to regulate or license, as lawmaker, an entire trade or profession, or to control an entire branch of private business, but, rather, as proprietor, to manage [its] internal operatio[ns] . . . ." Cafeteria & Restaurant Workers v McElroy, 367 US 886, 896, 6 L Ed 2d 1230, 81 S Ct 1743 (1961). When dealing with its own employees, the government may not act in a manner that is "patently arbitrary or discriminatory," id., at 898, 6 L Ed 2d 1230, 81 S Ct 1743, but its regulations are valid if they bear a "rational connection" to the governmental end sought to be served, Kelley v Johnson, 425 US, at 247, 47 L Ed 2d 708, 96 S Ct 1440.

In particular, restrictions on speech by public employees are not judged by the test applicable to similar restrictions on speech by nonemployees. We have said that "[a] governmental employer may subject its employees to such special restrictions on free expression as are reasonably necessary to promote effective government." Brown v Glines, 444 US 348, 356, n 13, 62 L Ed 2d 540, 100 S Ct 594 (1980). In Public Workers v Mitchell, 330 US, at 101, 91 L Ed 754, 67 S Ct 556, upholding provisions of the Hatch Act which prohibit political activities by federal employees, we said that "it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service." We reaffirmed Mitchell in Civil Service Comm'n v Letter Carriers, 413 US, at 556, 37 L Ed 2d 796, 93 S Ct 2880, over a dissent by Justice Douglas arguing against application of a special standard to government employees, except insofar as their "job performance" is concerned, id., at 597, 37 L Ed 2d 796, 93 S Ct 2880. We did not say that the Hatch Act was narrowly tailored to meet [497 US 99] the government's interest, but merely deferred to the judgment of Congress, which we were not "in any position to dispute." Id., at 567, 37 L Ed 2d 796, 93 S Ct 2880. Indeed, we recognized that the Act was not indispensably necessary to achieve those ends, since we repeatedly noted that "Congress at some time [may] come to a different view." Ibid.; see also id., at 555, 564, 37 L Ed 2d 796, 93 S Ct 2880. In Broadrick v Oklahoma, 413 US 601, 37 L Ed 2d 830, 93 S Ct 2908 (1973), we upheld similar restrictions on state employees, though directed "at political expression which if engaged in by private persons would plainly be protected by the First and Fourteenth Amendments," id., at 616, 37 L Ed 2d 830, 93 S Ct 2908.

To the same effect are cases that specifically concern adverse employment action taken against public employees because of their speech. In Pickering v Board of Education of Township High School Dist., 391 US 563, 568, 20 L Ed 2d 811, 88 S Ct 1731 (1968), we recognized:

> "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon mat-

> ters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

Because the restriction on speech is more attenuated when the government conditions employment than when it imposes criminal penalties, and because "government offices could not function if every employment decision became a constitutional matter," Connick v Myers, 461 US, at 143, 75 L Ed 2d 708, 103 S Ct 1684, we have held that government employment decisions taken on the basis of an employee's speech do not "abridg[e] the freedom of speech," US Const, Amdt 1, merely because they fail

the narrow-tailoring and compelling-interest tests applicable to direct regulation of speech. We have not subjected such decisions to strict scrutiny, but have accorded "a wide degree of deference to the employer's judgment" that an employee's speech will interfere with close working relationships. 461 US, at 152, 75 L Ed 2d 708, 103 S Ct 1684.

When the government takes adverse action against an employee on the basis of his political affiliation (an interest whose constitutional protection is derived from the interest in speech), the same analysis applies. That is why both the Elrod plurality, 427 US, at 359, 49 L Ed 2d 547, 96 S Ct 2673, and the opinion concurring in the judgment, id., at 375, 49 L Ed 2d 547, 96 S Ct 2673, as well as Branti, 445 US, at 514-515, 63 L Ed 2d 574, 100 S Ct 1287, and the Court today, ante, at 72, 111 L Ed 2d, at 64-65, rely on Perry v Sindermann, 408 US 593, 33 L Ed 2d 570, 92 S Ct 2694 (1972), a case that applied the test announced in Pickering, not the strict-scrutiny test applied to restrictions imposed on the public at large. Since the government may dismiss an employee for political *speech* "reasonably deemed by Congress to interfere with the efficiency of the public service," Public Workers v Mitchell, supra, at 101, 91 L Ed 754, 67 S Ct 556, it follows, a fortiori, that the government may dismiss an employee for political *affiliation* if "reasonably necessary to promote effective government." Brown v Glines, supra, at 356, n 13, 62 L Ed 2d 540, 100 S Ct 594.

While it is clear from the above cases that the normal "strict scrutiny" that we accord to government regulation of speech is not applicable in this field,[3] the precise test that replaces [497 US 101] it is not so clear; we have used various formulations. The one that appears in the case dealing with an employment practice closest in its effects to patronage is whether the [497 US 102] practice could be "reasonably deemed" by the enacting legislature to further a legitimate goal. Public Workers v Mitchell, 330 US, at 101, 91 L Ed 754, 67 S Ct 556. For purposes of my ensuing discussion, however, I will apply a less permissive standard that seems more in accord with our general "balancing" test: Can the governmental advantages of this employment practice reasonably

---

[3] The Court calls our description of the appropriate standard of review "questionable," and suggests that these cases applied strict scrutiny ("even were Justice Scalia correct that less-than-strict scrutiny is appropriate"). Ante, at 70, n 4, 111 L Ed 2d, at 64 (emphasis added). This suggestion is incorrect, does not aid the Court's argument, and if accepted would eviscerate the strict-scrutiny standard. It is incorrect because even a casual perusal of the cases reveals that the governmental actions were sustained, not because they were shown to be "narrowly tailored to further vital government interests," ante, at 74, 111 L Ed 2d, at 66, but because they were "reasonably" deemed necessary to promote effective government. It does not aid the Court's argument, moreover, because *whatever* standard those cases applied must be applied here, and if the asserted interests in patronage are as weighty as those proffered in the previous cases, then Elrod and Branti were wrongly decided. It eviscerates the standard, finally, because if the practices upheld in those cases survived strict scrutiny, then the so-called "strict-scrutiny" test means nothing. Suppose a State made it unlawful for an employee of a privately owned nuclear power plant to criticize his employer. Can there be any doubt that we would reject out

---

of hand the State's argument that the statute was justified by the compelling interest in maintaining the appearance that such employees are operating nuclear plants properly, so as to maintain public confidence in the plants' safety? But cf. Civil Service Comm'n v Letter Carriers, 413 US 548, 565, 37 L Ed 2d 796, 93 S Ct 2880 (1973) (Hatch Act justified by need for government employees to "appear to the public to be avoiding [political partiality], if confidence in the system of representative Government is not to be eroded"). Suppose again that a State prohibited a private employee from speaking on the job about matters of private concern. Would we even hesitate before dismissing the State's claim that the compelling interest in fostering an efficient economy overrides the individual's interest in speaking on such matters? But cf. Connick v Myers, 461 US 138, 147, 75 L Ed 2d 708, 103 S Ct 1684 (1983) ("[W]hen a public employee speaks . . . upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior"). If the Court thinks that strict scrutiny is appropriate in all these cases, then it should forthrightly admit that Public Workers v Mitchell, 330 US 75, 91 L Ed 754, 67 S Ct 556 (1947), Letter Carriers, supra, Pickering v Board of Education of Township High School Dist., 391 US 563, 20 L Ed 2d 811, 88 S Ct 1731 (1968), Connick, supra, and similar cases were mistaken and should be overruled; if it rejects that course, then it should admit that those cases applied, as they said they did, a reasonableness test.

The Court's further contention that these cases are limited to the "interests that the government has in its capacity as an employer," ante, at 70, n 4, 111 L Ed 2d, at 64, as distinct from its interests "in the structure and functioning of society as a whole," ibid., is neither true nor relevant. Surely a principal reason for the statutes that we have upheld preventing political activity by government employees—and indeed the *only* substantial reason, with respect to those employees who are permitted to be hired and fired on a political basis—is to prevent the party in power from obtaining what is considered an unfair advantage in political campaigns. That is precisely the type of governmental interest at issue here. But even if the Court were correct, I see no reason in policy or principle why the government would be limited to furthering *only* its interests "as employer." In fact, we have seemingly approved the furtherance of broader governmental interests through employment restrictions. In Hampton v Mow Sun Wong, 426 US 88, 48 L Ed 2d 495, 96 S Ct 1895 (1976), we held unlawful a Civil Service Commission regulation prohibiting the hiring of aliens on the ground that the Commission lacked the requisite authority. We were willing, however, to "assume . . . that if the Congress or the President had expressly imposed the citizenship requirement, it would be justified by the national interest in providing an incentive for aliens to become naturalized, or possibly even as providing the President with an expendable token for treaty negotiating purposes." Id., at 105, 48 L Ed 2d 495, 96 S Ct 1895. Three months after our opinion, the President adopted the restriction by Executive Order. Exec Order No. 11935, 3 CFR 146 (1976 Comp). On remand, the lower courts denied the Mow Sun Wong plaintiffs relief on the basis of this new Executive Order and relying upon the interest in providing an incentive for citizenship. Mow Sun Wong v Hampton, 435 F Supp 37 (ND Cal 1977), aff'd, 626 F2d 739 (CA9 1980). We denied certiorari, sub nom. Lum v Campbell, 450 US 959, 67 L Ed 2d 384, 101 S Ct 1419 (1981). In other cases, the lower federal courts have uniformly reached the same result. See, e.g., Jalil v Campbell, 192 US App DC 4, 7, n 3, 590 F2d 1120, 1123, n 3 (1978); Vergara v Hampton, 581 F2d 1281 (CA7 1978), cert denied, 441 US 905, 60 L Ed 2d 373, 99 S Ct 1993 (1979); Santin Ramos v United States Civil Service Comm'n, 430 F Supp 422 (PR 1977) (three-judge court).

be deemed to outweigh its "coercive" effects?

B

Preliminarily, I may observe that the Court today not only declines, in this area replete with constitutional ambiguities, to give the clear and continuing tradition of our people the *dispositive* effect I think it deserves, but even declines to give it substantial weight in the balancing. That is contrary to what the Court has done in many other contexts. In evaluating

[497 US 103]

so-called "substantive due process" claims we have examined our history and tradition with respect to the asserted right. See, e.g., Michael H. v Gerald D., 491 US 110, 105 L Ed 2d 91, 109 S Ct 2333 (1989); Bowers v Hardwick, 478 US 186, 192-194, 92 L Ed 2d 140, 106 S Ct 2841 (1986). In evaluating claims that a particular procedure violates the Due Process Clause we have asked whether the procedure is traditional. See, e.g., Burnham v Superior Court of California, Marin County, 495 US 604, 109 L Ed 2d 631, 110 S Ct 2105 (1990). And in applying the Fourth Amendment's reasonableness test we have looked to the history of judicial and public acceptance of the type of search in question. See, e.g., Camara v Municipal Court of San Francisco, 387 US 523, 537, 18 L Ed 2d 930, 87 S Ct 1727 (1967). See also Press-Enterprise Co. v Superior Court of California, Riverside County, 478 US 1, 8, 92 L Ed 2d 1, 106 S Ct 2735 (1986) (tradition of accessibility to judicial proceedings implies judgment of experience that individual's interest in access outweighs government's interest in closure); Richmond Newspapers, Inc. v Virginia, 448 US 555, 589, 65 L Ed 2d 973, 100 S Ct 2814 (1980) (Brennan, J., concurring in judgment) ("Such a tradition [of public access] commands respect in part because the Constitution carries the gloss of history"); Walz v Tax Comm'n of New York City, 397 US 664, 678, 25 L Ed 2d 697, 90 S Ct 1409 (1970) ("unbroken practice of according the [property tax] exemption to churches" demonstrates that it does not violate Establishment Clause).

But even laying tradition entirely aside, it seems to me our balancing test is amply met. I assume, as the Court's opinion assumes, that the balancing is to be done on a generalized basis, and not case by case. The Court holds that the governmental benefits of patronage cannot reasonably be thought to outweigh its "coercive" effects (even the lesser "coercive" effects of patronage hiring as opposed to patronage firing) not merely in 1990 in the State of Illinois, but at any time in any of the numerous political subdivisions of this vast country. It seems to me that that categorical pronouncement reflects a naive vision of politics and an inadequate appreciation of the systemic effects of patronage in promoting political stability

[497 US 104]

and facilitating the social and political integration of previously powerless groups.

The whole point of my dissent is that the desirability of patronage is a policy question to be decided by the people's representatives; I do not mean, therefore, to endorse that system. But in order to demonstrate that a legislature could reasonably determine that its benefits outweigh its "coercive" effects, I must describe those benefits as the proponents of patronage see them: As Justice Powell discussed at length in his Elrod dissent, patronage stabilizes political parties and prevents excessive political fragmentation—both of which are results in which States have a strong governmental interest. Party strength requires the efforts of the rank and file, especially in "the dull periods between elections," to perform such tasks as organizing precincts, registering new voters, and providing constituent services. Elrod, 427 US, at 385, 49 L Ed 2d 547, 96 S Ct 2673 (dissenting opinion). Even the most enthusiastic supporter of a party's program will shrink before such drudgery, and it is folly to think that ideological conviction alone will motivate sufficient numbers to keep the party going through the off years. "For the most part, as every politician knows, the hope of some reward generates a major portion of the local political activity supporting parties." Ibid. Here is the judgment of one such politician, Jacob Arvey (best known as the promoter of Adlai Stevenson): Patronage is " 'a necessary evil if you want a strong organization, because the patronage system permits of discipline, and without discipline, there's no party organization.' " Quoted in M. Tolchin & S. Tolchin, To the Victor 36 (1971). A major study of the patronage system describes the reality as follows:

> "[A]lthough men have many motives for entering political life . . . the vast underpinning of both major parties is made up of men who seek practical rewards. Tangible advantages constitute the unifying thread of most successful political practitioners" Id., at 22.

> "With so little patronage cement, party discipline is relatively low; the rate of participation and amount of service the party can extract from [Montclair] county committeemen are minuscule compared with Cook County. The party considers itself lucky if 50 percent of its committeemen show up at meetings—even those labeled 'urgent'—while even lower percentages turn out at functions intended to produce crowds for visiting candidates." Id., at 123.

See also W. Grimshaw, The Political Economy of Machine Politics, 4 Corruption and Reform 15, 30 (1989); G. Pomper, Voters, Elections, and Parties 255 (1988); Wolfinger, Why Political Machines Have Not Withered Away and Other Revisionist Thoughts, 34 J. Politics 365, 384 (1972).

The Court simply refuses to acknowledge the link between patronage and party discipline, and between that and party success. It relies (as did the plurality in Elrod, supra, at 369, n 23, 49 L Ed 2d 547, 96 S Ct 2673) on a single study of a rural Pennsylvania county by Professor Sorauf, ante, at 75, 111 L Ed 2d, at 66-67—a work that has been described as "more persuasive about the ineffectuality of Democratic leaders in Centre County than about the generalizability of [its] findings." Wolfinger, supra, at 384, n 39. It is unpersuasive to claim, as the Court does, that party workers are obsolete because campaigns are now conducted through media and other money-intensive means. Ante, at 75, 111 L Ed 2d, at 66-67. Those techniques have supplemented but not supplanted personal contacts. See Price, Bringing Back the Parties, at 25. Certainly they have not made personal contacts unnecessary in campaigns for the lower level offices that are the foundations of party strength, nor have they replaced the myriad functions performed by party regulars not directly related to campaigning. And to the extent such techniques have replaced older methods of campaigning (partly in response to the limitations the Court has placed on patronage), the political system is not clearly better off. See Elrod, supra, at 384, 49 L Ed 2d 547, 96 S Ct 2673 (Powell, J., dissenting); Branti, 445

US, at 528, 63 L Ed 2d 574, 100 S Ct 1287 (Powell, J., dissenting). Increased reliance on money-intensive campaign techniques tends to entrench those in power much more effectively than patronage—but without the attendant benefit of strengthening the party system. A challenger can more easily obtain the support of party workers (who can expect to be rewarded even if the candidate loses—if not this year, then the next) than the financial support of political action committees (which will generally support incumbents, who are likely to prevail).

It is self-evident that eliminating patronage will significantly undermine party discipline; and that as party discipline wanes, so will the strength of the two-party system. But, says the Court, "[p]olitical parties have already survived the substantial decline in patronage employment practices in this century." Ante, at 74, 111 L Ed 2d, at 66. This is almost verbatim what was said in Elrod, see 427 US, at 369, 49 L Ed 2d 547, 96 S Ct 2673. Fourteen years later it seems much less convincing. Indeed, now that we have witnessed, in 18 of the last 22 years, an Executive Branch of the Federal Government under the control of one party while the Congress is entirely or (for two years) partially within the control of the other party; now that we have undergone the most recent federal election, in which 98% of the incumbents, of whatever party, were returned to office; and now that we have seen elected officials changing their political affiliation with unprecedented readiness, Washington Post, Apr. 10, 1990, p A1, the statement that "political parties have already survived" has a positively whistling-in-the-graveyard character to it. Parties have assuredly survived—but as what? As the forges upon which many of the essential compromises of American political life are hammered out? Or merely as convenient vehicles for the conducting of national Presidential elections?

The patronage system does not, of course, merely foster political parties in general; it fosters the two-party system in particular. When getting a job, as opposed to effectuating a particular substantive policy, is an available incentive for

party workers, those attracted by that incentive are likely to work for the party that has the best chance of displacing the "ins," rather than for some splinter group that has a more attractive political philosophy but little hope of success. Not only is a two-party system more likely to emerge, but the differences between those parties are more likely to be moderated, as each has a relatively greater interest in appealing to a majority of the electorate and a relatively lesser interest in furthering philosophies or programs that are far from the mainstream. The stabilizing effects of such a system are obvious. See Toinet & Glenn, Clientelism and Corruption in the "Open" Society, at 208. In the context of electoral laws we have approved the States' pursuit of such stability, and their avoidance of the "splintered parties and unrestrained factionalism [that] may do significant damage to the fabric of government." Storer v Brown, 415 US 724, 736, 39 L Ed 2d 714, 94 S Ct 1274 (1974) (upholding law disqualifying persons from running as independents if affiliated with a party in the past year).

Equally apparent is the relatively destabilizing nature of a system in which candidates cannot rely upon patronage-based party loyalty for their campaign support, but must attract workers and raise funds by appealing to various interest groups. See Tolchin & Tolchin, To the Victor, at 127-130. There is little doubt that our decisions in Elrod and Branti, by contributing to the decline of party strength, have also contributed to the growth of interest-group politics in the last decade. See, e. g., Fitts, The Vice of Virtue, 136 U Pa L Rev 1567, 1603-1607 (1988). Our decision today will greatly accelerate the trend. It is not only campaigns that are affected, of course, but the subsequent behavior of politicians once they are in power. The replacement of a system firmly based in party discipline with one in which each officeholder comes to his own accommodation with competing interest groups produces "a dispersion of political influence that may inhibit a

political party from enacting its programs into law." Branti, supra, at 531, 63 L Ed 2d 574, 100 S Ct 1287 (Powell, J., dissenting).[4]

Patronage, moreover, has been a powerful means of achieving the social and political integration of excluded groups. See, e. g., Elrod, 427 US, at 379, 49 L Ed 2d 547, 96 S Ct 2673 (Powell, J., dissenting); Cornwell, Bosses, Machines and Ethnic Politics, in Ethnic Group Politics 190, 195-197 (H. Bailey, Jr., & E. Katz eds 1969). By supporting and ultimately dominating a particular party "machine," racial and ethnic minorities have—on the basis of their politics rather than their race or ethnicity—acquired the patronage awards the machine had power to confer. No one disputes the historical accuracy of this observation, and there is no reason to think that patronage can no longer serve that function. The abolition of patronage, however, prevents groups that have only recently obtained political power, especially blacks, from following this path to economic and social advancement.

> "'Every ethnic group that has achieved political power in American cities has used the bureaucracy to provide jobs in return for political support. It's only when Blacks begin to play the same game that the rules get changed. Now the use of such jobs to build political bases becomes an "evil" activity, and the city insists on taking the control back "downtown."'" New York Amsterdam News, Apr. 1, 1978, p A-4, quoted in Hamilton, The Patron-Recipient Relationship and Minority Politics in New York City, 94 Pol Sci Q 211, 212 (1979).

While the patronage system has the benefits argued for above, it also has undoubted disadvantages. It facilitates financial corruption, such as salary kickbacks and partisan political activity on government-paid time. It reduces the efficiency

---

[4] Justice Stevens discounts these systemic effects when he characterizes patronage as fostering partisan, rather than public, interests. Ante, at 88, 111 L Ed 2d, at 75. But taking Justice Stevens at his word, one wonders why patronage can *ever* be an "appropriate requirement for the position involved," ante, at 64, 111 L Ed 2d, at 60.

of government, because it creates incentives to hire more and less-qualified workers and because highly qualified workers are reluctant to accept jobs that may only last until the next election. And, of course, it applies some greater or lesser inducement for individuals to join and work for the party in power.

To hear the Court tell it, this last is the greatest evil. That is not my view, and it has not historically been the view of the American people. Corruption and inefficiency, rather than abridgment of liberty, have been the major criticisms leading to enactment of the civil service laws—for the very good reason that the patronage system does not have as harsh an effect upon conscience, expression, and association as the Court suggests. As described above, it is the nature of the pragmatic, patronage-based, two-party system to build alliances and to suppress rather than foster ideological tests for participation in the division of political "spoils." What the patronage system ordinarily demands of the party worker is loyalty to, and activity on behalf of, the organization itself rather than a set of political beliefs. He is generally free to urge *within the organization* the adoption of any political position; but if that position is rejected he must vote and work for the party nonetheless. The diversity of political expression (other than expression of party loyalty) is channeled, in other words, to a different stage—to the contests for party endorsement rather than the partisan elections. It is undeniable, of course, that the patronage system entails some constraint upon the expression of views, particularly at the partisan-election stage, and considerable constraint upon the employee's right to associate with the other party. It greatly exaggerates these, however, to describe them as a general " 'coercion of belief,' " ante, at 71, 111 L Ed 2d, at 64, quoting Branti, 445 US, at 516, 63 L Ed 2d 574, 100 S Ct 1287; see also ante, at 75, 111 L Ed 2d, at 67; Elrod, supra, at 355, 49 L Ed 2d 547, 96 S Ct 2673 (plurality opinion). Indeed, it greatly exaggerates them to call them "coercion" at all, since we generally make a distinction between inducement and compulsion. The public official

offered a bribe is not "coerced" to violate the law, and the private citizen offered a patronage job is not "coerced" to work for the party. In sum, I do not deny that the patronage system influences or redirects, perhaps to a substantial degree, individual political expression and political association. But like the many generations of Americans that have preceded us, I do not consider that a significant impairment of free speech or free association.

In emphasizing the advantages and minimizing the disadvantages (or at least minimizing one of the disadvantages) of the patronage system, I do not mean to suggest that that system is best. It may not always be; it may never be. To oppose our Elrod-Branti jurisprudence, one need not believe that the patronage system is *necessarily* desirable; nor even that it is always and everywhere *arguably* desirable; but merely that it is a political arrangement that may sometimes be a reasonable choice, and should therefore be left to the judgment of the people's elected representatives. The choice in question, I emphasize, is not just between patronage and a merit-based civil service, but rather among various combinations of the two that may suit different political units and different eras: permitting patronage hiring, for example, but prohibiting patronage dismissal; permitting patronage in most municipal agencies but prohibiting it in the police department; or permitting it in the mayor's office but prohibiting it everywhere else. I find it impossible to say that, always and everywhere, all of these choices fail our "balancing" test.

C

The last point explains why Elrod and Branti should be overruled, rather than merely not extended. Even in the field of constitutional adjudication, where the pull of stare decisis is at its weakest, see Glidden Co. v Zdanok, 370 US 530, 543, 8 L Ed 2d 671, 82 S Ct 1459 (1962) (opinion of Harlan, J.), one is reluctant to depart from precedent. But when that precedent is not only wrong, not only recent, not only contradicted by a long prior

[497 US 111]

tradition, but also has proved unworkable in practice, then all reluctance ought to disappear. In my view that is the situation here. Though unwilling to leave it to the political process to draw the line between desirable and undesirable patronage, the Court has neither been prepared to rule that no such line exists (i. e., that *all* patronage is unconstitutional) nor able to design the line itself in a manner that judges, lawyers, and public employees can understand. Elrod allowed patronage dismissals of persons in "policymaking" or "confidential" positions. 427 US, at 367, 49 L Ed 2d 547, 96 S Ct 2673 (plurality opinion); id., at 375, 49 L Ed 2d 547, 96 S Ct 2673 (Stewart, J., concurring in judgment). Branti retreated from that formulation, asking instead "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 US, at 518, 63 L Ed 2d 574, 100 S Ct 1287. What that means is anybody's guess. The Courts of Appeals have devised various tests for determining when "affiliation is an appropriate requirement." See generally Martin, A Decade of Branti Decisions: A Government Officials' Guide to Patronage Dismissals, 39 Am UL Rev 11, 23-42 (1989). These interpretations of Branti are not only significantly at variance with each other; they are still so general that for most positions it is impossible to know whether party affiliation is a permissible requirement until a court renders its decision.

A few examples will illustrate the shambles Branti has produced. A city cannot fire a deputy sheriff because of his political affiliation,[5] but then again perhaps it can,[6] especially if he is called the "police captain."[7] A county cannot fire on that basis its attorney for the department of social

[497 US 112]

services,[8] nor its assistant

---

[5] Jones v Dodson, 727 F2d 1329, 1338 (CA4 1984).

[6] McBee v Jim Hogg County, 730 F2d 1009, 1014-1015 (CA5 1984) (en banc).

[7] Joyner v Lancaster, 553 F Supp 809, 818 (MDNC 1982), later proceeding, 815 F2d 20, 24 (CA4), cert denied, 484 US 830, 98 L Ed 2d 62, 108 S Ct 102 (1987).

[8] Layden v Costello, 517 F Supp 860, 862 (NDNY 1981).

attorney for family court,[9] but a city can fire its solicitor and his assistants,[10] or its assistant city attorney,[11] or its assistant state's attorney,[12] or its corporation counsel.[13] A city cannot discharge its deputy court clerk for his political affiliation,[14] but it can fire its legal assistant to the clerk on that basis.[15] Firing a juvenile court bailiff seems impermissible,[16] but it may be permissible if he is assigned permanently to a single judge.[17] A city cannot fire on partisan grounds its director of roads,[18] but it can fire the second in command of the water department.[19] A government cannot discharge for political reasons the senior vice president of its development bank,[20] but it can discharge the regional director of its rural housing administration.[21]

The examples could be multiplied, but this summary should make obvious that the "tests" devised to implement Branti have produced inconsistent and unpredictable results. That uncertainty undermines the purpose of both the nonpatronage

[497 US 113]

rule and the exception. The rule achieves its objective of preventing the "coercion" of political affiliation, see supra, at 97, 111 L Ed 2d, at 81, only if the employee is confident that he can engage in (or refrain from) political activities without risking dismissal. Since the current doctrine leaves many employees utterly in the dark about whether their jobs are protected, they are likely to play it safe. On the other side, the exception was designed to permit the government to implement its electoral mandate. Elrod, supra, at 367, 49 L Ed 2d 547, 96 S Ct 2673 (plurality opinion). But unless the government is fairly sure that dismissal is permitted, it will leave the politically uncongenial official in place, since an incorrect decision will expose it to lengthy litigation and a large damages award, perhaps even against the responsible officials personally.

This uncertainty and confusion are not the result of the fact that Elrod, and then Branti, chose the wrong "line." My point is that there is no right line—or at least no right line that can be nationally applied and that is known by judges. Once we reject as the criterion a long political tradition showing that party-based employment is entirely permissible, yet are unwilling (as any reasonable person must be) to replace it with the principle that party-based employment is entirely impermissible, we have left the realm of law and entered the domain of political science, seeking to ascertain when and where the undoubted benefits of political hiring and firing are worth its undoubted costs. The answer to that will vary from State to State, and indeed from city to city, even if one rejects out of hand (as the Branti line does) the benefits associated with party stability. Indeed, the answer will even vary from year to year. During one period, for example, it may be desirable for the manager of a municipally owned public utility to be a career specialist, insulated from the political system. During another, when the efficient operation of that utility or even its very existence has become a burning political issue, it may be desirable that he be hired and fired on a political basis. The appropriate "mix" of party-based

---

[9] Tavano v County of Niagara, 621 F Supp 345, 349-350 (WDNY 1985), aff'd mem, 800 F2d 1128 (CA2 1986).

[10] Ness v Marshall, 660 F2d 517, 521-522 (CA3 1981); Montaquila v St. Cyr, 433 A2d 206, 211 (RI 1981).

[11] Finkelstein v Barthelemy, 678 F Supp 1255, 1265 (ED La 1988).

[12] Livas v Petka, 711 F2d 798, 800-801 (CA7 1983).

[13] Bavoso v Harding, 507 F Supp 313, 316 (SDNY 1980).

[14] Barnes v Bosley, 745 F2d 501, 508 (CA8 1984), cert denied, 471 US 1017, 85 L Ed 2d 303, 105 S Ct 2022 (1985).

[15] Bauer v Bosley, 802 F2d 1058, 1063 (CA8 1986), cert denied, 481 US 1038, 95 L Ed 2d 816, 107 S Ct 1976 (1987).

[16] Elrod v Burns, 427 US 347, 351, 49 L Ed 2d 547, 96 S Ct 2673 (1976).

[17] Balogh v Charron, 855 F2d 356 (CA6 1988).

[18] Abraham v Pekarski, 537 F Supp 858, 865 (ED Pa 1982), aff'd in part and dismissed in part, 728 F2d 167 (CA3), cert denied, 467 US 1242, 82 L Ed 2d 822, 104 S Ct 3513 (1984).

[19] Tomczak v Chicago, 765 F2d 633 (CA7), cert denied, 474 US 946, 88 L Ed 2d 289, 106 S Ct 313 (1985).

[20] De Choudens v Government Development Bank of Puerto Rico, 801 F2d 5, 10 (CA1 1986) (en banc), cert denied, 481 US 1013, 95 L Ed 2d 494, 107 S Ct 1886 (1987).

[21] Rosario Nevarez v Torres Gaztambide, 820 F2d 525 (CA1 1987).

[497 US 114]

employment is a political question if there ever was one, and we should give it back to the voters of the various political units to decide, through civil service legislation crafted to suit the time and place, which mix is best.

III

Even were I not convinced that Elrod and Branti were wrongly decided, I would hold that they should not be extended beyond their facts, viz., actual discharge of employees for their political affiliation. Those cases invalidated patronage firing in order to prevent the "restraint it places on freedoms of belief and association." Elrod, 427 US, at 355, 49 L Ed 2d 547, 96 S Ct 2673 (plurality opinion); see also id., at 357, 49 L Ed 2d 547, 96 S Ct 2673 (patronage "compels or restrains" and "inhibits" belief and association). The loss of one's current livelihood is an appreciably greater constraint than such other disappointments as the failure to obtain a promotion or selection for an uncongenial transfer. Even if the "coercive" effect of the former has been held always to outweigh the benefits of party-based employment decisions, the "coercive" effect of the latter should not be. We have drawn a line between firing and other employment decisions in other contexts, see Wygant v Jackson Bd. of Education, 476 US 267, 282-283, 90 L Ed 260, 106 S Ct 1842 (1986) (plurality opinion), and should do so here as well.

I would reject the alternative that the Seventh Circuit adopted in this case, which allows a cause of action if the employee can demonstrate that he was subjected to the "substantial equivalent of dismissal." 868 F2d 943, 950, 954 (1989). The trouble with that seemingly reasonable standard is that it is so imprecise that it will multiply yet again the harmful uncertainty and litigation that Branti has already created. If Elrod and Branti are not to be reconsidered in light of their demonstrably unsatisfactory consequences, I would go no further than to allow a cause of action when the employee has lost his position, that is, his formal title and salary. That narrow ground alone is enough to resolve the constitutional

[497 US 115]

claims in the present case. Since none of the plaintiffs has alleged loss of his position because of affiliation,[22] I would affirm the Seventh Circuit's judgment insofar as it affirmed the dismissal of petitioner Moore's claim and would reverse the Seventh Circuit's judgment insofar as it reversed the dismissal of the claims of other petitioners and of cross-respondents.

The Court's opinion, of course, not only declines to confine Elrod and Branti to dismissals in the narrow sense I have proposed, but, unlike the Seventh Circuit, even extends those opinions beyond "constructive" dismissals—indeed, even beyond adverse treatment of current employees—to all hiring decisions. In the long run there may be cause to rejoice in that extension. When the courts are flooded with litigation under that most unmanageable of standards (Branti) brought by that most persistent and tenacious of suitors (the disappointed officeseeker) we may be moved to reconsider our intrusion into this entire field.

In the meantime, I dissent.

---

[22] Standefer and O'Brien do not allege that their political affiliation was the reason they were laid off, but only that it was the reason they were not recalled. Complaint ¶¶ 9, 21-22, App to Respondents' Brief in Opposition; 641 F Supp 249, 256, 257 (CD Ill 1986). Those claims are essentially identical to the claims of persons wishing to be hired; neither fall within the narrow rule of Elrod and Branti against patronage firing.

[497 US 116]

MAISLIN INDUSTRIES, U.S., INC., et al., Petitioners

v

PRIMARY STEEL, INC., et al.

497 US 116, 111 L Ed 2d 94, 110 S Ct 2759

[No. 89-624]

Argued April 16, 1990. Decided June 21, 1990.

Decision: ICC's policy of relieving shipper of obligation of paying filed rate when shipper and motor common carrier have privately negotiated lower rate held inconsistent with Interstate Commerce Act.

SUMMARY

With respect to a motor common carrier, the Interstate Commerce Act (ICA) (1) requires, under 49 USCS § 10701, the adoption of reasonable rates and practices; (2) requires, under 49 USCS § 10741, that such rates not be discriminatory; (3) requires, under 49 USCS § 10762(a)(1), that a carrier publish and file with the Interstate Commerce Commission (ICC) tariffs containing the rates for the transportation the carrier may provide; and (4) prohibits, in 49 USCS § 10761(a), a carrier from providing services at any rate other than the filed rate, also known as the tariff rate. The requirement to adhere to the filed rate has become known as the filed rate doctrine. Beginning in 1986, however, the ICC—citing changes in the motor carrier industry—adopted a negotiated rates policy according to which a shipper, under certain circumstances, was relieved of the obligation of paying the filed rate when the shipper and a motor common carrier had privately negotiated a lower rate. From 1981 to 1983, a motor common carrier which was a subsidiary of a parent company (1) privately negotiated rates with a shipper that were lower than the carrier's rates on file with the ICC, and (2) never filed the negotiated rates with the ICC. In 1983, the carrier's parent company filed for bankruptcy. After the shipper had refused to pay agents of the bankrupt estate for the alleged undercharges resulting from the prior billing of the shipper at the negotiated rather than the filed rate, the estate brought suit in the United States District Court for the Western District of Missouri against the shipper for the difference between the filed rates and the negotiated rates. The District Court, finding certain matters to be within

Briefs of Counsel, p 846, infra.

the primary jurisdiction of the ICC, stayed the proceedings and referred the case to the ICC, which, ruling in favor of the shipper under the negotiated rates policy, expressed the view that (1) § 10701 authorized the ICC to consider all the circumstances surrounding an undercharge suit to determine whether collection of the filed rate would constitute an unreasonable practice; and (2) the carrier was not entitled to recover the filed rates in the case at hand, where (a) the carrier and the shipper had negotiated rates other than the tariff rates, (b) the shipper had relied on the carrier to file the rates with the ICC, (c) the shipper had reasonably believed that the amounts quoted and billed by the carrier were the correct total charges for the transportation services performed, and (d) the shipper had made full payment. The case then returned to the District Court, which granted summary judgment for the shipper and expressed the view that (1) the ICC's policy was based on a permissible construction of the ICA, and (2) the ICC's finding that the carrier had engaged in an unreasonable practice was supported by substantial evidence (705 F Supp 1401). On appeal, the United States Court of Appeals for the Eighth Circuit, in affirming, expressed the view that the ICC's approach (1) was consistent with the ICA, and (2) did not abolish the filed rate doctrine, but (3) merely allowed the ICC to consider all the circumstances, including equitable defenses, to determine if strict adherence to the filed rate doctrine would constitute an unreasonable practice (879 F2d 400).

On certiorari, the United States Supreme Court reversed the judgment of the Court of Appeals and remanded the case for further proceedings. In an opinion by Brennan, J., joined by White, Marshall, Blackmun, O'Connor, Scalia, and Kennedy, JJ., it was held that, under the filed rate doctrine which follows from §§ 10701, 10741, 10761(a), and 10762(a)(1), the ICC's negotiated rates policy was invalid as inconsistent with the ICA, because the ICC's justification for a departure from the filed rate schedule, as set forth in the ICC's negotiated rates policy, rested upon an interpretation of the ICA that was contrary to the language and structure of the statute as a whole and the requirements that made up the filed rate doctrine in particular, given that (1) for a century, the Supreme Court has held that the ICA, as it incorporates the filed rate doctrine, forbids the discriminatory secret negotiation and collection of rates lower than the filed rate; (2) the ICC, by refusing to order the collection of filed rates solely because the parties have agreed to a lower rate, permitted the very price discrimination that the ICA by its terms seeks to prevent; (3) Congress had not diverged from the Supreme Court's interpretation, and the Supreme Court would decline to revisit it; (4) the ICC's labeling, under the negotiated rates policy, of the carrier's conduct as an unreasonable practice in violation of § 10701 could not disguise the fact that the ICC was justifying deviation from the filed rate solely on the grounds that the carrier and shipper had privately negotiated a lower rate; (5) the ICC's policy could not be justified as a remedy for a carrier's failure to comply with the 49 USCS § 10762 directive to file a negotiated rate with the ICC; and (6) although the Motor Carrier Act of 1980 (MCA) (amending the ICA) substantially deregulated the motor carrier industry in many ways, nothing in the MCA repealed 49 USCS

§§ 10761 and 10762 or cast doubt on the Supreme Court's prior interpretation of §§ 10761 and 10762.

Scalia, J., concurring, expressed the view that (1) the court correctly relied upon its prior filed rate decisions, which were based on the text of the ICA; (2) while the 1980 amendments to the ICA reflected an intent to deregulate, the intent was to deregulate within the framework of the existing statutory scheme; and (3) perhaps deregulation could not be efficiently accomplished within that framework, but that was Congress' choice, and not the ICC's or the Supreme Court's.

Stevens, J., joined by Rehnquist, Ch. J., dissenting, expressed the view that the court's opinion, in placing an interpretation on the filed rate doctrine even more strict than the original version of the doctrine in the 19th century, (1) misread the text of the ICA; (2) ignored the history of motor carrier regulation in the United States; (3) gave no deference to the sensible construction of the ICA by six Courts of Appeals and by the administrative agency responsible for the ICA's enforcement; and (4) failed to appreciate the significance of the 1980 amendments' "sea change" in the statutory scheme that had converted a regime of regulated monopoly pricing into a highly competitive market.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Motor Vehicles and Carriers § 14; Statutes §§ 109, 152, 160, 164 — adherence to filed rate — private negotiation of lower rates — Interstate Commerce Commission policy

1a-1g. Under the filed rate doctrine—derived from provisions of the Interstate Commerce Act (ICA) in 49 USCS §§ 10701, 10741, 10761(a), and 10762(a)(1), and requiring that motor common carriers must file their rates with the Interstate Commerce Commission (ICC) and that both carriers and shippers must adhere to those rates—the ICC's negotiated rates policy, according to which a shipper, under certain circumstances, is relieved of the obligation of paying the filed rate when the shipper and a motor common carrier have privately negotiated a lower rate, is invalid as inconsistent with the ICA; the ICC's departure from the filed rate schedule, as set forth in the ICC's negotiated rates policy, rests upon an interpretation of the ICA that is contrary to the language and structure of the statute as a whole and the requirements that make up the filed rate doctrine in particular, given that (1) for a cen-

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

13 Am Jur 2d, Carriers §§ 26, 28, 30, 40, 107, 108, 110, 121, 122

32 Federal Procedure, L Ed, Transportation §§ 76:746, 76:798, 76:800

49 USCS §§ 10701, 10741, 10761(a), 10762(a)(1)

US L Ed Digest, Motor Vehicles and Carriers § 14; Statutes § 160

Index to Annotations, Administrative Law; Carriers; Interstate Commerce Commission; Negotiations; Reasonableness

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Supreme Court's view as to weight and effect to be given, on subsequent judicial construction, to prior administrative construction of statute. 39 L Ed 2d 942.

The doctrine of primary administrative jurisdiction as defined and applied by the Supreme Court. 38 L Ed 2d 796.

Carrier's understatement of charges where discrimination is forbidden. 88 ALR2d 1375.

tury, the United States Supreme Court has held that the ICA, as it incorporates the filed rate doctrine, forbids the discriminatory secret negotiation and collection of rates lower than the filed rate, (2) the ICC, by refusing to order the collection of filed rates solely because the parties have agreed to a lower rate, has permitted the very price discrimination that the ICA by its terms seeks to prevent, and (3) Congress has not diverged from the Supreme Court's interpretation of the ICA, and the Supreme Court will decline to revisit that interpretation; the ICC's labeling, under the negotiated rates policy, of a carrier's attempt to collect the filed rate after the parties have negotiated a lower rate as an unreasonable practice in violation of § 10701 cannot disguise the fact that the ICC is justifying deviation from the filed rate solely on the grounds that the carrier and shipper privately negotiated a lower rate. (Stevens, J., and Rehnquist, Ch. J., dissented from this holding.)

Motor Vehicles and Carriers § 14 — rates — reasonableness

2. Under the Interstate Commerce Act (49 USCS §§ 10101 et seq.), which provides for Interstate Commerce Commission (ICC) regulation of interstate transportation by motor common carriers in order to insure that rates are both reasonable and not discriminatory, the ICC has primary responsibility for determining whether a rate or practice is reasonable.

Motor Vehicles and Carriers § 14; Statutes §§ 102, 103 — adherence to filed rate

3a-3d. The filed rate doctrine—under which a motor common carrier must adhere to the tariff rates filed with the Interstate Commerce Commission (ICC)—follows from the provisions of the Interstate Commerce Act (ICA) which (1) require, under 49 USCS § 10701, the adoption of reasonable rates and practices, (2) require, under 49 USCS § 10741, that such rates not be discriminatory, (3) require, under 49 USCS § 10762(a)(1), that such a carrier publish and file with the ICC tariffs containing the rates for the transportation the carrier may provide, and (4) prohibit, in 49 USCS § 10761(a), such a carrier from providing services at any rate other than the filed rate, also known as the tariff rate; the filed rate governs the legal relationship between shipper and carrier, because the ICA, in order to render rates definite and certain, and in order to prevent discrimination and other abuses, makes such filed rates the legal rates which must be charged to all shippers alike; thus, under the ICA, (1) deviation from the filed rate is not permitted under any pretext, (2) shippers and travelers are charged with notice of the filed rate, (3) they, as well as the carrier, must abide by that rate, and (4) ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed; the filed rate is not enforceable, however, if the ICC finds the rate to be unreasonable; while the filed rate doctrine is strict and may work hardship in some cases, the doctrine embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination; if a carrier's rates are subject to secret alteration by special agreement, the ICA will fail of its purpose, given that the ICA has provided for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate while in force to be the only legal rate; any other construction of the ICA opens the door to the possibility of the very abuses of unequal rates which it was the design of the ICA to prohibit and punish. (Stevens, J., and Rehnquist, Ch. J., dissented in part from this holding.)

Appeal §§ 1304, 1662, 1750; Motor Vehicles and Carriers § 10 — judicial review of ICC — presumptions — effect of decision on other grounds — consideration on remand

4a, 4b. On certiorari to review a Federal Court of Appeals judgment affirming a Federal District Court decision in favor of the validity, under the Interstate Commerce Act (ICA) (49 USCS §§ 10101 et seq.), of the negotiated rates policy of the Interstate Commerce Commission (ICC)—according to which policy a shipper, under certain circumstances, is relieved of the obligation of paying a motor common carrier's tariff rate filed with the ICC when the shipper and the carrier have privately negotiated a lower rate—the United States Supreme Court must assume for the purposes of decision that the particular filed rates of the motor common carrier in question were reasonable, where the ICC, to whom the case had been referred by the District Court as within the ICC's primary jurisdiction, (1) did not find that the rates were unreasonable, even though the shipper had requested such a determination, but (2) concluded, under the negotiated rates policy, that the carrier had engaged in an unreasonable practice, in violation of 49 USCS § 10701, that should preclude the carrier from collecting the filed rate; where the Supreme Court, under such circumstances, reverses the Court of Appeals judgment and remands the case for further proceedings, upon determining that the ICC's justification for a departure from the filed rate schedule, as set forth in the ICC's negotiated rates policy, rests upon an interpretation of the ICA that is contrary to the language and structure of the statute as a whole and the requirements that make up the filed rate doctrine in particular, (1) the Supreme Court need not determine whether a carrier's unreasonable practice justifies departure from the filed tariff schedule, and (2) the issue of the reasonableness of the particular tariff rates in question is open for exploration on remand.

Administrative Law § 276; Courts § 775 — adherence to decision — meaning of statute

5. Once the United States Supreme Court has determined a statute's clear meaning, the Supreme Court (1) adheres to that determination under the doctrine of stare decisis, and (2) judges an agency's later interpretation of the statute against the Supreme Court's prior determination of the statute's meaning.

Motor Vehicles and Carriers § 14; Statutes §§ 102, 103, 160 — adherence to filed rate — private negotiation of lower rates — remedy

6a, 6b. Although the Interstate Commerce Commission (ICC) may have discretion to craft appropriate remedies for violations of the Interstate Commerce Act (ICA) (49 USCS §§ 10101 et seq.), the ICC's negotiated rates policy—according to which a shipper, under certain circumstances, is relieved of the obligation of paying a motor common carrier's rate filed with the ICC when the shipper and the carrier have privately negotiated a lower rate—cannot be justified as a remedy for a carrier's failure to comply with the 49 USCS § 10762 directive to file a negotiated rate with the ICC, because the "remedy" articulated in the ICC's policy effectively renders nugatory the requirements of 49 USCS §§ 10761 and 10762 and conflicts directly with the core purposes of the ICA, for (1) 49 USCS § 10761 requires such a carrier to collect the filed rate; (2) the United States Supreme Court has never accepted the argument that such "equities" are relevant to the application of § 10761, given that strict adherence to the filed rate has never been justified on the ground that the carrier is equitably entitled to that rate, but rather on the ground that such adherence, despite its harsh consequences in some cases, is necessary to the ICA's enforcement; (3) the alleged purpose of preventing a carrier from fraudulently representing that the negotiated rate has been properly filed and then insisting upon collection of the higher filed rate does not justify the negotiated rates policy, given that (a) the ICC has determined that, with respect to the particular carrier-shipper billing in question, there had been no intentional or fraudulent conduct, (b) any carrier which engaged in such conduct could be punished under 49 USCS § 11903(b), and (c) such a risk of intentional misconduct on the part of a carrier has always existed and has never been considered sufficient to justify a less stringent interpretation of § 10761; (4) compliance with §§ 10761 and 10762 is central to the administration of the ICA; and (5) the ICC's policy, by sanctioning adherence to unfiled rates, undermines the basic structure of the ICA, since (a) the ICC cannot review in advance the reasonableness of unfiled rates, and (b) other shippers cannot know if they should challenge a carrier's rates as discriminatory when many of the carrier's rates are privately negotiated and never disclosed to the ICC. (Stevens, J., and Rehnquist, Ch. J., dissented in part from this holding.)

Motor Vehicles and Carriers § 14; Statutes §§ 154, 160 — adherence to filed rate — private negotiation of lower rates — changes in statute

7a-7c. Although the Motor Carrier Act of 1980 (MCA), which amended the Interstate Commerce Act (ICA) (49 USCS §§ 10101 et seq.), substantially deregulated the motor carrier industry in many ways, the negotiated rates policy of the Interstate Commerce Commission (ICC)—according to which policy, a shipper, under certain circumstances, is relieved of the obligation of paying a motor common carrier's tariff rate filed with the ICC when the shipper and the carrier have privately negotiated a lower rate—cannot be justified as a response to the enactment of the MCA, because nothing in the MCA repeals 49 USCS §§ 10761 and 10762, which require that only filed rates be collected, or casts doubt on the United States Supreme Court's prior interpretation of §§ 10761 and 10762, given that (1) the MCA's generalized congressional exhortations to increase competition cannot provide the ICC with the authority to alter the well-established, statutory filed rate requirements; (2) Congress' 49 USCS § 10761(b) authorization, prior to the passage of the MCA, for the ICC to exempt motor contract carriers from the requirement that they adhere to the published tariff demonstrates that Congress is aware of the filed rate requirement and has deliberately chosen not to disturb the requirement with respect to motor common carriers; (3) the exception in the Household Goods Transportation Act of 1980—which states, in 49 USCS § 10735(a)(1), that motor common carriers providing transportation of household goods may, subject to provisions including the general tariff requirements of § 10762, establish a rate which is based on the carrier's written, binding estimate of charges for providing such transportation—also demonstrates that Congress is aware of, but has elected not to eliminate, the general requirements of §§ 10761 and 10762, as applied to other motor common carriers; and (4) if strict adherence to §§ 10761 and 10762, as embodied in the filed rate doctrine, has become an anachronism in the wake of the MCA, it is the responsibility of Congress to modify or eliminate §§ 10761 and 10762. (Stevens, J., and Rehnquist, Ch. J., dissented from this holding.)

Interstate Commerce Commission § 3 — powers

8. Although the Interstate Commerce Commission (ICC) has both the authority and expertise generally to adopt new policies when faced with new developments in the industry, the ICC does not have the power to adopt a policy that directly conflicts with the ICC's governing statutes.

Evidence § 147; Statutes § 154 — prior interpretation — overturning — presumption of knowledge

9. With respect to a longstanding judicial interpretation of the Interstate Commerce Act (ICA) (49 USCS §§ 10101 et seq.), Congress, in enacting the Motor Carrier Act of 1980 (amending the ICA), must be presumed to have been fully cognizant of the prior interpretation of the statutory scheme; where a party has pointed to no specific statutory provision or legislative history indicating a specific congressional intention to overturn the longstanding construction, harmony with the general legislative purpose is inadequate for that formidable task. (Stevens, J., and Rehnquist, Ch. J., dissented in part from this holding.)

SYLLABUS BY REPORTER OF DECISIONS

The Interstate Commerce Act (Act) requires motor common carriers to publish their rates in tariffs filed with the Interstate Commerce Commission (ICC), 49 USC § 10762 [49 USCS § 10762], and prohibits both carriers and shippers from deviating from those rates, § 10761. The Act also specifies that a carrier's rates must be nondiscriminatory, § 10741, and that its rates and practices must be reasonable, § 10701, and charges the ICC, upon determining that a rate or practice violates the statute, with prescribing the rate or practice to be followed, § 10704(b)(1). Purportedly pursuant to this authority, the ICC, in its recent Negotiated Rates decisions, has adopted a policy that relieves a shipper of the obligation to pay the filed rate when it has privately negotiated a lower rate with the carrier. From 1981 to 1983, Quinn Freight Lines, a motor common carrier and a subsidiary of petitioner Maislin Industries, U.S., Inc., privately negotiated interstate shipment rates with respondent Primary Steel, Inc., that were lower than Quinn's filed rates. Quinn never filed the negotiated rates with the ICC. In 1983, Maislin filed for bankruptcy, and the bankrupt estate issued balance due bills to Primary for the difference between the filed rates and the negotiated rates. When Primary refused to pay the undercharges, the estate brought suit in the District Court, which referred the matter to the ICC. Rejecting the argument that it lacked the statutory power to release a shipper from liability for such undercharges, the ICC relied on its Negotiated Rates policy to hold that § 10701 authorized it to consider all the circumstances surrounding an undercharge suit to determine whether collection of the filed rate would constitute an unreasonable practice. The ICC concluded that Maislin was not entitled to recover, since Quinn and Primary had negotiated other rates, and since Primary had relied on Quinn to file those rates, had reasonably believed that the amounts quoted and billed were the correct total charges, and had made full payment. The case returned to the District Court, which granted summary judgment for Primary on the basis of the ICC's decision. The Court of Appeals affirmed, agreeing with the District Court that the approach taken by the ICC was consistent with the Act.

Held: The ICC's Negotiated Rates policy is inconsistent with the Act and is therefore invalid.

(a) Since the duty to file rates under § 10762 and the obligation to charge only those rates under § 10761 have always been considered essential to preventing price discrimination violative of § 10741, Arizona Grocery Co. v Atchison, T. & S. F. R. Co. 284 US 370, 384, 76 L Ed 348, 52 S Ct 183, this Court has long held that the filed rate alone governs the legal rights of a shipper against a carrier, see, e.g., Keogh v Chicago & Northwestern R. Co. 260 US 156, 163, 67 L Ed 183, 43 S Ct 47, and that the statute forbids equitable defenses to collection of the filed tariff, see, e.g., Texas & Pacific R. Co. v Mugg, 202 US 242, 245, 50 L Ed 1011, 26 S Ct 628, including the shipper's ignorance or the carrier's misquotation of rates, see, e.g., Louisville & Nashville R. Co. v Maxwell, 237 US 94, 97, 59 L Ed 853, 35 S Ct 494. Despite its sometimes harsh effects, this rigid "filed rate doctrine" has been strictly applied and consistently adhered to by the Court. See, e.g., Thurston Motor Lines, Inc. v Jordan K. Rand, Ltd. 460 US 533, 535, 75 L Ed 2d 260, 103 S Ct 1343.

(b) Although, under the filed rate doctrine, the tariff rate is not enforceable if the ICC finds it to be unreasonable, see, e.g., Maxwell, supra, at 97, 59 L Ed 853, 35 S Ct 494, that exception is not applicable here. The ICC's determination that a carrier engages in an "unreasonable practice" when it attempts to collect the filed rate after the parties have negotiated a lower rate is not entitled to deference, since it conflicts with this Court's interpretation, from which Congress has not diverged, that the secret negotiation and collection of rates lower than the filed rate is discriminatory under § 10741. See, e.g., Armour Packing Co. v United States, 209 US 56, 81, 52 L Ed 681, 28 S Ct 428. Stripped of its semantic cover, the Negotiated Rates policy and, more specifically, the ICC's interpretation of "unreasonable practices," thus stand revealed as flatly inconsistent with the

Act's scheme as a whole and §§ 10761 and 10762 in particular. Nor can the ICC's policy be justified on the ground that it prevents the carrier from receiving a windfall, i. e., the higher filed rate, from its failure to comply with § 10762's directive to file the negotiated rate, since such "equities" are irrelevant to the application of § 10761, which *requires* the carrier to collect the filed rate. Compliance with §§ 10761 and 10762 is utterly central to the administration of the Act, and, by sanctioning adherence to *unfiled* rates, the Negotiated Rates policy effectively renders those sections nugatory and conflicts directly with the Act's core purposes.

(c) The passage of the Motor Carrier Act of 1980 (MCA)—which substantially deregulated the motor carrier industry for the avowed purpose of promoting competitive and efficient transportation services—does not justify the ICC's Negotiated Rates policy. Although the ICC has both the authority and the expertise generally to adopt new policies when faced with new developments in the industry, its power does not extend to a policy that directly conflicts with its governing statute. Nothing in the MCA repeals §§ 10761 and 10762, and generalized congressional exhortations to "increase competition" cannot provide the ICC authority to alter the requirements of those sections as interpreted by this Court. Cf. Square D Co. v Niagara Frontier Tariff Bureau, Inc. 476 US 409, 420, 90 L Ed 2d 413, 106 S Ct 1922. The fact that, even before the MCA's passage, Congress had allowed the ICC to exempt motor *contract* carriers from the requirement that they adhere to the published tariff, see § 10761(b), demonstrates that Congress is aware of the requirement and has deliberately chosen not to disturb it with respect to motor *common* carriers.

879 F2d 400, reversed and remanded.

Brennan, J., delivered the opinion of the Court, in which White, Marshall, Blackmun, O'Connor, Scalia, and Kennedy, JJ., joined. Scalia, J., filed a concurring opinion. Stevens, J., filed a dissenting opinion, in which Rehnquist, C. J., joined.

APPEARANCES OF COUNSEL

Thomas M. Auchincloss argued the cause for petitioners.

Thomas W. Merrill argued the cause for respondents.

Briefs of Counsel, p 846, infra.

OPINION OF THE COURT

[497 US 119]

Justice **Brennan** delivered the opinion of the Court.

[1a] Under the Interstate Commerce Act (Act), 49 USC § 10101 et seq. (1982 ed) [49 USCS §§ 10101 et seq.], motor common carriers must file their rates with the Interstate Commerce Commission (ICC or Commission), and both carriers and shippers must adhere to these rates. This case requires us to determine the validity of a policy recently adopted by the ICC that relieves a shipper of the obligation of paying the filed rate when the shipper and carrier have privately negotiated a lower rate. We hold that this policy is inconsistent with the Act.

I

A

[2] The ICC regulates interstate

transportation by motor common carriers to ensure that rates are both reasonable and nondiscriminatory. See 49 USC §§ 10101(a), 10701(a), 10741(b) (1982 ed) [49 USCS §§ 10101(a), 10701(a), 10741(b)]. The Act provides that a "common carrier . . . may not subject a person, place, port, or type of traffic to unreasonable discrimination." § 10741. In addition, the Act states that "[a] rate . . . , classification, rule, or practice related to transportation or service . . . must be reasonable." § 10701(a).[1] The ICC has primary responsibility for determining whether a rate or practice is reasonable. See Texas & Pacific R. Co. v Abilene Cotton Oil Co. 204 US 426, 440-442, 51 L Ed 553, 27 S Ct 350 (1907). The Commission may investigate the reasonableness of a rate "on its own initiative or on complaint." § 11701(a). When the Commission determines that a rate or practice violates the statute, it "shall prescribe the rate . . . or practice to be followed." § 10704(b)(1). Moreover, motor common carriers are liable "for damages resulting from the imposition of rates for transportation or service

the Commission finds to be in violation" of the Act. 49 USC § 11705(b)(3) (1982 ed, Supp V) [49 USCS § 11705(b)(3)].

The Act requires a motor common carrier to "publish and file with the Commission tariffs containing the rates for transportation it may provide." 49 USC § 10762(a)(1) (1982 ed) [49 USCS § 10762(a)(1)]. The Act also specifically prohibits a carrier from providing services at any rate other than the filed (also known as the tariff) rate:

> "Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission . . . shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device." § 10761(a).

Deviation from the filed rate may result in the imposition of civil or criminal sanctions on the carrier or shipper. See §§ 11902-11904.[2]

[3a] As the Court has frequently stated, the statute does not permit either a shipper's ignorance or the carrier's misquotation of the applicable rate to serve as a defense to the collection of the filed rate. See Southern Pacific Transp. Co. v

Commercial Metals Co. 456 US 336, 352, 72 L Ed 2d 114, 102 S Ct 1815 (1982); Louisville & Nashville R. Co. v Maxwell, 237 US 94, 97, 59 L Ed 853, 35 S Ct 494 (1915). In 1986, however, the ICC concluded that changes in the motor carrier industry "clearly warrant a tempering of the former harsh rule of adhering to the tariff rate in virtually all cases." NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 3 ICC 2d 99, 106 (1986) (Negotiated Rates I). Under the new policy, when cases are referred to the Commission, it "decid[es] if the collection of undercharges would be an unreasonable practice." Id., at 100.

---

[1] The Act states that when reviewing the reasonableness of a carrier's rates, the Commission "shall authorize revenue levels that are adequate under honest, economical, and efficient management to cover total operating expenses . . . plus a reasonable profit." 49 USC § 10701(e) (1982 ed) [49 USCS § 10701(e)].

[2] Section 11902 provides that a shipper who knowingly receives a rebate or offset against the filed rate is liable to the Government for a civil penalty in an amount equal to three times the rebate. See § 11902. Section 11903(a) states that any person who "knowingly offers, grants, gives, solicits, accepts, or receives" service at less than the filed rate "shall be fined at least $1,000 but not more than $20,000, imprisoned for not more than 2 years, or both." A carrier who willfully fails to file and publish its tariffs is subject to the same penalty. See § 11903(b); see also § 11904 (corporate liability).

In Negotiated Rates I, the Commission adverted to a growing trend in the motor carrier industry whereby carriers and shippers negotiate rates lower than those on file with the ICC, and the shippers are billed for and remit payment at the negotiated rate. In many instances, however, the negotiated rate is never filed with the ICC. In some of those cases, the carrier subsequently files for bankruptcy and the trustee bills the shipper for the difference between the tariff rate and the negotiated rate, arguing that § 10761 compels the collection of the filed rather than negotiated rate. Id., at 99. The Commission concluded that, under such circumstances, "it could be fundamentally unfair not to consider a shipper's equitable defenses to a claim for undercharges." Id., at 103. The Commission reasoned that the passage of the Motor Carrier Act of 1980, which significantly deregulated the motor carrier industry, justified the change in policy, for the new competitive atmosphere made strict application of § 10761 unnecessary to deter discrimination. 3 ICC2d, at 106. Moreover, the Commission asserted that it had authority under § 10701 to determine whether the collection of the undercharge in a particular case would constitute an unreasonable practice. Id., at 103.[3]

[497 US 122]

The ICC clarified its new policy in NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 5 ICC2d 623 (1989) (Negotiated Rates II). The Commission explained that its policy did not recognize "equitable defenses" but rather applied the "affirmative statutory requiremen[t] and obligatio[n]" of § 10701 that a carrier's practices be reasonable. Id., at 631, n 18.[4] "[T]he Commission is finding to be an unreasonable practice . . . a course of conduct consisting of: (1) negotiating a rate; (2) agreeing to a rate that the shipper reasonably relies upon as being lawfully filed; (3) failing, either willfully or otherwise, to publish the rate; (4) billing and accepting payment at the negotiated rate for (sometimes) numerous shipments; and (5) then demanding additional payment at higher rates." Id., at 628, n 11.

---

[3] The Commission stated that its new policy did not "abrogate Section 10761. Rather, we emphasize that carriers must continue to charge the tariff rate, as provided in the statute. The issue here is simply whether we have the authority to consider all the circumstances surrounding an undercharge suit." NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 3 ICC 2d 99, 103 (1986) (citations omitted). The Commission rejected a proposal by the National Industrial Transportation League (NITL) that would have declared the negotiated rate to be the maximum reasonable rate. The Commission concluded that the proposal conflicted with § 10761 because it created a "per se determination that, as a matter of law, the negotiated rate would apply." Id., at 102.

[4] The Commission stated: "[O]ur *Negotiated Rates* policy does not represent a relaxed interpretation of § 10761, but rather a separate determination under § 10701. But even if it were viewed as a reinterpretation of a previously strict construction of § 10761, it would be . . . well within this agency's authority (and indeed duty) to reinterpret the Interstate Commerce Act, based on upon experience gained and changing circumstances." NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 5 ICC2d 623, 631 (1989) (citing American Truck-

B

This case involves the application of the Commission's new Negotiated Rates policy. It arises from an action by petitioner Maislin Industries, U.S. Inc. (Maislin), to recover freight undercharges for 1,081 interstate shipments performed

[497 US 123]

for a shipper, respondent Primary Steel (Primary), by petitioner's subsidiary, Quinn Freight Lines (Quinn). From 1981 to 1983, Quinn, a motor common carrier certificated by the ICC, privately negotiated rates with Primary that were lower than Quinn's rates then on file with the ICC. Quinn never filed the negotiated rates with the ICC.

In 1983, Maislin filed for bankruptcy, and a postpetition audit of its accounts revealed undercharges of $187,923.36 resulting from billing Primary at the negotiated, rather than filed, rates. The agents of the bankrupt estate, pursuant to the authorization of the Bankruptcy Court, issued balance due bills to Primary for these undercharges. When Primary refused to pay the amounts demanded, the estate brought suit in the United States District Court for the Western District of Missouri under 49 USC § 11706(a) (1982 ed) [49 USCS § 11706(a)][5] for the difference between the filed rates and the negotiated rates.

In its answer, Primary alleged that since the parties had negotiated lower rates, rebilling at the tariff rates would constitute an unreasonable practice in violation of § 10701; that the tariff rates themselves were not "reasonable" within the meaning of § 10701; and that the asserted tariff rates were otherwise inapplicable to the shipments at issue. The District Court, finding these matters to be within the primary jurisdiction of the ICC, stayed the proceeding at Primary's request and referred the case to the Commission. App 6-8.

The ICC ruled in Primary's favor, rejecting Maislin's argument that the Commission lacked the statutory power to release a shipper from liability for such undercharges. Relying on Negotiated Rates I, the ICC reiterated that § 10701 authorized it to "consider all the circumstances surrounding an

[497 US 124]

undercharge suit" to determine whether collection of the filed rate would constitute an unreasonable practice. App to Pet for Cert 35a. In the Commission's view, its role was "to undertake an analysis of whether a negotiated but unpublished rate existed, the circumstances surrounding assessment of the tariff rate, and any other pertinent facts." Id., at 36a. With respect to the instant controversy, the ICC concluded that Quinn and Primary had negotiated rates other than the

---

ing Assns., Inc. v Atchison T. & S. F. R. Co. 387 US 397, 416, 18 L Ed 2d 847, 87 S Ct 1608 (1967)).

[5] Section 11706(a) provides:

"A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission . . . must begin a civil action to recover charges for transportation or service provided by the carrier within 3 years after the claim accrues."

tariff rates[6] and that Primary had relied on Quinn to file the rates with the ICC.[7] "Primary reasonably believed that the amounts quoted and billed by Quinn were the correct total charges for the transportation services it performed, that the amounts were reached as the result of negotiations between Primary and Quinn, and that, since full payment

was made by [Primary]," Maislin was not entitled to recover the filed rates. Id., at 43a.

The case returned to the District Court where both parties moved for summary judgment. The court granted summary judgment for Primary, rejecting Maislin's argument that the ICC's new policy was, in effect, an impermissible recognition of equitable defenses to the application of the filed rate. The District Court concluded that the ICC's policy of determining case by case whether the collection of undercharges would be an unreasonable practice under § 10701 was based on a permissible construction of the Act. 705 F Supp 1401, 1405-1406 (1988). The court also determined that the ICC's finding that Maislin had engaged in an unreasonable practice was supported by substantial evidence. Id., at 1406-1407.

The Court of Appeals for the Eighth Circuit affirmed, agreeing that the approach taken by the ICC was consistent with the Act. The court reasoned that "[s]ection 10761(a), which mandates the collection of tariff rates, is only part of an overall regulatory scheme administered by the ICC, and there is no provision in the [Act] elevating this section over section 10701, which requires that tariff rates be reasonable." 879 F2d 400, 405 (1989). The court concluded: "[T]he proper authority to harmonize these competing provisions is the ICC. . . . The approach taken by the ICC does not abolish the filed rate doctrine, but merely allows the ICC to consider all of the circumstances, including equitable defenses, to determine if strict adherence to the filed rate doctrine would constitute an unreasonable practice." Ibid. (citation omitted). Because the Courts of Appeals have disagreed on the important issue of whether the ICC's Negotiated Rates policy is consistent with the Act,[8] we granted certiorari. 493 US 1041, 107 L Ed 2d 830, 110 S Ct 834 (1990).

---

[6] See App to Pet for Cert 36a-38a. The Commission relied primarily on two "rate sheets" to find that negotiated rates existed. According to the Commission, a three-page rate sheet prepared by Primary in 1981 demonstrated that Quinn, through its agent James McGowan, had negotiated a five percent across-the-board increase in rates above those in Quinn's tariff on file with the ICC. Sometime in 1982, when Primary notified Quinn that it would need relief from the rates in order to continue using Quinn, the parties orally negotiated a decrease in the rates. Primary prepared a new rate sheet which was sent to all the relevant individuals. Subsequently, whenever rates were needed for destinations other than those shown on the rate sheet, McGowan would set a new rate based on the mileage involved. The ICC concluded that "there is evidence of offers, acceptances, and approvals by the involved parties" before each of the shipments in question. Id., at 36a; see also id., at 38a.

[7] See id., at 43a. This finding was based on the fact that McGowan represented that his superiors had approved the rates on the written rate sheets. See id., at 40a. The Commission noted that Primary's representative was never given an actual tariff documenting that the agreed-upon rates had been filed with ICC and that Primary's representative had no training with respect to tariffs, but the Commission concluded that the representative "understood that Quinn would do whatever was necessary to implement the agreed upon rates." Id., at 32a. The Commission specifically found that "[w]hile Quinn may not have taken appropriate steps to legalize the quoted rates, it has not been demonstrated that this occurred as a result of any intent to engage in unlawful conduct." Id., at 42a.

II

[3b] The Act requires a motor common carrier to publish its rates in a tariff filed with the Commission. 49 USC § 10762 (1982 ed) [49 USCS § 10762]. This Court has long understood that the filed rate governs the legal relationship between shipper and carrier. In Keogh v Chicago & Northwestern R. Co. 260 US 156, 163, 67 L Ed 183, 43 S Ct 47 (1922), the Court explained:

> "The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier. . . . This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated." (Citations omitted.)

See Square D Co. v Niagara Frontier Tariff Bureau, Inc. 476 US 409, 415-417, 90 L Ed 2d 413, 106 S Ct 1922 (1986); Abilene Cotton Oil, 204 US, at 439, 51 L Ed 553, 27 S Ct 350; Texas & Pacific R. Co. v Mugg, 202 US 242, 245, 50 L Ed 1011, 26 S Ct 628 (1906); Gulf, C. & S. F. R. Co v Hefley, 158 US 98, 101, 39 L Ed 910, 15 S Ct 802 (1895). The duty to file rates with the Commission, see § 10762, and the obligation to charge only those rates, see § 10761, have always been considered essential to preventing price discrimination and stabilizing rates. "In order to render rates definite and certain, and to prevent discrimination and other abuses, the statute require[s] the filing and publishing of tariffs specifying the rates adopted by the carrier, and ma[kes] these the *legal* rates, that is, those which must be charged to all shippers alike." Arizona Grocery Co. v Atchison, T. & S. F. R. Co. 284 US 370, 384, 76 L Ed 348, 52 S Ct 183 (1932).

Given the close interplay between the duties imposed by §§ 10761-10762 and the statutory prohibition on discrimination,

see § 10741, this Court has read the statute to create strict filed rate requirements and to forbid equitable defenses to collection of the filed tariff. See Mugg, supra, at 245, 50 L Ed 1011, 26 S Ct 628; Hefley, supra, at 101, 39 L Ed 910, 15 S Ct 802. The classic statement of the "filed rate doctrine," as it has come to be known, is explained in Louisville & Nashville R. Co. v Maxwell, 237 US 94, 59 L Ed 853, 35 S Ct 494 (1915). In that case, the Court held that a passenger who purchased a train ticket at a rate misquoted by the ticket agent did not have a defense against the subsequent collection of the higher tariff rate by the railroad.

> "Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge.

---

[8] Compare In re Caravan Refrigerated Cargo, Inc. (Supreme Beef Processors), 864 F2d 388 (CA5 1989), with Delta Traffic Service, Inc. v Transtop, Inc., 902 F2d 101 (CA1 1990); Orscheln Bros. Truck Lines, Inc. v Zenith Electric Corp. 899 F2d 642 (CA7 1990); West Coast Truck Lines, Inc. v Weyerhaeuser, Co. 893 F2d 1016 (CA9 1990); Delta Traffic Service & Oneida Motor Freight, Inc. v Appco Paper & Plastics Corp. 893 F2d 472 (CA2 1990).

> Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination." Id., at 97, 59 L Ed 853, 35 S Ct 494.[9]

This rigid approach was deemed necessary to prevent carriers from intentionally "misquoting" rates to shippers as a means of offering them rebates or discounts. See S Rep

No. 46, 49th Cong, 1st Sess, 181, 188-190, 198-200 (1886). As the Commission itself found: "[P]ast experience shows that billing clerks and other agents of carriers might easily become experts in the making of errors and mistakes in the quotation of rates to favored shippers, while other shippers, less fortunate in their relations with carriers and whose traffic is less important, would be compelled to pay the higher published rates." Poor v Chicago, B. & Q. R. Co. 12 ICC 418, 421-422 (1907); see also Western Transp. Co. v Wilson & Co. 682 F2d 1227, 1230-1231 (CA7 1982). Despite the harsh effects of the filed rate doctrine, we have consistently adhered to it. See, e.g., Thurston Motor Lines, Inc. v Jordan K. Rand, Ltd. 460 US 533, 535, 75 L Ed 2d 260, 103 S Ct 1343 (1983); Southern Pacific Transp. Co. 456 US, at 343-344, 72 L Ed 2d 114, 102 S Ct 1815; Baldwin v Scott County Milling Co. 307 US 478, 484-485, 83 L Ed 1409, 59 S Ct 943 (1939); Louisville & Nashville R. Co. v Central Iron & Coal Co. 265 US 59, 65, 68 L Ed 900, 44 S Ct 441 (1924).

[1b, 3c] The filed rate doctrine, however, contains an important caveat: The filed rate is not enforceable if the ICC finds the rate to be unreasonable. See Maxwell, supra, at 97, 59 L Ed 853, 35 S Ct 494 (filed rate applies *"unless it is found by the Commission to be unreasonable"*) (emphasis added); see also Keogh, supra, at 163, 67 L Ed 183, 43 S Ct 47 ("The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. *Unless and until suspended or set aside,* this rate is made, for all purposes, the legal rate") (emphasis added). The filed rate doctrine, therefore, follows from the requirement that only filed rates be collected, as commanded by §§ 10761 and 10762, the requirement that rates not be discriminatory, see § 10741, and the requirement of § 10701 that carriers adopt reasonable rates and practices. As we explained in Arizona Grocery, supra, although the filed rate is the *legal* rate, the Act

---

[9] See also Louisville & Nashville R. Co. v Central Iron & Coal Co. 265 US 59, 65, 68 L Ed 900, 44 S Ct 441 (1924) ("No contract of the carrier could reduce the amount legally payable; or release from liability a shipper who had assumed an obligation to pay the charges. Nor could any act or omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor"); Kansas City Southern R. Co. v Carl, 227 US 639, 653, 57 L Ed 683, 33 S Ct 391 (1913) ("Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay. The shipper's knowledge of the lawful rate is conclusively presumed").

> "did not abrogate, but [rather] expressly affirmed, the common-law duty to charge no more than a reasonable rate . . . . In other words, the legal rate was not made by the statute a lawful rate—it was lawful only if it was
>
>
>
> reasonable. Under [the Act] the shipper was bound to pay the legal rate; but if he could show that it was unreasonable he might recover reparation.
>
> "The Act altered the common law by lodging in the Commission the power theretofore exercised by courts, of determining the reasonableness of a published rate. If the finding on this question was against the carrier, reparation was to be awarded the shipper, and only the enforcement of the award was relegated to the courts." 284 US, at 384-385, 76 L Ed 348, 52 S Ct 183 (footnote omitted).

[1c, 4a] In the instant case, the Commission did not find that the rates were unreasonable,[10] but rather concluded that the carrier had engaged in an unreasonable practice in violation of § 10701 that should preclude it from collecting the filed rates. The Commission argues that under the filed rate doctrine, a finding that the carrier engaged in an unreasonable practice should, like a finding that the filed rate is unreasonable, disentitle the carrier to collection of the filed rate. We have never held that a carrier's unreasonable practice justifies departure from the filed tariff schedule.[11] But we need not

resolve this issue today because we conclude that the justification for departure from the filed tariff schedule that the ICC set forth in its Negotiated Rates policy rests on an interpretation of the Act that is contrary to the language and structure of the statute as a whole and the requirements that make up the filed rate doctrine in particular.

Under the Negotiated Rates policy, the ICC has determined that a carrier engages in an unreasonable practice when it attempts to collect the filed rate after the parties have negotiated a lower rate. The ICC argues that its conclusion is entitled to deference because § 10701 does not specifically address the types of practices that are to be considered unreasonable and because its construction is rational and consistent with the statute. See Chevron U. S. A. Inc. v Natural Resources Defense Council, Inc. 467 US 837, 843, 81 L Ed 2d 694, 104 S Ct 2778 (1984).

---

[10] **[4b]** The ICC did not determine whether the tariff rates were unreasonable even though respondent requested such a determination. We therefore must assume, for purposes of our decision today, that the rates were reasonable. The issue of the reasonableness of the tariff rates is open for exploration on remand.

[11] None of our cases involving a determination by the ICC that the carrier engaged in an unreasonable practice have required departure from the filed tariff schedule altogether; instead, they have required merely the application of a different filed tariff. For example, in Hewitt-Robins Inc. v Eastern Freight-Ways, Inc. 371 US 84, 86, 9 L Ed 2d 142, 83 S Ct 157 (1962), the Commission's finding that a carrier had engaged in an unreasonable practice by routing intrastate shipments over interstate routes required only the application of a different filed rate, i.e., the intrastate rates, rather than departure from the tariff schedule entirely. See also Adams v Mills, 286 US 397, 412, 76 L Ed 1184, 52 S Ct 589 (1932) (reparations ordered constituted difference between one filed rate and another). Likewise, the cases in which the ICC has determined that a carrier engaged in an unreasonable practice by requiring a certain notation attached to the bill of lading to qualify the shipper for a reduced tariff also did not require deviation from the filed tariff. See Standard Brands, Inc. v Central R. Co. of New Jersey, 350 ICC 555 (1974); Carriers Traffic Service, Inc. v Anderson, Clayton & Co. 881 F2d 475, 481-482 (CA7 1989) (collecting cases).

[1d, 3d, 5] We disagree. For a century, this Court has held that the Act, as it incorporates the filed rate doctrine, forbids as discriminatory the secret negotiation and collection of rates lower than the filed rate. See supra, at 126-128, 111 L Ed 2d, at 108-109. By refusing to order collection of the filed rate solely because the parties had agreed to a lower rate, the ICC has permitted the very price discrimination that the Act by its terms seeks to prevent. See 49 USC § 10741 [49 USCS § 10741]. As we stated in Armour Packing Co. v United States, 209 US 56, 81, 52 L Ed 681, 28 S Ct 428 (1908):

> "If the rates are subject to secret alteration by special agreement then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart. . . . [The Act] has provided for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be while in force the only legal rate. Any other
>
> **[497 US 131]**
>
> construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish."

Congress has not diverged from this interpretation and we decline to revisit it ourselves. See California v FERC, 495 US 490, 499, 109 L Ed 2d 474, 110 S Ct 2024 (1990) (recognizing the respect "this Court must accord to longstanding and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes"). Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of stare decisis, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning. Labeling the carrier's conduct an "unreasonable practice" cannot disguise the fact that the ICC is justifying deviation from the filed rate purely on the ground that the carrier and shipper have privately negotiated a lower rate. Stripped of its semantic cover, the Negotiated Rates policy and, more specifically, the Commission's interpretation of "unreasonable practices" thus stand revealed as flatly inconsistent with the statutory scheme as a whole, cf Fort Stewart Schools v FLRA, 495 US 641, 645, 109 L Ed 2d 659, 110 S Ct 2043 (1990); Dole v Steelworkers, 494 US 26, 32, 108 L Ed 2d 23, 110 S Ct 929 (1990), and §§ 10761 and 10762 in particular.

[1e, 6a] Nor can the Negotiated Rates policy be justified as a remedy for the carrier's failure to comply with § 10762's directive to file the negotiated rate with the ICC. See Negotiated Rates I, 3 ICC 2d, at 103. The Commission argues that the carrier should not receive a windfall, i.e., the higher filed rate, from its failure to comply with the statute. See Brief for Federal Respondent 25-27. But § 10761 *requires* the carrier to collect the filed rate, and we have never accepted the argument that such "equities" are relevant to the application of § 10761.[12] See, e.g. Maxwell, 237 US, at 97, 59 L Ed 853, 35 S Ct 494. Indeed,

strict adherence to the filed rate has never been justified on the ground that the carrier is equitably entitled to that rate, but rather that such adherence, despite its harsh consequences in some cases, is necessary to enforcement of the Act. See supra, at 126-128, 111 L Ed 2d, at 108-109.

Compliance with §§ 10761 and 10762 is "utterly central" to the administration of the Act. Regular Common Carrier Conference v United States, 253 US App DC 305, 308, 793 F2d 376, 379 (1986). "Without [these provisions] . . . it would be monumentally difficult to enforce the requirement that rates be reasonable and nondiscriminatory, . . . and virtually impossible for the public to assert its right to challenge the lawfulness of existing proposed rates." Ibid. (citations omitted). Although the ICC argues that the Negotiated Rates policy does not "abolis[h] the requirement in section 10761 that carriers must continue to charge the tariff rate," App to Pet for Cert 36a, the policy, by sanctioning adherence to unfiled rates, undermines the basic structure of the Act. The ICC cannot review in advance the reasonableness of *unfiled* rates. Likewise, other shippers cannot know if they should challenge a carrier's rates as discriminatory when many of the carrier's rates are privately negotiated and

never disclosed to the ICC. Thus, although we agree that the Commission may have discretion to craft appropriate remedies for violations of the statute, see ICC v American Trucking Assns., Inc. 467 US 354, 364-365, 81 L Ed 2d 282, 104 S Ct 2458 (1984), the "remedy" articulated in the Negotiated Rates policy effectively renders nugatory the requirements of §§ 10761 and 10762 and conflicts directly with the core purposes of the Act.

[1f, 7a] The ICC maintains, however, that the passage of the Motor Carrier Act of 1980 (MCA), Pub L 96-296, 94 Stat 793, justifies its Negotiated Rates policy. The MCA substantially deregulated the motor carrier industry in many ways in an effort to "promote competitive and efficient transportation services." Pub L 96-296, § 4, formerly codified at 49 USC § 10101(a)(7) (1976 ed, Supp V) [49 USCS § 10101(a)(7)]. In addition to loosening entry controls, see § 5, codified at 49 USC § 10922 (1982 ed) [49 USCS § 10922], the

---

[12] **[6b]** Even if the equities of the situation were relevant, it is difficult to see how the equities favor the shipper. One would think that a shipper who has the market power to require a carrier to reduce his tariffs could also require proof from a carrier that the negotiated rates had been filed before tendering the shipment, especially since there are commercial services providing up-to-the-minute details of the carrier's rate schedule. But see Fort Howard Paper Co. v Maislin Industries, US, Inc. No. MC—C—10983 (ICC Aug. 4, 1987), p 5 (unreasonable practice found even when the shipper had a copy of the tariff). Nevertheless, the Commission argues that if § 10761 "prevailed over the requirement of reasonable practices, a carrier could intentionally engage in 'bait and switch' tactics by negotiating one rate, fraudulently representing that it was properly filed, and then insisting upon collection of a higher tariff rate." Brief for Federal Respondent 30. We note first that the Commission determined that there was no intentional or fraudulent conduct in this case. Moreover, any carrier who engaged in such conduct could be punished under 49 USC § 11903(b) (1982 ed) [49 USCS § 11903(b)]. Finally, this risk of intentional misconduct on the part of a carrier has always existed and has never been considered sufficient to justify a less stringent interpretation of § 10761.

MCA also created a zone of reasonableness within which carriers can raise rates without interference from the ICC. See § 11, codified at 49 USC § 10708 (1982 ed) [49 USCS § 10708]. More importantly, the MCA also allows motor carriers to operate as both common carriers and contract carriers. See § 10(b)(1), amending 49 USC § 10930(a) (1982 ed) [49 USCS § 10930(a)]. A contract carrier transports property under exclusive agreements with a shipper, see § 10102(14), and the Commission has exempted all motor contract carriers from the requirements of §§ 10761 and 10762. See Exemption of Motor Contract Carriers from Tariff Filing Requirements, 133 MCC 150 (1983), aff'd sub nom. Central & Southern Motor Freight Tariff Assn., Inc. v United States, 244 US App DC 226, 757 F2d 301, cert denied, 474 US 1019, 88 L Ed 2d 553, 106 S Ct 568 (1985).[13] The Commission has also relaxed the

regulations relating to motor common carriers, most significantly, by allowing decreased rates to go into effect one day after the filing of a tariff. See Short Notice Effectiveness for Independently Filed Rates, 1 ICC2d 146 (1984), aff'd sub nom Southern Motor Carriers Rate Conference v United States, 773 F2d 1561 (CA11 1985).[14] In Negotiated Rates I and II, the Commission concluded that in light of the more competitive environment, strict adherence to the filed rate doctrine "is inappropriate and unnecessary to deter discrimination today." Negotiated Rates I, 3 ICC, at 106. According to the Commission, " 'the inability of a shipper to rely on a carrier's interpretation of a tariff is a greater evil than the remote possibility that a carrier might intentionally misquote an applicable tariff rate to discriminate illegally between shippers.' " Ibid., quoting Seaboard System R. Co. v United States, 794 F2d 635, 638 (CA11 1986).

[1g, 7b, 8, 9] We reject this argument. Although the Commission has both the authority and expertise generally to adopt new policies when faced with new developments in the industry, see American Trucking Assns., Inc. v Atchison, T. & S. F. R. Co. 387 US 397, 416, 18 L Ed 2d 847, 87 S Ct 1608 (1967), it does not have the power

---

[13] The Act specifically provides that the Commission may "grant relief" from the filing requirements to motor contract carriers "when relief is consistent with the public interest and the transportation policy." §§ 10761(b), 10762(f); see also § 10702(b). The Commission concluded that granting a classwide exemption rather than individual exemptions was both in the public interest and consistent with the purpose behind the Act. See Exemption of Motor Contract Carriers from Tariff Filing Requirements, 133 MCC, at 156-158. The Commission has also allowed contract carriers to obtain permits to serve entire classes of unnamed shippers. See Issuance of Permits Authorizing Industrywide Service, 133 MCC 298 (1983).

[14] The Act provides that rates will not go into effect until 30 days after the filing of a tariff, see § 10762(c)(3), but specifically allows the Commission to reduce the period if "cause exists." § 10762(d)(1). The Commission determined that cause existed to reduce the waiting period to one day after the filing of a tariff reducing rates and seven days after the filing of a tariff increasing rates. See Short Notice Effectiveness for Independently Filed Rates, 1 ICC2d, at 150-160. In addition, the Commission has determined that neither tariffs applicable to a single shipper nor rates providing volume discounts are per se discriminatory. See Rates for a Named Shipper or Receiver, 367 ICC2d 959 (1984); Petition for Declaratory Order—Lawfulness of Volume Discount Rates by Motor Common Carriers of Property, 365 ICC 711 (1982). We express no view today on the validity of such policies.

[497 US 135]

to adopt a policy that directly conflicts with its governing statute. Nothing in the MCA repeals §§ 10761 and 10762 or casts doubt on our prior interpretation of those sections. Generalized congressional exhortations to "increase competition" cannot provide the ICC authority to alter the well-established statutory filed rate requirements. As we said in Square D Co. v Niagara Frontier Tariff Bureau, Inc., with respect to a similarly longstanding judicial interpretation of the Act:

> "Congress must be presumed to have been fully cognizant of this interpretation of the statutory scheme, which had been a significant part of our settled law for over half a century, and . . . Congress did not see fit to change it when Congress carefully reexamined this area of the law in 1980. [Respondent has] pointed to no specific statutory provision or legislative history indicating a specific congressional intention to overturn the longstanding . . . construction; harmony with the general legislative purpose is inadequate for that formidable task." 476 US, at 420, 90 L Ed 2d 413, 106 S Ct 1922 (footnotes omitted).

See also California v FERC, 495 US, at 498, 499-500, 109 L Ed 2d 474, 110 S Ct 2024. Even before the passage of the MCA, Congress had allowed the Commission to exempt motor *contract* carriers from the requirement that they adhere to the published tariff, see 49 USC § 10761(b) (1982 ed) [49 USCS § 10761(b)], demonstrating that Congress is aware of the requirement and has deliberately chosen not to disturb it with respect to motor *common* carriers.[15] If

[497 US 136]

strict adherence to §§ 10761 and 10762 as embodied in the filed rate doctrine has become an anachronism in the wake of the MCA, it is the responsibility of Congress to modify or eliminate these sections.

Accordingly, the judgment of the Court of Appeals is reversed, and the cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

SEPARATE OPINIONS

Justice **Scalia,** concurring.

I join the Court's opinion but add a few words in response to Justice Stevens' assertion that the Court has "fail[ed] to adhere today to the teaching of Chevron [U. S. A. Inc. v Natural Resources Defense Council, Inc. 467 US 837 [81 L Ed 2d 694, 104 S Ct 2778] (1984)]." Post, at 152, 111 L Ed 2d, at 125.

In my view, the Court correctly relies upon our prior "filed rate" decisions, which were based not on the "regulatory scheme as a whole," post, at 144, 111 L Ed 2d, at 119—by which Justice Stevens appears to mean the regulatory climate within which the statute then operated, post, at 145-146, 111 L Ed 2d, at 120-121—but rather on the text of the statute. Justice Stevens argues that there is no textual limitation on the scope of the term "reasonable," as that term is used in 49 USC § 10701(a) (1982 ed) [49 USCS § 10701(a)] ("A . . . practice related to transportation or service provided by a carrier . . . must be reasonable"), and that we must therefore accord deference to the Commission's interpretation of that term. Post, at 140-141, 151-152, 111 L Ed 2d, at 117, 124. I do not agree. Whatever else may qualify as an unreasonable practice, under no sensible construction of that term could it consist of failing to do what the statute explicitly *prohibits* doing—viz., charging or receiving a rate different from the rate specified in a tariff. 49 USC § 10761(a) (1982 ed) [49 USCS § 10761(a)].

---

[15] **[7c]** Moreover, in the Household Goods Transportation Act of 1980, Pub L 96-454, 94 Stat 2011, Congress provided that "motor common carrier[s] providing transportation of household goods . . . may, subject to the provisions of this chapter *(including the general tariff requirements of section 10762 of this title),* establish a rate for the transportation of household goods which is based on the carrier's written, binding estimate of charges for providing such transportation." 49 USC § 10735(a)(1) (1982 ed, Supp V) [49 USCS § 10735(a)(1)] (emphasis added). This exception for household goods carriers also demonstrates that Congress is aware of, but has elected not to eliminate as applied to other motor common carriers, the general requirements of §§ 10761 and 10762.

Nor can the phrase "[e]xcept as provided in this subtitle," § 10761(a), carry the enormous weight that Justice Stevens

[497 US 137]

places upon it. Post, at 142-143, 111 L Ed 2d, at 119, and n 6. That clause is affixed to only the *first* sentence of § 10761(a), which states that before providing transportation and services, certain carriers must place their rates on file. (What is referred to by the exception is obvious—such provisions as § 10762(a)(1), which states that certain motor contract carriers that serve only one shipper need file only minimum rates.) But it is the *second* sentence of § 10761(a) that contains the requirement that only filed rates can be charged. Of course the subject of the second sentence, "*[t]hat* carrier" (emphasis added), must reasonably be deemed to refer to a carrier covered by the first sentence—so that the obligation to charge the filed rate applies only to those carriers *required* to file "the rate for the transportation or service." (Thus, a motor contract carrier required to file only minimum rates under § 10762(a)(1) can charge rates higher than those minimums.) But there is no way in which the "[e]xcept as provided" clause can be imported directly into the second sentence, causing it to recite an exception to the obligation to charge the required-to-be-filed rate, which Justice Stevens asserts can refer to the "reasonable practices" requirement of § 10701(a) as readily as it can to the "reasonable rate" requirement. Post, at 141-142, 111 L Ed 2d, at 117-118. The basis for the "unreasonable rate" exception to the "filed rate" rule is not the "[e]xcept as provided" language at all; rather it is the need to reconcile two textual provisions that would otherwise be categorically inconsistent (do not charge unreasonable rates, but charge whatever rates you have filed). While an "unreasonable rate" unavoidably means a rate that is economically unreasonable—so that where economic unreasonableness exists §§ 10701(a) and 10761(a) *need* to be reconciled by assuming an implicit but unexpressed exception to the filed rate requirement—an "unreasonable practice" does *not* unavoidably mean charging the filed rate when a different rate has been promised, so with respect to that term normal construction of § 10701(a) (as in the previous paragraph) avoids any difficulty.

[497 US 138]

Finally, Justice Stevens points to

changes in the motor carrier industry occasioned in part by 1980 amendments to the statute, which amendments he says "represented a fundamental policy choice in favor of deregulation." Post, at 147, 111 L Ed 2d, at 121. See also post, at 147-151, 111 L Ed 2d, at 121-124. But the only amendments of any relevance to the requirement of § 10761(a) that a carrier collect no rate other than the filed rate are those that remove certain pre-existing barriers to motor contract carriage, see generally Central & Southern Motor Freight Tariff Association, Inc. v United States, 244 US App DC 226, 757 F2d 301, 311-312 (1985) (per curiam)—which amendments have the practical effect of making more carriers eligible for the *pre-existing exception* to the filing requirement of § 10761(a), permitting the Commission to exempt them under certain circumstances. § 10761(b). While this plainly reflects an intent to deregulate, it reflects an intent to deregulate *within the framework of the existing statutory scheme*. Perhaps deregulation cannot efficiently be accomplished within that framework, but that is Congress' choice and not the Commission's or ours. It may well be, as Justice Stevens thinks, that after the 1980 amendments and the various administrative changes that the Commission has made by rule, " '[t]he skeleton of regulation remains; the flesh has been stripped away.' " Post, at 148, 111 L Ed 2d, at 122, quoting Orscheln Bros. Truck Lines, Inc. v Zenith Electric Corp. 899 F2d 642, 644-645 (CA7 1990). But it is the skeleton we are construing, and we must read it for what it says.

Justice **Stevens,** with whom The **Chief Justice** joins, dissenting.

The "filed rate doctrine" was developed in the 19th century as part of a program to regulate the ruthless exercise of monopoly power by the Nation's railroads. Today the Court places an interpretation on that doctrine even more strict than the original version. In doing so, the Court misreads the text of the Interstate Commerce Act (Act), 49 USC § 10101 et seq. (1982 ed) [49 USCS §§ 10101 et seq.], ignores the history of motor carrier

regulation in this country, and gives no deference to the sensible construction of the Act by six Courts of Appeals[1] and the administrative agency responsible for its enforcement. Most significantly, the majority fails to appreciate the significance of the "sea change" in the statutory scheme that has converted a regime of regulated monopoly pricing into a highly competitive market. Even wearing his famous blinders, old Dobbin would see through the tired arguments the Court accepts today.

---

[1] See Delta Traffic Service, Inc. v Transtop, Inc. 902 F2d 101 (CA1 1990); Delta Traffic Service, Inc. v Appco Paper & Plastics Corp., 893 F2d 472 (CA2 1990); Orscheln Bros. Truck Lines, Inc. v Zenith Electric Corp. 899 F2d 642 (CA7 1990); 879 F2d 400 (CA8 1989) (case below); West Coast Truck Lines, Inc. v Weyerhaeuser Co. 893 F2d 1016 (CA9 1990); Seaboard System R. Co. v United States, 794 F2d 635 (CA11 1986). The decision of the Court of Appeals for the Eleventh Circuit in Seaboard System involved railroad regulation rather than motor carrier regulation, but presented very similar issues.

The sole exception to this consensus is In re Caravan Refrigerated Cargo, Inc. 864 F2d 388 (CA5 1989).

I

As originally enacted in 1887, the Act provided, in part:

> "And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force." 24 Stat 381.

Read literally, this text commanded strict adherence to the tariffs filed by a carrier. From the beginning, however, the Court construed that command as subject to the unstated exception

that a filed rate would not be enforced if the Interstate Commerce Commission (Commission) determined that the rates were "unreasonable."[2] Amendments to the Act incorporated language that expressly allows exceptions in cases in which the Commission determines that strict enforcement would be unreasonable.[3]

Thus, 49 USC § 10761(a) (1982 ed) [49 USCS § 10761(a)] now provides:

> "*Except as provided in this subtitle,* a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device." (Emphasis added.)

The emphasized language in the foregoing provision obviously refers, inter alia, to § 10701(a) which states, in part:

> "A *rate* (other than a rail rate), classification, rule, *or practice* related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title *must be reasonable.*" (Emphasis added.)

Furthermore, § 10704(b) expressly authorizes the Commission, after finding that a rate or practice of a carrier is unreasonable, to prescribe the rate or practice that the carrier must follow.[4]

---

[2] Thus, in the most frequently quoted statement of the filed rate doctrine, we wrote: "Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, *unless it is found by the Commission to be unreasonable.*" Louisville & Nashville R. Co. v Maxwell, 237 US 94, 97, 59 L Ed 853, 35 S Ct 494 (1915) (emphasis added).

Similarly, in Keogh v Chicago & Northwestern R. Co. 260 US 156, 163, 67 L Ed 183, 43 S Ct 47 (1922), we wrote:
"The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. *Unless and until suspended or set aside,* this rate is made, for all purposes, the legal rate, as between carrier and shipper." (Emphasis added.)

[3] See, e. g., 34 Stat 587.

The action of the Commission in this case faithfully tracks its statutory grant of authority. After considering all of the relevant evidence, the Commission determined "that it would be an unreasonable practice now to require Primary to pay undercharges for the difference between the negotiated rates and the tariff rates." App to Pet for Cert 44a. That determination was unquestionably consistent with the plain language of the statute governing the Commission's authority. A carrier's failure to file negotiated rates obviously does not make it reasonable for the carrier to quote low rates and collect higher ones; the Commission is free to find, as it has done, that a practice of misquotation, failure to file, and subsequent collection is unreasonable under § 10701(a).

The Court offers no reason whatsoever to doubt this conclusion. Indeed, the Court's discussion of the statutory text consists almost entirely of vague references to some unarticulated

interplay between §§ 10761(a) and 10762(a)(1),[5] see ante, at 126-127, 111 L Ed 2d, at 108-109, an interplay which the Court contends would be "render[ed] nugatory" if carriers are not permitted to obtain payment of the filed rate when they have led shippers to rely upon a lower negotiated rate. Ante, at 133, 111 L Ed 2d, at 112. For the reasons I have already stated, the text of those provisions does not generate any "interplay" capable of sustaining so rigid an inference. The Court virtually concedes as much, for it recognizes that the unreasonableness of a rate is a longstanding ground for denying collection of the filed rate, ante, at 128-129, 111 L Ed 2d, at 109-110, and n 10, and refuses to hold that the unreasonableness of a practice can never bar collection of a filed rate, ante, at 129-130, 111 L Ed 2d, at 110.

Having admitted that the doctrine synthesized from the "interplay" between §§ 10761(a) and 10762(a)(1) is susceptible of exceptions based upon the nature of a carrier's rates and practices, the Court can argue only that this particular exception is impermissible.[6] The source of the exceptions is,

---

[4] 49 USC § 10704(b)(1) (1982 ed and Supp V) [49 USCS § 10704(b)(1)] provides, in part:

"When the Commission decides that a rate charged or collected by—

"(A) a motor common carrier for providing transportation subject to its jurisdiction under subchapter II of chapter 105 of this title by itself, with another motor common carrier, with a rail, express, or water common carrier, or any of them;

. . . .

"or that a classification, rule, or practice of that carrier, does or will violate this chapter, the Commission shall prescribe the rate (including a maximum or minimum rate, or both), classification, rule, or practice to be followed."

[5] Section 10762(a)(1) provides:

"A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs."

[6] The Court attempts to make hay of the fact that under § 10761(a) carriers "may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff." According to the Court, this provision " *requires* the carrier to collect the filed rate." Ante, at 131, 111 L Ed 2d, at 111. That is true if the Court means that the carrier is obligated to seek payment of the filed rate, but not if the Court means

however, not the "interplay" that dominates the majority's reasoning, but the combined effect of the "Except as otherwise provided" language of § 10761(a) and the express authority to determine reasonableness granted to the Commission by § 10701(a). This second "interplay" gets little attention from the majority, and it is difficult to see how the text of either component might yield the distinction which the majority insists upon drawing. Nor can the Court mean that the exception literally voids the obligations imposed by §§ 10761(a) and 10762(a)(1), because the Commission maintains, and the Court does not deny, that the filed rate doctrine would still provide an effective right to recover for undercharges in some cases. See, e. g., NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 5 ICC2d 623, 629, and n 13 (1989). Moreover, even if the "filed rate doctrine" were discarded entirely, a knowing or willful failure to comply with §§ 10761(a) and 10762(a)(1) may subject a carrier to prosecution.[7]

The Court's assertion that the agency policy now before us "renders nugatory" the "interplay" between §§ 10761(a) and 10762(a)(1) therefore amounts to no more than an observation that the policy substantially diminishes the importance of the "filed rate doctrine" as a means for enforcing those sections. Consideration of the statute's structure makes all the more clear what should already be evident from the statutory text: The Court's observation is true but utterly irrelevant.

II

Because no particular provision of the statute supports the Court's position, its principal argument must be that the agency's construction of the Act is inconsistent with the regulatory scheme as a whole. See ante, at

---

that the carrier is entitled to receive payment of the filed rate. The longstanding reasonableness exception to the filed rate doctrine an exception not contested by the Court makes this much clear. Moreover, as has already been noted, the clause that prefaces § 10761(a) allows for the existence of exceptions to the collection requirement. The Court's argument simply begs the question before us, which is under what conditions a valid defense to a carrier's suit may exist.

Even less persuasive than the Court's argument from the collection requirement is a related claim made by petitioners. They contend that because carriers are legally obligated to collect the filed rate, the practice of filing suit to collect that rate cannot be unreasonable. See, e. g., Reply Brief for Petitioners 7-8. This argument, too, ignores the exceptions clause at the beginning of § 10761(a). Moreover, the argument mischaracterizes the practice deemed unreasonable by the Commission: A collection suit is one component of that practice, even though the suit considered in isolation from the broader course of conduct is not itself unreasonable. See NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 5 ICC2d 623, 628, n 11 (1989); see also ante, at 122, 111 L Ed 2d, at 106.

Justice Scalia trots out the same argument again, this time harnessed to an assertion that the exceptions clause applies only to the first sentence of § 10761(a). Ante, at 137, 111 L Ed 2d, at 115 (concurring opinion). Although that is perhaps a possible reading of § 10761(a), it is obviously not the only one. There is no reason to believe that it is an interpretation of the section that the Commission must accept. In any event, Justice Scalia admits that § 10701(a)— which imposes a reasonableness condition upon practices and rates alike—modifies the requirements of § 10761(a), and this admission renders moot his discussion of the exceptions clause. Ante, at 137, 111 L Ed 2d, at 115 (concurring opinion). In light of that admission, Justice Scalia's argument fails for exactly the reasons set out above.

[7] See, e.g., 49 USC §§ 11903 and 11904 (1982 ed) [49 USCS §§ 11903 and 11904].

131, 111 L Ed 2d, at 111. There are, of course, important differences between markets in which prices are regulated, either by private cartels or by public authority, and those in which prices are the product of independent decisions by competitors. Rules requiring adherence to predetermined prices are characteristic of regulated markets, but are incompatible with independent pricing in a competitive market.[8] The "filed rate doctrine" has played an important role, not just in the segments of the transportation industry regulated by the Interstate Commerce Commission, but in other regulated markets as well.[9] It requires the courts to respect the public agency's control over

market prices and industry practices; moreover, it significantly reduces the temptation of regulated parties to deviate from the marketwide rules formulated by the agency.

The filed rate doctrine has been a part of our law during the century of regulation of the railroad industry by the Commission. In 1935, when Congress decided to impose economic regulation on the motor carrier industry, partly if not primarily in order to protect the railroads from too much competition,[10] the filed rate doctrine was applied to their rates just as it had previously applied to the railroads. It had the same regulatory purpose.[11] In its applications during

---

[8] See, e. g., Sugar Institute, Inc. v United States, 297 US 553, 582-583, 80 L Ed 859, 56 S Ct 629 (1936) (regulation by private agreement in violation of the Sherman Act); California Retail Liquor Dealers Assn. v Midcal Aluminum, Inc. 445 US 97, 99, 63 L Ed 2d 233, 100 S Ct 937 (1980) (state regulation of wine prices); United Gas Pipe Line Co. v Mobile Gas Service Corp. 350 US 332, 338, 100 L Ed 373, 76 S Ct 373 (1956) (federal regulation of natural gas prices).

[9] See, e. g., Montana-Dakota Utilities Co. v Northwestern Public Service Co. 341 US 246, 251-252, 95 L Ed 912, 71 S Ct 692 (1951) (federal regulation of prices for electrical power); Arkansas Louisiana Gas Co. v Hall, 453 US 571, 577-578, 69 L Ed 2d 856, 101 S Ct 2925 (1981) (federal regulation of prices for natural gas); H. J. Inc. v Northwestern Bell Telephone Co. 492 US 229, 234, n 1, 106 L Ed 2d 195, 109 S Ct 2893 (1989) (state regulation of rates for telephone service).

[10] "Though identical statutory standards govern both motor carrier and rail consolidations, their legislative backgrounds differ. The demand for motor carrier regulation came, not from shippers, as in railroads, but from the roads themselves, who urged that virtually unregulated motor carrier competition threatened railroad financial stability. This view was also supported by the Interstate Commerce Commission, and the Federal Coordinator of Transportation who, in his 1934 and 1935 reports, recommended legislation regulating interstate motor carriers. In addition, during hearings on proposed legislation, many truck operators, previously opposed to Federal regulation, favored such control because they feared the effects of unrestrained competition on the motor carrier industry itself. The result was legislation, enacted in 1935, which from the first placed considerable restraint on motor carrier competition.

"Entry was controlled by certificates of convenience and necessity; those already in the field were given a preferred position by the grandfather clauses, assuring not only the right to continue in operation, but also to expand within the areas or between the points which they already served. Moreover, the Commission was empowered to establish minimum as well as maximum rates. And this minimum rate power was soon utilized by the Commission both to protect the railroads from motor carrier competition as well as to safeguard the motor carrier industry from 'destructive' competition within its own ranks. Indeed, from the inception of motor carrier regulation to the present day, the power to fix minimum rates has been more significant than the authority to fix maximum charges." Report of the Attorney General's National Committee to Study the Antitrust Laws 265 (1955).

[11] "To understand the purpose of the filed-rate doctrine and hence the Commission's recent efforts to relax it, on which see Na-

[497 US 146]

the period of regulatory control over motor carrier ratemaking, the doctrine was for the most part applied to reinforce the policies and the decisions of the regulatory agency.[12]

[497 US 147]

After years of debate over whether it was sound policy to substitute regulation for competition in the motor carrier industry, Congress decided to eliminate the regulatory barriers to free entry and individual ratemaking. The 1980 amendments to the Act represented a fundamental policy choice in favor of deregulation.[13] Overnight the application of the filed rate doctrine in that mar-

---

tional Industrial Transportation League—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 3 ICC2d 99 (1986); Buckeye Cellulose Corp. v Louisville & Nashville R. R. 1 ICC2d 767 (1985), affirmed as Seaboard System R. R. v United States, supra; Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 5 ICC2d 623 (1989), one must understand the history of federal regulation of common carriers. Railroads have heavy fixed costs, and in their heyday faced little effective competition from other modes of transportation. Naturally they tended to load the fixed costs onto those shippers who had poor competitive alternatives and to charge low prices to those shippers who had good alternatives by reason of (for example) being big enough to induce two or more railroads to serve their plants. This created a disparity in transportation costs painful to shippers who paid high railroad rates and were competing with shippers who paid low rates, and it also undermined the railroads' efforts to cartelize railroad transportation. The confluence of interests between railroads and weak shippers resulted in a regulatory scheme in which railroads were forbidden both to price off tariff and to refuse service to any shipper at the tariffed rate. Western Transportation Co. v Wilson & Co., supra, 682 F2d at 1230-31. The scheme would have been undermined if carriers had been permitted to negotiate secret discounts with favored shippers. Regular Common Carrier Conference v United States, 793 F2d 376, 379 (DC Cir 1986). To deter this was the office of the filed-rate doctrine. It authorized carriers to recover the discounts regardless, which meant that the shipper could not count on being able to keep any discount that the railroad might dangle before it. Motor carriers do not have heavy fixed costs, but they do not like competition any more than railroads do, so when in 1935 they were brought under federal regulation (in major part to protect the railroads from their competition) they were placed under the filed-rate doctrine too." Orscheln Bros. Truck Lines, Inc. v Zenith Electric Corp. 899 F2d 642, 643-644 (CA7 1990).

[12] **12.** As the Court's opinion makes clear, there was no tension between judicial interpretation and agency policy in the cases that developed the filed rate doctrine. See ante, at 128, 111 L Ed 2d, at 109, citing Poor v Chicago, B. & Q. R. Co. 12 ICC 418, 421-422 (1907). On the contrary, a recurring theme in those cases is that the Commission, rather than the courts, should have primary responsibility for administration of the statute. The filed rate doctrine was regarded in significant part as a means for ensuring that this allocation of responsibility was respected. See, e. g., Texas & Pacific R. Co. v Abilene Cotton Oil Co. 204 US 426, 440-442, 51 L Ed 553, 27 S Ct 350 (1907); Arizona Grocery Co. v Atchison, T. & S. F. R. Co. 284 US 370, 384-385, 76 L Ed 348, 52 S Ct 183 (1932); Baldwin v Scott County Milling Co. 307 US 478, 483-485, 83 L Ed 1409, 59 S Ct 943 (1939). The most notable exception to this pattern is the 5-to-4 decision in T.I.M.E. Inc. v United States, 359 US 464, 3 L Ed 2d 952, 79 S Ct 904 (1959), in which this Court prohibited district courts from staying collection proceedings pending agency review of the reasonableness of a filed rate. Although T.I.M.E. is strikingly similar to today's decision in a host of respects, the majority does not rely upon it. Its reluctance to place any substantial weight upon T.I.M.E. is easily understood because that precedent was greatly limited by this Court's subsequent decision in Hewitt-Robins, Inc. v Eastern Freight-Ways, Inc. 371 US 84, 88-89, 9 L Ed 2d 142, 83 S Ct 157 (1962), and what remained of it was soon thereafter unambiguously repudiated by Congress. See Act of Sept. 6, 1965, Pub L 89-170, §§ 6-7, 79 Stat 651-652 (codified at 49 USC § 11705(b)(3) (1982 ed and Supp V) [49 USCS § 11705(b)(3)], 49 USC § 11706(c)(2) (1982 ed) [49 USCS § 11706(c)(2)]).

[13] **13.** Motor Carrier Act of 1980, Pub L 96-296, 94 Stat 793.

ket became an anachronism. As Judge Posner has explained:

> "Many years later came deregulation, which has changed the trucking industry beyond recognition. As a result of amendments made to the Motor Carrier Act in 1980 and their interpretation by the Commission, the present regime is essentially one of free competition. No longer does the ICC seek to nurture and protect cartel pricing and division of markets. A motor carrier that wants to lower its price can file a new tariff effective the following day. Short Notice Effectiveness for Independently Filed Motor Carrier and Freight Forwarder Rates, 1 ICC2d 146 (1984), affirmed as Southern Motor Carriers Rate Conference v United States, 773 F2d 1561 (11th Cir 1985). No longer does the Commission seek to limit the number of motor carriers, which
>
> **[497 US 148]**
>
> has more than doubled in less than a decade. Most important, a carrier and shipper who want to get out from under tariff regulation altogether have only to negotiate a contract of carriage, and then the lawful price is the price in the contract rather than in any filed tariff. There used to be all sorts of restrictions on contract carriage, which greatly limited it as an escape hatch from regulation. There are no longer. Wheaton Van Lines, Inc. v ICC, 731 F2d 1264 (7th Cir 1984). The skeleton of regulation remains; the flesh has been stripped away." Orscheln Bros. Truck Lines, Inc. v Zenith Electric Corp. 899 F2d 642, 644 (CA7 1990).

The significance of these fundamental changes was also noted and explained by Judge Alarcon:

> "A variety of practices that previously would have been considered discriminatory are now allowed. For example, the ICC has recently ruled that volume discount rates are not per se unlawful and may be justified by cost savings to the carrier. See Lawfulness of Volume Discount Rates by Motor Common Carrier of Property, 365 ICC 711, 715-16 (1982). Moreover, carriers may impose geographic or product line restrictions that must be met to obtain rate reductions. See Rates for Named Shipper or Receiver, 367 ICC 959, 962-965 (1984).
>
> "In addition to increased competitive pressures, statutory changes, and a relaxed regulatory climate, the ICC's Negotiated Rates decisions are a practical response to the information costs faced by shippers. The ease of filing tariffs and the sheer number filed no longer makes it appropriate to allocate the burden of discovering a filed rate to the shipper in all cases. Reduced tariff rates may now be filed to become effective on one day's notice." West Coast Truck Lines, Inc. v Weyerhaeuser Co. 893 F2d 1016, 1026 (CA9 1990).

[497 US 149]

The Court catalogues these reforms, ante, at 133-134, 111 L Ed 2d, at 112-113, but fails to analyze their implications for the "reasonableness" requirement of § 10701(a) and, consequently, for the provisions of § 10761(a). What the Court now misses has been succinctly set forth by Judge Alarcon:

> "The ICC's determination that the collection of undercharges constitutes an unreasonable practice if the shipper is unaware of the

filed rate is also a reflection of changing legislative goals. Congress modified national transportation policy when it amended 49 USC § 10101(a) [49 USCS § 10101(a)] in the Motor Carrier Act of 1980. Section 10101(a)(2) now directs the Commission, 'in regulating transportation by motor carrier, to promote competitive and efficient transportation services in order to (A) meet the needs of shippers, receivers, passengers, and consumers; [and] (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public . . . .' 49 USC § 10101(a)(1)(A), (B) (1982) [49 USCS § 10101(a)(1)(A), (B)]. In addition, § 10101(a)(1)(D) directs the ICC to encourage the establishment of reasonable transportation rates without 'unfair or destructive competitive practices.' 49 USC § 10101(a)(1)(D) (1982) [49 USCS § 10101(a)(1)(D)]. Congress intended these sections of the Motor Carrier Act 'to emphasize the importance of competition and efficiency as the most desirable means for achieving transportation goals while, at the same time, providing the Commission with sufficient flexibility to promote the public interest.' HR Rep No. 96-1069, 96th Cong, 2d Sess 12, *reprinted in* 1980 US Code Cong & Admin News 2283, 2294.

"Section 10701(a) provides the ICC with the mechanism to put into effect Congress' restated goals of national transportation policy. By declaring the adherence to filed rates unreasonable under the circumstances presented in this case, the ICC has demonstrated its intention to prevent carriers from engaging in unfair

competitive practices." Weyerhueuser, 893 F2d, at 1026-1027.

Despite the Court's puzzling suggestion that the filed rate doctrine is essential to the "core purposes of the Act," ante, at 133, 111 L Ed 2d, at 112, the doctrine is instead, as the Court elsewhere seems to concede, "an anachronism in the wake of the [Motor Carrier Act of 1980]," ante, at 136, 111 L Ed 2d, at 114. If plain text is a poor basis for the Court's holding, statutory purpose is altogether worse. As Judge Posner has explained:

> "Counsel for the carrier in this case—which is to say for the carrier's trustee in bankruptcy—conceded at argument that the motor carrier industry is today highly competitive. But if so, the filed-rate doctrine has lost its raison d'etre. The classic explanations for the doctrine are from a different world. 'If a mistake in naming a rate between two given points is to be accepted as requiring the application of that rate by the carrier, the great principle of equality in rates, to secure which was the very purpose and object of the enactment of these several statutes, might as well be abandoned.' Poor v Chicago, Burlington & Quincy Ry., supra, 12 ICC at 421. 'Stability and equality of rates are more important to commercial interests than reduced rates.' Id., at 422. 'Occasional hardships may result from any inelastic rule of general application. The principle, however, is vital in our commercial life that there shall be one fixed and absolutely rigid rate governing the transportation at a given time of any given commod-

> ity between two given points.' Id., at 423.
>
> "*Cessante ratione legis, cessat et ipsa lex.* Firms in a competitive market cannot discriminate against weak shippers, for even the weak shipper has, by definition of competition, alternative sources of supply to which to turn if one of his suppliers tries to make a monopoly profit off him. 'In the more competitive, more flexible pricing atmosphere created by [deregulation], there is
>
>
>
> little likelihood of carriers using a rate misquotation as a means to discriminate in favor of particular shippers.' Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, supra, 5 ICC 2d at 625. And since it is no longer the policy of Congress or the ICC to foster monopoly pricing in the motor carrier industry, no public object is served by forcing carriers to adhere to published price schedules regardless of circumstances. All this the Commission found and persuasively articulated in National Industrial Transportation League, supra, 3 ICC 2d at 104-08." Orscheln, 899 F2d, at 644-645.

Judge Posner's conclusion that strict mechanical adherence to the filed rate doctrine produces absurd results and serves no social purpose, id., at 645, is one that I share. It is likewise shared by the agency charged with administration of the Act.

III

A few years ago, in Chevron U. S. A. Inc. v Natural Resources Defense Council, Inc., 467 US 837, 81 L Ed 2d 694, 104 S Ct 2778 (1984), we reiterated the importance of giving appropriate deference to an agency's reasonable interpretation of its governing statute. Indeed, long before our decision in Chevron, we recognized that even when faced with a "long history of the Commission's construction and application of the Act contrary to its present position," American Trucking Assns., Inc. v Atchison T. & S. F. R. Co. 387 US 397, 415, 18 L Ed 2d 847, 87 S Ct 1608 (1967), we must defer to the Commission's interpretation of a statute which it is responsible for administering:

> "[W]e agree that the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. . . . In fact, although we make no judgment as to the policy aspects of the Commission's action, this kind of flexibility
>
>
>
> and adaptibility to changing needs and patterns of transportation is an essential part of the office of a regulatory agency." Id., at 416, 18 L Ed 2d 847, 87 S Ct 1608.

Four Courts of Appeals have expressly invoked Chevron in the course of upholding the agency action challenged in this case,[14] but this Court does not deem Chevron—or any other case involving deference to agency action—worthy of extended discussion. The Court dismisses Chevron by means of a conclusory assertion that the agency's interpretation is inconsistent with "the statutory scheme as a whole." Ante, at 131, 111 L Ed 2d, at 111. Insofar as the Court offers any justification for that result, it does so by relying on cases in which this Court's action was entirely consistent with the agency's interpretation of the Act.[15] The fact that the Court has strictly enforced the filed rate doctrine in the many cases in which it served the agency's regulatory purposes provides no justification for enforcing the doctrine in a competitive market in which it frustrates the agency's attempt to carry out the plainly expressed intent of Congress.

---

[14] Delta Traffic Service, Inc. v Transtop, Inc. 902 F2d, at 109; Orscheln Bros. Truck Lines, Inc. v Zenith Electric Corp. 899 F2d, at 646; 879 F2d, at 406 (case below); West Coast Truck Lines, Inc. v Weyerhaeuser Co., 893 F2d, at 1023, 1025-1026.

The Court's failure to adhere today to the teaching of Chevron is compounded by its misplaced reliance on Square D Co. v Niagara Frontier Tariff Bureau, Inc. 476 US 409, 90 L Ed 2d 413, 106 S Ct 1922 (1986). See ante, at 134-135, 111 L Ed 2d, at 113-114. In Square D, we adhered to a longstanding settled construction of § 4 of the Clayton Act that had not been affected by any subsequent statutory amendment. No question of agreeing or disagreeing with agency action, or with an agency's interpretation of a congressional policy choice, was presented. That case is therefore totally inapplicable to the question presented here. Even less persuasive authority for the Court's position is California v FERC, 495 US 490, 109 L Ed 2d 474, 110 S Ct 2024 (1990), see ante, at 131, 135, 111 L Ed 2d, at 111, 114, a case in which we upheld

an agency interpretation that conformed to longstanding precedent.

IV

Finally, I must express my emphatic agreement with the Commission's conclusion, App to Pet for Cert 44a, that an unreasonable practice would result if the carrier in this case were rewarded for violating its duty to file a new rate promptly. There is no evidence of discrimination in this record; nor is there any reason to believe that any shipper or any competing motor carrier was harmed by the negotiated rate or by the failure to file it. The only consequence of today's misguided decision is to produce a bonanza for the bankruptcy bar. "Now that off-tariff pricing is harmless to the (de)regulatory scheme, the only purpose served by making the statutory obligation to price in conformity with published tariffs draconian is to provide windfalls for unsecured creditors in bankruptcy." Orscheln, 899 F2d, at 646.

As Justice Black said more than 30 years ago in similar circumstances, "I am unable to understand why the Court strains so hard to reach so bad a result." T.I.M.E. Inc. v United States, 359 US 464, 481, 3 L Ed 2d 952, 79 S Ct 904 (1959) (dissenting opinion). The Court's analysis is plausible only if read as a historical excursus about a statute that no longer exists. Nothing more than blind adherence to language in cases that have nothing to do with the present situation supports today's result.

I respectfully dissent.

---

[15] See, n 12, supra.

[497 US 154]

PORTLAND GOLF CLUB, Petitioner

v

COMMISSIONER OF INTERNAL REVENUE

497 US 154, 111 L Ed 2d 126, 110 S Ct 2780

[No. 89-530]

Argued April 17, 1990. Decided June 21, 1990.

Decision: Social club's losses from sales to nonmembers held not tax deductible against investment income, where profit motive as to such sales is not shown.

SUMMARY

A private golf and country club which was a nonprofit Oregon corporation derived most of its income from membership dues and other receipts from club members, and such income was exempt from federal income tax under § 501(c)(7) of the Internal Revenue Code of 1954 (26 USCS § 501(c)(7)). Also, the club derived nonexempt "unrelated business taxable income"—which, for social clubs, is defined, under § 512(a)(3)(A) of the Code (26 USCS § 512(a)(3)(A)) as encompassing all sources of income except receipts from club members—from sales of food and drink to nonmembers, and from the return on its investments. In calculating its federal income tax liability for two fiscal years, the club offset its net losses on nonmember sales against the earnings from its investments and therefore reported no unrelated business taxable income for the two tax years. In computing the losses on nonmember sales, the club identified variable, or direct, expenses, such as the cost of the food sold to the nonmembers, and fixed, or indirect, overhead expenses, which would have been incurred regardless of whether sales had been made to nonmembers. The club allocated fixed expenses to nonmember sales using a "gross-to-gross method," based on the ratio that nonmember sales bore to total sales. For each year, the variable expenses were less than the income from nonmember sales, but the total of the fixed and variable expenses exceeded the income from nonmember sales. On audit, the Commissioner of Internal Revenue, determining that the club's losses from nonmember sales could not be used to offset investment income because the

Briefs of Counsel, p 847, infra.

club had failed to show that its nonmember sales had been undertaken with an intent to profit, determined tax deficiencies for each year reflecting the tax owed on the investment income. On redetermination of the club's tax liability, the United States Tax Court, concluding that the club had adequately demonstrated a profit motive because its gross receipts from sales to nonmembers had consistently exceeded the variable costs associated with those sales, held that the club was entitled to offset its losses from the sales against its investment income (55 TCM 212). The United States Court of Appeals for the Ninth Circuit, holding that profit, for purposes of demonstrating an intent to profit from nonmember sales, meant the production of gains in excess of all direct and indirect costs, reversed the judgment of the Tax Court and remanded the case to the Tax Court for a determination whether the club had demonstrated the required intent (876 F2d 897).

On certiorari, the United States Supreme Court affirmed. In an opinion by BLACKMUN, J., joined by REHNQUIST, Ch. J., and BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., and joined as to point 1 below by KENNEDY, O'CONNOR, and SCALIA, JJ., it was held that (1) the club could offset its losses from sales to nonmembers against investment income only if the nonmember sales were motivated by an intent to profit, because (a) Congress intended, under § 512(a)(3)(A), that the investment income of social clubs should be subject to federal income tax, (b) the statutory scheme for the taxation of social clubs was intended to achieve tax neutrality, rather than to provide social clubs with a tax advantage, and (c) deduction of the losses against investment income was allowable, under § 162(a) of the Code (26 USCS § 162(a)) as "ordinary and necessary" expenses of a "trade or business," only if the club demonstrated an intent to profit on the sales; and (2) the club, having calculated its actual losses according to the gross-to-gross method, was foreclosed from attempting to demonstrate its intent to profit by arguing that some other allocation method more accurately reflected economic reality, because it would be an inherent contradiction to allow a portion of fixed expenses to be attributed to nonmember sales in establishing the club's actual losses, while being attributed to the club's exempt activities in determining whether the club has acted with the requisite intent to profit.

KENNEDY, J., joined by O'CONNOR and SCALIA, JJ., concurring in part and concurring in the judgment, agreed that the club could offset losses from sales to nonmembers against investment income only if the sales were motivated by an intent to profit, but expressed the view that (1) a taxpayer's profit motive cannot turn upon the particular accounting method by which it reports its ordinary and necessary expenses to the Internal Revenue Service; (2) an activity may be a trade or business even if the taxpayer intended to show losses from the activity on its income tax forms under a permissible accounting method; and (3) if the nonmember sales were not a trade or business, the club could not, even to the extent of gross receipts, deduct, under § 162(a), any expenses associated with the sales.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Income Taxes §§ 84, 95, 100, 104; Statutes § 91 — exempt social club — losses on sales to nonmembers — offset against investment income — deductions for food, payroll, and overhead — congressional intent

1a-1i. In calculating its federal income tax liability for each of two consecutive tax years, a nonprofit golf and country club, whose income

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

34 Am Jur 2d, Federal Taxation ¶¶ 6000, 6515, 7900, 7936

20 Federal Procedure, L Ed, Internal Revenue §§ 48:121-48:124

11 Federal Procedural Forms, L Ed, Internal Revenue § 43:131

Am Jur Legal Forms 2d, Federal Tax Guide to Legal Forms ¶¶ 190-A, 190-C, 190-E

20 Am Jur Trials 255, Preparing a Federal Income Tax Case for Trial

26 USCS §§ 162(a), 512(a)(3)(A)

RIA Federal Tax Coordinator 2d ¶¶ D-4200—D-4261, L-4250—L-4256

US L Ed Digest, Income Taxes §§ 84, 94, 95, 100, 104

Index to Annotations, Associations and Clubs; Deductions; Income Tax; Nonprofit Organizations; Taxes

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Modern status of rule dealing with public policy as ground for denying deduction for federal income tax purposes. 16 L Ed 2d 1117.

When will income received by organization exempt from federal income tax under § 501 of Internal Revenue Code of 1954 (26 USCS § 501) be deemed income from unrelated trade or business taxable under §§ 511-513 of Code (26 USCS §§ 511-513). 70 ALR Fed 229.

When is corporation, community chest, fund, foundation, or club "organized and operated exclusively" for charitable or other exempt purposes under Internal Revenue Code. 69 ALR2d 871.

Public policy as ground for denying deduction for federal income tax purposes. 27 ALR2d 498.

from membership dues and other receipts from club members is exempt from federal income tax, may offset losses incurred in selling food and drink to nonmembers against investment income only if the club's nonmember sales are motivated by an intent to profit—where, for social clubs, nonexempt "unrelated business taxable income" is defined, under § 512(a)(3)(A) of the Internal Revenue Code of 1954 (26 USCS § 512(a)(3)(A)), to include the gross income from all sources except receipts from club members, less the deductions allowed by Chapter 1 of the Code (26 USCS §§ 1-1399) which are directly connected with the production of the gross income—because (1) Congress intended, under § 512(a)(3)(A), that the investment income of social clubs should be subject to federal income tax; (2) the statutory scheme for the taxation of social clubs is intended to achieve tax neutrality by insuring that club members are not disadvantaged as compared with persons who pursue recreation through private purchases rather than through the medium of an organization, but is not intended to provide social clubs with a tax advantage; (3) the club's claimed deductions for food, payroll, and overhead expenses in excess of gross receipts from nonmember sales are allowable, if at all, only under § 162(a) of the Code (26 USCS § 162(a)), which allows a deduction for "ordinary and necessary expenses" incurred in carrying on any "trade or business"; (4) the United States Supreme Court has ruled, in a prior case, that a taxpayer's activities fall within the scope of § 162 only if an intent to profit has been shown; and (5) Congress' use of the term "unrelated business taxable income" in § 512(a)(3)(A) to describe all receipts other than payments from club members does not manifest an intent to define activities as a "trade or business" where the activities are otherwise outside the scope of § 162.

Appeal § 1673; Income Taxes §§ 84, 94, 104; Statutes § 164 — exempt social club — losses from sales to nonmembers — offset against investment income — profit motive — statutory language

2a-2f. For purposes of demonstrating the requisite profit motive—where a nonprofit golf and country club, whose income from membership dues and other receipts from club members is exempt from federal income tax, may offset losses incurred in selling food and drink to nonmembers against investment income only if the club's nonmember sales are motivated by an intent to profit—the club, having calculated its actual losses on nonmember sales by allocating fixed expenses to such sales on a "gross-to-gross method," based on the ratio that nonmember sales bore to total sales, is foreclosed from attempting to demonstrate its intent to profit by arguing that some other allocation method more accurately reflects economic reality, because it is an inherent contradiction to allow a portion of the club's fixed expenses to be attributed to the production of income from nonmember sales in establishing the club's actual losses, while being attributed to the club's exempt activities in determining whether the club has acted with the requisite intent to profit, given that (1) the club's right to use the gross-to-gross method rests on the club's assertion that this allocation formula reasonably identifies those expenses that are "directly connected" to nonmember sales—where, under § 512(a)(3)(A) of the Internal Revenue Code of 1954 (26 USCS § 512(a)(3)(A)), a social club's expenses that are directly connected to nonmember sales may be deducted from those sales for income tax purposes—and are "the ordinary and necessary expenses paid or incurred" in selling food and drink to nonmembers—where, under § 162(a) of the Code (26 USCS § 162(a)), the ordinary and necessary expenses incurred in carrying on a trade or business are deductible for income tax purposes—and (2) the Code language referred to in the club's assertion reflects an attempt to measure economic income, rather than an effort to use the tax law to serve ancillary purposes; thus, although the club may offset its losses on nonmember sales against investment income if it can demonstrate that it intended to earn gross income in excess of total expenses, with fixed expenses being allocated under the gross-to-gross formula, the United States Supreme Court, on certiorari to review a United States Court of Appeals' judgment reversing the United States Tax Court's judgment holding that the club had adequately demonstrated a profit motive, will affirm the Court of Appeals' judgment, where the club has not asserted that it possessed such a motive. (Kennedy, O'Connor, and Scalia, JJ., dissented from this holding.)

Income Taxes § 104 — deduction of losses

3a, 3b. The general rule under the Internal Revenue Code of 1954 (26 USCS §§ 1 et seq.) is that, for purposes of federal income tax, losses incurred in a profit-seeking venture may be deducted from unrelated income; expenses of a not-for-profit activity may be offset against the income from that activity, but losses may not be applied against income from other sources.

Appeal § 1662 — effect of decision on other grounds

4a, 4b. On certiorari to review a United States Court of Appeals' judgment as to the circumstances under which a nonprofit golf and country club, in calculating its federal income tax liability for each of two consecutive tax years, may offset losses incurred in selling food and drink to nonmembers against its investment income, the United States Supreme Court's holding that the club may offset such losses against investment income only if the nonmember sales were undertaken with an intent to profit, and that the club, because it has calculated its actual losses on the basis of the gross-to-gross formula, is precluded from attempting to demonstrate its intent to profit by arguing that some other allocation method more accurately reflects economic reality, makes it unnecessary for the Supreme Court to interpret precisely the Court of Appeals' opinion reversing the United States Tax Court's judgment holding that the club had demonstrated the requisite profit motive, where, although the basis for the Court of Appeals' order remanding the case to the Tax Court is not entirely clear to the Supreme Court, it appears that the Court of Appeals left open the possibility that the club could establish its intent to profit by using some other method of allocating fixed costs, while continuing to use the gross-to-gross formula in computing actual losses.

Income Taxes § 84 — exempt organizations — unrelated business taxable income — social clubs — investment income

5. Virtually all tax-exempt busi-

ness organizations are required to pay federal income tax on their "unrelated business taxable income"—which, for most exempt organizations, is limited, under § 512(a)(1) of the Internal Revenue Code of 1954 (26 USCS § 512(a)(1)), to income derived from a trade or business, and, for social clubs, includes, under § 512(a)(3)(A) of the Code (26 USCS § 512(a)(3)(A)), income other than that derived from dues, fees, or other charges paid by members; thus, a social club's investment income is subject to federal income tax, while the investment income of most other exempt organizations is not; for most nonprofit organizations, a general exemption from federal income tax is intended to encourage the provision of services that are deemed socially beneficial, while taxes are levied on such organizations' unrelated business taxable income in order to prevent the organizations from gaining an unfair advantage over competing commercial enterprises; however, social clubs are exempted generally from federal income tax not as a means of conferring tax advantages, but as a means of insuring that club members are not subject to tax disadvantages as a consequence of their decision to pool their resources for the purchase of social or recreational services.

Income Taxes § 94 — golf and country club — nonmember sales — deductions

6a, 6b. Although § 183 of the Internal Revenue Code of 1954 (26 USCS § 183), which permits a taxpayer to offset expenses incurred in a not-for-profit activity against income from that activity up to the amount of the income, is inapplicable to a nonprofit golf and country club, the club's deduction, for federal income tax purposes, of expenses incurred in selling food and drink to nonmembers up to the amount of the club's receipts from those sales is permissible under longstanding tax principles.

Income Taxes §§ 93, 94 — deductions — personal expenses — unrelated business income

7a, 7b. Just as an individual taxpayer may not offset personal expenses against income from other sources in calculating federal income tax liability, a social club should not be allowed to deduct expenses incurred for the benefit of the club's membership from "unrelated business taxable income"—which, for social clubs, includes, under § 512(a)(3)(A) of the Internal Revenue Code of 1954 (26 USCS § 512(a)(3)(A)), income other than that derived from dues, fees, or other charges paid by members.

Income Taxes §§ 91, 94 — deductions — business expenses

8. For expenses to be deductible under § 162 of the Internal Revenue Code of 1954 (26 USCS § 162)—which allows a deduction, in calculating federal income tax liability, for ordinary and necessary expenses incurred in carrying on any trade or business—it is required only that there be an intent to earn an economic profit, rather than an intent to earn taxable income; moreover, under many Code provisions which are designed to serve purposes other than the accurate measurement of economic income, a taxpayer who takes advantage of deductions or preferences may establish an intent to profit even though the taxpayer has no expectation of realizing taxable income.

Appeal § 1289 — presumption of irrelevance

9a, 9b. On certiorari to review a

United States Court of Appeals' judgment as to the circumstances under which a nonprofit golf and country club, in calculating its federal income tax liability for each of two consecutive tax years, may offset losses incurred in selling food and drink to nonmembers against its investment income, the United States Supreme Court, having held that the club may offset such losses against investment income only if the nonmember sales were undertaken with an intent to profit, will assume, without deciding, that potential reductions in tax liability are irrelevant to the determination whether a profit motive exists, where (1) the United States Tax Court consistently has held that the possibility of realizing tax benefits should be disregarded in determining whether an intent to earn an economic profit has been shown, and (2) the club does not dispute this principle.

Income Taxes § 104 — deduction of losses — profit motive

10a, 10b. The fact that a nonprofit golf and country club, whose income from club members is exempt from federal income tax under § 501(c)(7) of the Internal Revenue Code of 1954 (26 USCS § 501(c)(7)), has suffered actual losses from sales of food and drink to nonmembers in each of two consecutive tax years does not, by itself, prove that the club lacked a profit motive in those years—where the United States Supreme Court has determined that the club may offset such losses against investment income only if the nonmember sales were undertaken with an intent to profit—because a taxpayer's intent to profit is not disproved simply because no profit is realized during a particular year.

SYLLABUS BY REPORTER OF DECISIONS

As a nonprofit corporation that owns and operates a private social club, petitioner's income derived from membership fees and other receipts from members is exempt from income tax. However, all other income is nonexempt "unrelated business taxable income," defined in § 512(a)(3)(A) of the Internal Revenue Code as "the gross income (excluding any exempt function income), less the deductions allowed by this chapter which are directly connected with the production of the gross income (excluding exempt function income)." Petitioner has nonexempt income from sales of food and drink to nonmembers and from return on its investments. During its 1980 and 1981 tax years, petitioner offset net losses on nonmember sales against the earnings from its investments and reported no unrelated business taxable income. In computing its losses, petitioner identified two categories of expenses incurred in nonmember sales: (1) variable (direct) expenses, such as the cost of food, which, in each year in question, were exceeded by gross income from nonmember sales; and (2) fixed (indirect) overhead expenses, which would have been incurred whether or not sales had been made to nonmembers. It determined what portions of fixed expenses were attributable to nonmember sales by employing an allocation formula known as the "gross-to-gross method," based on the ratio that nonmember sales bore to total sales. The total of these fixed expenses and variable costs exceeded petitioner's gross income from nonmember sales. On audit, the Commissioner determined that petitioner could deduct expenses associated with nonmember sales up to the amount of receipts from the sales themselves, but could not use losses from those activities to offset its investment income because it had failed to show that its nonmember sales were undertaken with an intent to profit. Petitioner sought redetermination, and the Tax Court ruled in petitioner's favor, concluding that petitioner had adequately demonstrated that it had a profit motive, since its gross receipts from nonmember sales consistently exceeded the variable costs associated with those activities. The Court of Appeals reversed, holding that the Tax Court had applied an incorrect legal standard in determining that petitioner had demonstrated an intent to profit, because profit in this context meant the production of gains in excess of all direct and indirect costs. The court remanded the case for a determination whether petitioner engaged in its nonmember activities with the required intent to profit from those activities.

Held: Petitioner may use losses incurred in sales to nonmembers to offset investment income only if those sales were motivated by an intent to profit, which is to be determined by using the same allocation method as petitioner used to compute its actual profit or loss.

(a) The statutory scheme for the taxation of social clubs was intended to achieve tax neutrality by ensuring that members are not subject to tax disadvantages as a consequence of their decision to pool their resources for the purchase of social or recreational services, but was not intended to provide clubs with a tax advantage.

(b) By limiting deductions from unrelated business income to those expenses allowable as deductions under "this chapter," § 512(a)(3)(A) limits such deductions to expenses allowable under Chapter 1 of the Code. Since only § 162 of Chapter 1 serves as a basis for the deductions claimed here, and since a taxpayer's activities fall within § 162's scope only if an intent to profit is shown, see Commissioner v Groetzinger, 480 US 23, 35, 94 L Ed 2d 25, 107 S Ct 980, petitioner's nonmember sales must be motivated by an intent to profit. Dispensing with the profit-motive requirement in this case would run counter to the principle of tax neutrality underlying the statutory scheme.

(c) The Commissioner correctly concluded that the same allocation method must be used in determining petitioner's intent to profit as in computing its actual profit or loss. It is an inherent contradiction to argue that the same fixed expenses that are attributable to nonmember sales in calculating actual losses can also be attributed to membership activities in determining whether petitioner acted with the requisite intent to profit. Having chosen to calculate its actual losses on the basis of the gross-to-gross formula, petitioner is foreclosed from attempting to demonstrate its intent to profit based on some other allocation method.

(d) Petitioner has failed to show that it intended to earn gross income from nonmember sales in excess of its total costs, where fixed expenses are allocated using the gross-to-gross method.

876 F2d 897, affirmed.

Blackmun, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Brennan, White, Marshall, and Stevens, JJ., joined, and in which O'Connor, Scalia, and Kennedy, JJ., joined except as to Parts III-B and IV. Kennedy, J., filed an opinion concurring in part and concurring in the judgment, in which O'Connor and Scalia, JJ., joined.

APPEARANCES OF COUNSEL

Leonard J. Henzke, Jr. argued the cause for petitioner.

Clifford M. Sloan argued the cause for respondent.

Briefs of Counsel, p 847, infra.

OPINION OF THE COURT

Justice **Blackmun** delivered the opinion of the Court.

[1a, 2a] This case requires us to determine the circumstances under which a social club, in calculating its liability for federal income tax, may offset losses incurred in selling food and drink to nonmembers against the income realized from its investments.

I

Petitioner Portland Golf Club is a nonprofit Oregon corporation, most of whose income is exempt from federal income tax under § 501(c)(7) of the Internal Revenue Code of 1954, 26 USC § 501(c)(7) [26 USCS § 501(c)(7)].[1] Since 1914 petitioner has owned and operated a private golf and country club with a golf course, restaurant and bar, swimming pool, and tennis courts. The great part of petitioner's income is derived from membership dues and other receipts from the club's members; that income is exempt from tax. Portland Golf also has two sources of nonexempt "unrelated business taxable income": sales of food and drink to nonmembers, and return on its investments.[2]

The present controversy centers on Portland Golf's federal income tax liability for its fiscal years ended September 30, 1980, and September 30, 1981, respectively. Petitioner received investment income in the form of interest in the amount of $11,752 for fiscal 1980 and in the amount of $21,414 for fiscal 1981. App 18. It sustained net losses of $28,433 for fiscal 1980 and $69,608 for fiscal 1981 on sales of food and drink to nonmembers. Petitioner offset these losses against the earnings from its investments and therefore reported no unrelated business taxable income for the two tax years. In computing these losses, petitioner identified two different categories of expenses incurred in selling food and drink to nonmembers. First, petitioner incurred *variable* (or direct) expenses, such as the cost of food, which varied depending on the amount of food and beverages sold

---

[1] Section 501(c)(7) grants an exemption from federal income tax to "[c]lubs organized for pleasure, recreation, and other nonprofitable purposes, substantially all of the activities of which are for such purposes and no part of the net earnings of which inures to the benefit of any private shareholder."

[2] Section 511 of the Code provides that the "unrelated business taxable income" of an exempt organization shall be taxed at the ordinary corporate rate. The term "unrelated business taxable income," as applied to the income of a club such as petitioner, is defined in § 512(a)(3)(A). That definition encompasses all sources of income except receipts from the club's members.

(and therefore would not have been incurred had no sales to nonmembers been made). For each year in question, petitioner's gross income from nonmember sales exceeded these variable costs.[3] Petitioner also included as an unrelated business expense a portion of the *fixed* (or indirect) overhead expenses of the club—expenses which would have been incurred whether or not petitioner had made sales to nonmembers. In determining what portions of its fixed expenses were attributable to nonmember sales, petitioner employed an allocation formula, described as the "gross-to-gross method," based on the ratio that nonmember sales bore to total sales.[4] When fixed

expenses, so calculated, were added to petitioner's variable costs, the total exceeded Portland Golf's gross income from nonmember sales.

[3a] On audit, the Commissioner took the position that petitioner could deduct expenses associated with nonmember sales up to the amount of receipts from the sales themselves, but that it could not use losses from those activities to offset its investment income. The Commissioner based that conclusion on the belief that a profit motive was required if losses from these activities were to be used to offset income from other sources, and that Port-

---

[3] For 1980, gross receipts from nonmember sales in the bar and dining room totaled $84,422, while variable expenses were $61,821. For 1981, gross receipts totaled $106,547, while variable expenses were $78,407. App 85.

[4] For example, if 10% of petitioner's gross receipts were derived from nonmember sales, 10% of petitioner's fixed costs would be allocated to the nonexempt activity. That method of allocation appears rather generous to Portland Golf. The club charges nonmembers higher prices for food and drink than members are charged, even though nonmembers' meals presumably cost no more to prepare and serve. It therefore seems likely that the gross-to-gross method overstates the percentage of fixed costs properly attributable to nonmember sales. The parties, however, stipulated that this allocation method was reasonable. Id., at 17.

[5] The following table shows petitioner's losses when fixed costs are allocated using the gross-to-gross method:

	1980	*1981*
Gross income	$84,422	$106,547
Variable expenses	(61,821)	(78,407)
Allocated fixed expenses	(51,034)	(97,748)
Net loss	($28,433)	($69,608)

It is of interest to note that if petitioner's fixed costs had been allocated using an alternative formula, known as the "square foot and hours of actual use" method, see id., at 29, its gross receipts exceeded the sum of variable and allocated fixed costs for both years:

	1980	*1981*
Gross income	$84,422	$106,547
Variable expenses	(61,821)	(78,407)
Allocated fixed expenses	(3,153)	(4,666)
Net profit	$19,448	$23,474

land Golf had failed to show that its sales to nonmembers were undertaken with an intent to profit.[6] The Commissioner therefore determined deficiencies of $1,828 for 1980 and $3,470 for 1981; these deficiencies

reflected tax owed on petitioner's investment income. App 48-51.

Portland Golf sought redetermination in the Tax Court. That court ruled in petitioner's favor. 55 TCM 212 (1988). The court assumed, without deciding, that losses incurred in the course of sales to nonmembers could be used to offset other nonexempt income only if the sales were undertaken with an intent to profit. The court, however, held that Portland Golf had adequately demonstrated a profit motive, since its gross receipts from sales to nonmembers consistently exceeded the variable costs associated with those activities.[7] The court therefore held that "petitioner is entitled to offset its unrelated business taxable income from interest by its loss from its nonmember food and beverage sales computed by allocating a portion of its fixed expenses to the nonmember food and beverage sales activity in a manner which respondent agrees is acceptable." Id., at 217.

[4a] The United States Court of Appeals for the Ninth Circuit remanded. App to Pet for Cert 1a, judgt order reported at 876 F2d 897 (1989). The Court of Appeals held that the Tax Court had applied an incorrect legal standard in determining that Portland Golf had demonstrated an intent to profit from sales to nonmembers. The appellate court relied on its decision in North Ridge Country Club v Commissioner, 877 F2d 750 (1989), where it had ruled that a social club "can properly deduct losses from a non-member activity only if it undertakes that activity with the intent to profit, where profit means the production of gains in excess of all direct and indirect costs." Id., at 756. The same court in the

present case concluded: "Because Portland Golf Club could have reported gains in excess of direct and indirect costs, but did not do so, relying on a method of allocation stipulated to be reasonable by the Commissioner, we REMAND this case to the tax court for a determination of whether Portland Golf Club engaged in its non-member activities with the intent required under North Ridge to deduct its losses from those activities." App to Pet for Cert 2a-3a.[8]

---

[6] **[3b]** The general rule under the Code is that losses incurred in a profit-seeking venture may be deducted from unrelated income; expenses of a not-for-profit activity may be offset against the income from that activity, but losses may not be applied against income from other sources. See 1 B. Bittker & L. Lokken, Federal Taxation of Income, Estates and Gifts ¶¶ 20.1.2, 22.5.4, pp 20-6, 22-63 to 22-64 (2d ed 1989).

[7] The Tax Court stated that Portland Golf "did intend to make a profit, and did make a profit between the amount received from sales to nonmembers and the costs related to those sales which would not have been incurred absent those sales." 55 TCM, at 216. The Tax Court, in articulating this standard for determining whether intent to profit had been shown, relied on its earlier reviewed decision in North Ridge Country Club v Commissioner, 89 TC 563 (1987). That decision subsequently was reversed. 877 F2d 750 (CA9 1989).

[8] **[4b]** The basis for the Court of Appeals' remand order is not entirely clear to us. It appears, however, that the court left open the possibility that petitioner could establish its intent to profit by using some other method of allocating fixed costs (such as the "actual use" method, see n 5, supra), while continuing to use the gross-to-gross formula in computing actual losses. Both parties interpret the Court of Appeals' decision in this manner, and both express disapproval of that approach. See Brief for Respondent 47, n 25 ("[T]his argu-

Because of a perceived conflict with the decision of the Sixth Circuit in Cleveland Athletic Club, Inc. v United States, 779 F2d 1160 (1985),[9] and because of the importance of the issue, we granted certiorari. 493 US 1041, 107 L Ed 2d 830, 110 S Ct 834 (1990).

II

[5] Virtually all tax-exempt business organizations are required to pay federal income tax on their "unrelated business taxable income." The law governing social clubs, however, is significantly different from that governing other tax-exempt entities. As to exempt organizations other than social clubs, the Code defines "unrelated business taxable income" as "the gross income derived by any organization from any unrelated trade or business (as defined in section 513) regularly carried on by it, less the deductions allowed by this chapter which are directly connected with the carrying on of

[497 US 161]

such trade or business." 26 USC § 512(a)(1) [26 USCS § 512(a)(1)].[10] As to social clubs, however, "unrelated business taxable income" is defined as "the gross income (excluding any exempt function income), less the deductions allowed by this chapter which are directly connected with the production of the gross income (excluding exempt function income)." § 512(a)(3)(A).[11] The salient point is that § 512(a)(1) (which applies to most exempt organizations) limits "unrelated business taxable income" to income derived from a "trade or business," while § 512(a)(3)(A) (which applies to social clubs) contains no such limitation. Thus, a social club's investment income is subject to federal income tax, while the investment income of most other exempt organizations is not.

This distinction reflects the fact that a social club's exemption from federal income tax has a justification fundamentally different from that which underlies the grant of tax exemptions to other nonprofit entities. For most such organizations, exemption from federal income tax is intended to encourage the provision of services that are deemed socially beneficial. Taxes are levied on "unrelated business income" only in order to prevent tax-exempt organizations from gaining an unfair advantage over competing commercial enterprises.[12] See United States v

---

ment is untenable"); Brief for Petitioner 48 ("While the Ninth Circuit's formula is better than that of the Government, it is basically unprincipled"). Our disposition of the case makes unnecessary precise interpretation of the Court of Appeals' opinion.

[9] See also Brook, Inc. v Commissioner, 799 F2d 833 (CA2 1986); Rev Rul 81-69, 1981-1 Cum Bull 351-352; A. Scialabba, The Unrelated Business Taxable Income of Social Clubs, 10 Campbell L Rev 249 (1988).

[10] Section 513(a) defines "unrelated trade or business" as "any trade or business the conduct of which is not substantially related . . . to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption."

[11] Section 512(a)(3)(B) defines "exempt function income" as "the gross income from dues, fees, charges, or similar amounts paid by members of the organization as consideration for providing such members or their dependents or guests goods, facilities, or services in furtherance of the purposes constituting the basis for the exemption of the organization to which such income is paid."

[12] See S Rep No. 2375, 81st Cong, 2d Sess, 28 (1950) ("The problem at which the tax on unrelated business income is directed is primarily that of unfair competition. The tax-free status of [these] organizations enables

American College of Physicians,
[497 US 162]
475 US 834, 838, 89 L Ed 2d 841, 106 S Ct 1591 (1986) ("Congress perceived a need to restrain the unfair competition fostered by the tax laws"). Since Congress concluded that investors reaping tax-exempt income from passive sources would not be in competition with commercial businesses, it excluded from tax the investment income realized by exempt organizations.[13]

The exemption for social clubs rests on a totally different premise. Social clubs are exempted from tax not as a means of conferring tax *advantages,* but as a means of ensuring that the members are not subject to tax *disadvantages* as a consequence of their decision to pool their resources for the purchase of social or recreational services. The Senate Report accompanying the Tax Reform Act of 1969, 83 Stat 536, explained that that purpose does not justify a tax exemption for income derived from investments:

> "Since the tax exemption for social clubs and other groups is designed to allow individuals to join together to provide recreational or social facilities or other benefits on a mutual basis, without tax consequences, the tax exemption operates properly only when the sources of income of the organization are limited to receipts from the membership. Under such circumstances, the individual is in substantially the same position as if he had spent his income on pleasure or recreation (or other benefits) without the intervening separate organization. However, where the organization receives income from sources outside the membership, such as income from investments . . . upon which no tax is paid, the membership receives a benefit not contemplated by the exemption in that untaxed dollars can be used by the organization to provide pleasure or recreation (or other benefits) to its membership. . . . In such a case, the exemption is
> **[497 US 163]**
> no longer simply allowing individuals to join together for recreation or pleasure without tax consequences. Rather, it is bestowing a substantial additional advantage to the members of the club by allowing tax-free dollars to be used for their personal recreational or pleasure purposes. The extension of the exemption to such investment income is, therefore, a distortion of its purpose." S Rep No. 91-552, p 71 (1969).

[1b] In the Tax Reform Act of 1969, Congress extended the tax on "unrelated business income" to social clubs. As to these organizations, however, Congress defined "unrelated business taxable income" to include income derived from investments. Our review of the present case must therefore be informed by two central facts. First, Congress intended that the investment income of social clubs should be subject to federal tax, and indeed Congress de-

---

them to use their profits tax-free to expand operations, while their competitors can expand only with the profits remaining after taxes"); HR Rep No. 2319, 81st Cong, 2d Sess, 36 (1950). The tax on "unrelated business income" was added to the Code by the Revenue Act of 1950, ch 994, 64 Stat 906.

[13] See S Rep No. 2375, at 30-31; HR Rep No. 2319, at 38.

vised a definition of "unrelated business taxable income" with that purpose in mind. Second, the statutory scheme for the taxation of social clubs was intended to achieve tax *neutrality,* not to provide these clubs a tax advantage: Even the exemption for income derived from members' payments was designed to ensure that members are not disadvantaged as compared with persons who pursue recreation through private purchases rather than through the medium of an organization.

III

Petitioner's principal argument is that it may deduct losses incurred through sales to nonmembers without demonstrating that these sales were motivated by an intent to profit. In the alternative, petitioner contends (and the Tax Court agreed) that if the Code does impose a profit-motive requirement, then that requirement has been satisfied in this case. We address these arguments in turn.

A

[1c, 6a] We agree with the Commissioner and the Court of Appeals that petitioner may use losses incurred in sales to nonmembers

to offset investment income only if those sales were motivated by an intent to profit. The statute provides that, as to social clubs, "the term 'unrelated business taxable income' means the gross income (excluding any exempt function income), less the deductions *allowed by this chapter* which are directly connected with the production of the gross income (excluding exempt function income)." § 512(a)(3)(A) (emphasis added). As petitioner concedes, the italicized language limits deductions from unrelated business income to expenses allowable as deductions under Chapter 1 of the Code. See Brief for Petitioner 21-22. In our view, the deductions claimed in this case—expenses for food, payroll, and overhead in excess of gross receipts from nonmember sales—are allowable, if at all, only under § 162 of the Code. See North Ridge Country Club v Commissioner, 877 F2d, at 753; Brook, Inc. v Commissioner, 799 F2d 833, 838 (CA2 1986).[14] Section 162(a) provides a deduction for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." Although the statute does not expressly require that a "trade or business" must be carried on with an intent to profit, this Court has ruled that a taxpayer's activities fall within the scope of § 162 only if an intent to profit has been shown. See Commissioner v Groetzinger, 480 US 23, 35, 94 L Ed 2d 25, 107 S Ct 980 (1987) ("[T]o be engaged in a [§ 162] trade or business, . . . the taxpayer's primary purpose for engaging in the activity must be for income or profit"). Thus, the losses that Portland Golf incurred in selling food and drink to nonmembers will constitute "deductions allowed by this chapter" only if the club's nonmember sales were performed with an intent to profit.[15]

---

[14] Portland Golf appears to concede this point, too. See Brief for Petitioner 10 ("The parties agree that all of the expenses in issue . . . are the types of corporate expenses allowed as deductions by Code Section 162"). Petitioner does not identify any other Code provision which would serve as a basis for the deduction claimed in this case.

[1d] We see no basis for dispensing with the profit-motive requirement in the present case. Indeed, such an exemption would be in considerable tension with the statutory scheme devised by Congress to govern the taxation of social clubs. Congress intended that the investment income of social clubs (unlike the investment income of most other exempt organizations) should be subject to the same tax consequences as the investment income of any other taxpayer. To allow such an offset for social clubs would run counter to the principle of tax neutrality which underlies the statutory scheme.

[1e, 7a] Petitioner concedes that "[g]enerally a profit motive is a necessary factor in determining whether an activity is a trade or business." Brief for Petitioner 23. Petitioner contends, however, that by including receipts from sales to nonmembers within § 512(a)(3)(A)'s definition of "unrelated business taxable income," the Code has defined nonmember sales as a "trade or business," and has thereby obviated the need for an inquiry into the taxpayer's intent to profit. We disagree. In our view, Congress' use of the term "unrelated *business taxable income" to describe all receipts other than payments from the members hardly manifests an intent to define as a "trade or business" activities otherwise outside the scope of § 162. Petitioner's reading would render superfluous the words "allowed by this chapter" in § 512(a)(3)(A): If each taxable activity of a social club is "deemed" to be a trade or business, then all* of the expenses "directly connected" with those activities would presumably be deductible. Moreover, Portland Golf's interpretation ignores Congress' general intent to tax the income of social clubs according to the same principles applicable to other taxpayers. We therefore conclude that petitioner may offset losses incurred in sales to nonmembers against investment income only if its nonmember sales are motivated by an intent to profit.[16]

---

[15] **[6b]** Section 183 of the Code permits a taxpayer to offset expenses incurred in a not-for-profit activity against income from that activity up to the amount of the income. Even before the enactment of § 183, moreover, the courts and the Commissioner had not required that revenues earned in activities showing a net loss be declared as taxable income. See 1 Bittker & Lokken, n 6, supra, ¶ 22.5.4, p 22-63. Although § 183 is inapplicable to a nonprofit corporation such as Portland Golf, the Commissioner has followed longstanding tax principles in permitting the deduction of expenses incurred in nonmember sales up to the amount of petitioner's receipts. See Brief for Respondent 33. At issue in this case is petitioner's right to offset losses from nonmember sales against income from unrelated investments.

[16] The Code distinguishes a social club's "exempt function income" from its "unrelated business taxable income" by looking to the source of the payment: "[E]xempt function income" is limited to money received from the members. § 512(a)(3)(B). However, a social club could easily organize events whose primary purpose was to benefit the membership, yet arrange for nonmembers to make modest contributions toward the cost of the events. Those contributions would constitute "unrelated business taxable income"; but if losses incurred in such activities could be used to offset investment income, it would be relatively easy for clubs to avoid taxation on their investments.

[7b] The general rule that losses incurred in a not-for-profit activity may not be used to offset unrelated income rests on the recognition that one who incurs expenses without an intent to profit presumably derives some intrinsic pleasure or benefit from the activity. The Code's limitation on deductibility (expen-

B

[1f] Losses from Portland Golf's sales to nonmembers may be used to offset investment income only if those activities were undertaken with a profit motive—that is, an intent to generate receipts in excess of costs. The parties and the other courts in this case, however, have taken divergent positions as to the range of expenses that qualify as costs of the nonexempt activity and are to be considered in determining whether petitioner acted with the requisite profit motive. In the view of the Tax Court, petitioner's profit motive was established by the fact that the club's receipts from nonmember

sales exceeded its variable costs. Since Portland Golf's fixed costs, by definition, have been incurred even in the absence of sales to nonmembers, the Tax Court concluded that these costs should be disregarded in determining petitioner's intent to profit.

[2b] The Commissioner has taken no firm position as to the precise manner in which Portland Golf's fixed costs are to be allocated between member and nonmember sales. Indeed, the Commissioner does not even insist that any portion of petitioner's fixed costs must be attributed to nonmember activities in determining intent to profit.[17] He does insist, however, that the *same* allocation method is to be used in determining petitioner's intent to profit as in computing its actual profit or loss. See Brief for Respondent 44-46. In the present case the parties have stipulated that the gross-to-gross method provides a reasonable formula for allocating fixed costs, and Portland Golf has used that method in calculating the losses incurred in selling food and drink to nonmembers. The Commissioner contends that petitioner is therefore required to demonstrate an intent to earn gross receipts in excess of fixed and variable costs, with the allocable share of fixed costs being determined by the gross-to-gross method.

Although the Court of Appeals' opinion is not entirely clear on this point, see n 8, supra, that court seems to have taken a middle ground. The Court of Appeals expressly rejected the Tax Court's assertion that profit motive could be established

by a showing that gross receipts exceeded variable costs; the court insisted that *some* portion of fixed costs must be considered in determining intent to profit. The court appeared, however, to leave open the possibility that Portland Golf could use the gross-to-gross

---

ses may be deducted up to, but not above, the gross income produced by the activity) reflects the view that taxpayers should not be allowed to deduct what are, in essence, personal expenses simply because the activity in question generates some receipts. Just as an individual taxpayer may not offset personal expenses against income from other sources, a social club should not be allowed to deduct expenses incurred for the benefit of the membership from unrelated business income.

[17] The parties stipulated that the gross-to-gross formula was a reasonable method of allocating fixed expenses. App 17. In his brief to this Court, however, the Commissioner states: "There may be room to debate whether the fixed costs allocated by petitioner to its nonmember sales constitute true economic costs of that activity that ought to be treated as 'directly connected' to the production of the nonmember sales income. It might be argued that only the variable costs are 'directly connected with' the nonmember activity, and therefore that only those variable costs should offset the gross receipts from the nonmember income." Brief for Respondent 45, n 24.

method in calculating its actual losses, while using some *other* allocation method to demonstrate that its sales to nonmembers were undertaken with a profit motive.[18]

We conclude that the Commissioner's position is the correct one. Portland Golf's argument rests, as the Commissioner puts it, on an "inherent contradiction." Brief for Respondent 44. Petitioner's calculation of actual losses rests on the claim that a portion of its fixed expenses is properly regarded as attributable to the production of income from nonmember sales. Given this assertion, we do not believe that these expenses can be ignored (or, more accurately, attributed to petitioner's exempt activities) in determining whether petitioner acted with the requisite intent to profit. Essentially the same criticism applies to the Court of Appeals' approach. That court required petitioner to include *some* portion of fixed expenses in demonstrating its intent to profit, but it left open the possibility that petitioner could employ an allocation method different from that used in calculating its actual losses. Under that approach, some of petitioner's fixed expenses could be attributed to exempt functions in determining intent to profit and to nonmember sales in establishing the club's actual loss. This, like the rationale of the Tax Court, seems to us to rest on an "inherent contradiction."

Petitioner's principal response is that § 162 requires an intent to earn an *economic* profit, and that this is quite different from an intent to earn *taxable income.* Portland Golf emphasizes that numerous provisions of the Code establish

deductions and preferences which do not purport to mirror economic reality. Therefore, petitioner argues, taxpayers may frequently act with an intent to profit, even though the foreseeable (and, indeed, the intended) result of their efforts is that they suffer (or achieve) tax losses. Much of the Code, in petitioner's view, would be rendered a nullity if the mere fact of tax losses sufficed to show that a taxpayer lacked an intent to profit, thereby rendering the deductions unavailable. In Portland Golf's view, the parties have stipulated only that the gross-to-gross formula provides a reasonable method of determining what portion of fixed expenses is "directly connected" with the nonexempt activity for purposes of computing *taxable income.* That stipulation, Portland Golf contends, is irrelevant in determining the portion of fixed expenses that represents the *actual economic cost* of the activity in question.

[1g, 2c, 8, 9a] We accept petitioner's contention that § 162 requires only an intent to earn an economic profit. We acknowledge, moreover, that many Code provisions are designed to serve purposes (such as encouragement of certain types of investment) other than the accurate measurement of economic income. A taxpayer who takes advantage of deductions or preferences of that kind may establish an intent to profit even though he has no expectation of realizing taxable income.[19] The fixed expenses that Portland Golf seeks to allocate

---

[18] See n 8, supra. The Tax Court noted that petitioner would have shown a profit on sales to nonmembers in both 1980 and 1981 if fixed costs had been allocated under the "actual use" method. See 55 TCM 212, 213 (1988).

to its nonmember sales, however, are deductions of a different kind. The Code does not state that fixed costs are allocable on a gross-to-gross basis irrespective of economic reality. Rather, petitioner's right to use the gross-to-gross method rests on the club's assertion that this allocation formula reasonably identifies those expenses that are "directly connected" to the nonmember sales, § 512(a)(3)(A), and are "the ordinary and necessary expenses paid or incurred" in selling food and drink to nonmembers, see § 162(a).[20] Language such as this, it seems to us, reflects an attempt to measure economic income—not an effort to use the tax law to serve ancillary purposes. Having calculated its actual losses on the basis of the gross-to-gross formula, petitioner is therefore foreclosed from attempting to demonstrate its intent to profit by arguing that some other allocation method more accurately reflects economic reality.[21]

IV

[1i, 2e, 10a] We hold that any losses incurred as a result of petitioner's nonmember sales may be offset against its investment income only if the nonmember sales were undertaken with an intent to profit. We also conclude that in demonstrating the requisite profit motive, Portland Golf must employ the same method of allocating fixed expenses as it uses in calculating its actual loss. Petitioner has failed to show that it intended to earn gross income from nonmember sales in excess of its total (fixed plus variable) costs, where fixed expenses are allocated using the gross-to-gross method.[22] The judgment of the Court of Appeals is therefore affirmed.

---

[19] **[9b]** The Tax Court consistently has held that the possibility of realizing tax benefits should be disregarded in determining whether an intent to earn an economic profit has been shown. (That is, the reduction in tax liability cannot itself be the "profit.") See, e.g., Gefen v Commissioner, 87 TC 1471, 1490 (1986) ("A transaction has economic substance and will be recognized for tax purposes if the transaction offers a reasonable opportunity for economic profit, that is, profit exclusive of tax benefits"); Seaman v Commissioner, 84 TC 564, 588 (1985) ("'[P]rofit' means economic profit, independent of tax savings"); Surloff v Commissioner, 81 TC 210, 233 (1983) (same). Accord, Simon v Commissioner, 830 F2d 499, 500 (CA3 1987). Portland Golf does not dispute this principle. See Brief for Petitioner 39 ("The cases have uniformly held that taxable businesses, in order to deduct expenses in excess of income, need only show an 'economic profit' independent of tax savings, or 'economic gain' independent of tax savings") (footnotes omitted). We therefore assume, without deciding, that potential reductions in tax liability are irrelevant to the determination whether a profit motive exists.

[20] **[1h]** As stated earlier, § 512(a)(3)(A) limits deductions from unrelated business taxable income to "deductions allowed by this chapter." In the present case, petitioner may offset losses from nonmember sales against investment income only if those losses are deductible under § 162. That Code provision states: "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." Thus, the expenses petitioner seeks to deduct will constitute "deductions allowed by this chapter" only if they are "the ordinary and necessary expenses paid or incurred" in selling food and drink to nonmembers.

[21] **[2d]** We do not hold that, for other cases, any particular method of allocating fixed expenses must be used by social clubs. We hold only that the allocation method used in determining actual profit or loss must also be used in determining whether the taxpayer acted with a profit motive. Petitioner here has stipulated, however, to the reasonableness of the gross-to-gross method and has used that method in calculating its actual losses. We note that no other allocation method, used consistently, would have produced a result more favorable to petitioner. Had petitioner employed the actual-use method, or ignored fixed costs entirely, it could have established its intent to profit, but it would have realized a net gain from nonmember sales and its "unrelated business taxable income" would have been higher.

It is so ordered.

SEPARATE OPINION

Justice **Kennedy,** with whom Justice **O'Connor** and Justice **Scalia** join, concurring in part and concurring in the judgment.

The Tax Court found that Portland Golf Club's nonmember activity qualified as a trade or business under § 162(a) of the

[497 US 172]

Internal Revenue Code of 1954, 26 USC § 162(a) [26 USCS § 162(a)], and it allowed the club to deduct expenses associated with the activity from its income. 55 TCM 212 (1988), ¶ 88,076 P-H Memo TC. The Court of Appeals remanded because it found the club's profit motive unclear. App to Pet for Cert 1a, judgt order reported at 876 F2d 897 (1989). Although the Tax Court had determined that the club intended the gross receipts from the nonmember activity to exceed the direct costs, the Court of Appeals held that § 162(a) requires an intent to produce gains in excess of both direct and indirect costs. The Court of Appeals remanded the case to allow the Tax Court to reconsider the club's profit motive, taking account of the overhead and other fixed costs attributable to the nonmember activity. I agree with that decision, and so would affirm the Court of Appeals.

I join all but Parts III-B and IV of the Court's opinion. I otherwise concur only in the judgment because the Court decides a significant issue that is unnecessary to our disposition of the case and, in my view, decides it the wrong way. When the Court of Appeals instructed the Tax Court to consider the club's indirect costs, it did not specify how the club should allocate these costs between its member and nonmember activities. In particular, it left open the possibility that the club could use one allocation method to calculate its expenses under § 162(a), while using some other allocation method to demonstrate its profit motivation. See ante, at 167-168, 111 L Ed 2d, at 141. Although the Court purports to affirm the Court of Appeals, its opinion eliminates this possibility, and thus works a dramatic change in the remand order. The Court rules in Parts III-B and IV that, if the club uses the so-called gross-to-gross method to allocate its fixed costs when computing its expenses, it must use the same allocation method to prove its profit motivation. The Tax Court and Court of Appeals, in my view, should have had the opportunity to consider this issue in the first instance. Because the Court has

---

[22] **[2f, 10b]** The fact that petitioner suffered actual losses in 1980 and 1981 does not, by itself, prove that Portland Golf lacked a profit motive. A taxpayer's intent to profit is not disproved simply because no profit is realized during a particular year. See Treas Reg § 1.183-1(c)(1)(ii), 26 CFR § 1.183-1(c)(1)(ii) (1989) (most activities presumed to be engaged in for profit if gross income exceeds costs in any two of five consecutive years); Treas Reg § 1.183-2(b)(6), 26 CFR § 1.183-2(b)(6) (1989) ("A series of losses during the initial or start-up stage of an activity may not necessarily be an indication that the activity is not engaged in for profit"). Petitioner could offset these losses against investment income if it could demonstrate that it *intended* to earn gross income in excess of total costs, with fixed expenses being allocated under the gross-to-gross formula. Portland Golf has not asserted, however, that it possessed such a motive. The club's reluctance to make that argument is understandable: In every year from 1975 through 1984, petitioner incurred losses from its sales to nonmembers when fixed costs are allocated on a gross-to-gross basis. 55 TCM, at 213.

[497 US 173]

reached the question, however, I must state my disagreement with its conclusion.

A taxpayer's profit motive, in my view, cannot turn upon the particular accounting method by which it reports its ordinary and necessary expenses to the Internal Revenue Service (IRS). The Court cites no authority for its novel rule and we cannot adopt it simply because we confront a hard case. Section 162(a) provides: "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . ." 26 USC § 162(a) [26 USCS § 162(a)]. Although the section does not require a profit motivation by its express terms, we have inferred such a requirement because the words "trade or business," in their ordinary usage, contemplate activities undertaken to earn a profit. See Commissioner v Groetzinger, 480 US 23, 27-28, 94 L Ed 2d 25, 107 S Ct 980 (1987); Flint v Stone Tracy Co. 220 US 107, 171, 55 L Ed 389, 31 S Ct 342 (1911). Yet, I see no justification for making the profit-motive requirement more demanding than necessary to distinguish trades and businesses from other activities pursued by taxpayers. See Whipple v Commissioner, 373 US 193, 197, 10 L Ed 2d 288, 83 S Ct 1168 (1963). Because an activity may be a trade or business even if the taxpayer intended to show losses on its income tax forms under a permissible accounting method, the Court endorses an improper conception of profit motivation.

A taxpayer often may choose from among different accounting methods when computing its ordinary and necessary expenses under § 162(a). In this case, as stipulated by the IRS, the club could have allocated its fixed costs either by the gross-to-gross method or by the so-called actual-use method. Although the gross-to-gross method showed a net loss for the relevant tax years, the actual-use method would have shown a net profit. See ante, at 158, n 5, 111 L Ed 2d, at 135. If profit motivation turns upon the allocation method employed by the club in filling out its tax forms, then the status of the nonmember activity as a trade or business may lie within the control of

[497 US 174]

the club's accountants. I find this interpretation of the words "trade or business" simply "to affront common understanding and to deny the facts of common experience." Helvering v Horst, 311 US 112, 118, 85 L Ed 75, 61 S Ct 144, 131 ALR 655 (1940). A taxpayer does not alter the nature of an enterprise by selecting one reasonable allocation method over another.

The Court's decision also departs from the traditional practice of the courts and the IRS. Rather than relying on strict consistency in accounting, the courts long have evaluated profit motivation according to a variety of factors that indicate whether the taxpayer acted in a manner characteristic of one engaged in a trade or business. See, e.g., Teitelbaum v C. I. R. 294 F2d 541, 545 (CA7 1961); Patterson v United States, 459 F2d 487, 493-494 (Ct Cl 1972); see Boyle, What is a Trade or Business?, 39 Tax Law 737, 743-745 (1986); Lee, A Blend of Old Wines in a New Wineskin: Section 183 and Beyond, 29 Tax L Rev 347, 390-447 (1974). In a regulation based on a wide range of prior court decisions, the IRS itself has explained § 162 and profit motivation as follows:

> "Deductions are allowable under section 162 for expenses of carrying on activities which constitute a trade or business of the taxpayer and under section 212 for expenses incurred in connection with activities engaged in for the production or collection of income or for the management, conservation, or maintenance of property held for the production of income. Except as provided in section 183 and [26 CFR] § 1.183-1 [which authorize individuals and S-corporations to offset hobby losses], no deductions are allowable for expenses incurred in connection with activities which are not engaged in for profit. . . . The determination whether an activity is engaged in for profit is to be made by reference to objective standards, taking into account all of the facts and circumstances of each case. Although a reasonable expectation of profit is not required, the facts and circumstances
>
> **[497 US 175]**
>
> must indicate that the taxpayer entered into the activity, or continued the activity, with the objective of making a profit." 26 CFR § 1.183-2(a) (1989).

To facilitate the application of this general standard, the IRS has supplied a list of nine factors, also based on a wide body of case law, for evaluating the taxpayer's profit motive. These factors include: (1) the manner in which the taxpayer carries on the activity; (2) the expertise of the taxpayer or his advisors; (3) the time and effort expended by the taxpayer in carrying on the activity; (4) the expectation that assets used in the activity may appreciate in value; (5) the success of the taxpayer in carrying on other similar or dissimilar activities; (6) the taxpayer's history of income or losses with respect to the activity; (7) the amount of occasional profits, if any, which are earned; (8) the financial status of the taxpayer; and (9) the elements of personal pleasure or recreation. See §§ 1.183-2(b)(1)-(9).

The Court today limits this longstanding approach by pinning the profit-motive requirement to the accounting method that a taxpayer uses to report its ordinary and necessary expenses under § 162(a). Although the tax laws in general strive to reflect the true economic income of a taxpayer, the IRS at times allows taxpayers to use accounting methods that understate their income or overstate their expenses. In this case, as the Court itself acknowledges, the IRS stipulated that the club could use the gross-to-gross allocation method to calculate its expenses under § 162(a) even though this method tends to exaggerate the percentage of fixed costs attributable to the club's nonmember sales. See ante, at 157-158, n 4, 111 L Ed 2d, at 135. Yet, I see no basis for saying that, when the club took advantage of this unconditional stipulation, it committed itself to the legal position that the gross-to-gross method best reflects economic reality. Some inconsistency will exist if the club uses the gross-to-gross allocation method in computing the expenses, while using some other reasonable accounting method to prove that it undertook the nonmember activity [497 US 176] as a trade or business. But the solution to this inconsistency lies in altering the stipulation in other cases, not in changing the longstanding interpretation of profit motivation.

The precise effect of the Court's holding with respect to the club remains unclear. The Court states only that the club may not offset its losses from nonmember sales against its investment income. But I do not understand how the Court can confine its ruling to investment income alone. If the club's nonmember activity does not qualify as a trade or business, then the club cannot use § 162(a) to deduct *any* of the expenses associated with the nonmember activity, not even to the extent of gross receipts. Confronted with this difficulty at oral argument, respondent stated that, in the absence of statutory authority, the IRS has allowed an offset of expenses against gross receipts out of its own "generosity," a characteristic as rare as it is implausible. Tr of Oral Arg 42-43. The IRS, indeed, asserts the authority to disallow the offset in the future. See id., at 44. Cf. 26 USC § 183 [26 USCS § 183] (authorizing individuals and S-corporations to offset hobby losses). This possibility further counsels against making the profit-motive requirement more stringent than necessary to determine whether the Club undertook the nonmember activity as a trade or business. For these reasons, I join the Court's opinion, with the exception of Parts III-B and IV, and concur in the judgment.

ILLINOIS, Petitioner

v

EDWARD RODRIGUEZ

497 US 177, 111 L Ed 2d 148, 110 S Ct 2793

[No. 88-2018]

Argued March 20, 1990. Decided June 21, 1990.

Decision: Warrantless entry onto accused's premises held valid, under Fourth Amendment, where based on consent of third party whom police reasonably believe to possess common authority over premises.

SUMMARY

Police officers who were summoned to a Chicago, Illinois residence were met by a woman who showed signs of having been severely beaten. In a conversation with the officers, the woman stated that she had been assaulted by the accused earlier in the day at an apartment on another Chicago street, and that the accused was asleep at the apartment. Several times during the conversation, the woman referred to the apartment as "our" apartment, and she said that she had clothes and furniture there. The woman consented to travel to the apartment with the officers in order to unlock the door with her key so that the officers could enter and arrest the accused. Without obtaining either an arrest warrant for the accused or a search warrant for the apartment, the officers drove to the apartment, accompanied by the woman. Once there, the woman unlocked the door with her key and gave the officers permission to enter. The officers entered and observed in plain view drug paraphernalia and containers filled with a white powder that they believed—and that later analysis showed—to be cocaine. Proceeding to the bedroom, the officers found the accused asleep and discovered additional containers of white powder in two open attache cases. The officers arrested the accused and seized the drugs and related paraphernalia. The accused, who was charged in the Circuit Court of Cook County, Illinois with possession of a controlled substance with intent to deliver, moved to suppress all evidence seized at the time of his arrest, on the ground that the woman had vacated the apartment several weeks earlier and had no authority to consent to the officers' entry. The circuit

SUBJECT OF ANNOTATION

Beginning on page 850, infra

Validity, under Federal Constitution's Fourth Amendment, of search conducted pursuant to consent

Briefs of Counsel, p 848, infra.

court, granting the motion, ruled that (1) at the time she consented to the entry, the woman did not have common authority over the apartment, since she was an "infrequent visitor" at the apartment, rather than a "usual resident," and (2) the Federal Constitution's Fourth Amendment was violated even if the officers reasonably believed at the time of their entry that the woman possessed the authority to consent. The Appellate Court of Illinois, First District, affirmed in an unpublished order (177 Ill App 3d 1154, 550 NE2d 65), and the Supreme Court of Illinois denied the state's petition for leave to appeal (125 Ill 2d 572, 537 NE2d 816).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by SCALIA, J., joined by REHNQUIST, Ch. J., and WHITE, BLACKMUN, O'CONNOR, and KENNEDY, JJ., it was held that (1) a warrantless entry does not violate the Fourth Amendment's proscription of unreasonable searches and seizures where such entry is based upon the consent of a third party whom the police, at the time of entry, reasonably believe to possess common authority over the premises, but who in fact does not possess such authority, and (2) the case would be remanded for consideration of the question whether the officers reasonably believed that the woman had the authority to consent to the officers' entry of the apartment.

MARSHALL, J., joined by BRENNAN and STEVENS, JJ., dissenting, expressed the view that (1) if an individual did not voluntarily limit his expectation of privacy by allowing others to exercise authority over his possessions, the police could not dispense with the safeguards established by the Fourth Amendment, and (2) because the sole law enforcement purpose underlying third-party consent searches was avoiding the inconvenience of securing a warrant, a departure from the warrant requirement was not justified simply because an officer reasonably believed that a third party had consented to a search of the accused's home.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Search and Seizure §§ 14, 25 — warrantless entry of premises — consent of third party — common authority — reasonable belief of police

1a-1c. A warrantless entry by law enforcement officers onto a person's premises does not violate the proscription of unreasonable searches and seizures, under the Federal Constitution's Fourth Amendment, where such entry is based upon the consent of a third party whom the officers, at the time of the entry, reasonably believe to possess common authority over the premises, but who in fact does not possess such authority; whether the basis for a person's authority to consent to a search exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment, and all that the Fourth Amendment requires is

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

68 Am Jur 2d, Searches and Seizures §§ 49, 50

8 Federal Procedure, L Ed, Criminal Procedure § 22:156

18 Am Jur Proof of Facts 2d 681, Third Party's Lack of Authority to Consent to Search of Premises or Effects

5 Am Jur Trials 331, Excluding Illegally Obtained Evidence

USCS, Constitution, Amendment 4

US L Ed Digest, Search and Seizure §§ 14, 25

Index to Annotations, Reasonableness; Search and Seizure

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

What constitutes adequate and independent state substantive ground precluding Supreme Court review of state court decision on federal question. 59 L Ed 2d 924.

Validity, under Federal Constitution, of consent to search—Supreme Court cases. 36 L Ed 2d 1143.

Admissibility of evidence discovered in warrantless search of property or premises authorized by one having ownership interest in property or premises other than relative. 49 ALR Fed 511.

Admissibility of evidence discovered in search of defendant's property or residence authorized by one, other than relative, who is cotenant or common resident with defendant—state cases. 4 ALR4th 1050.

Authority to consent for another to search or seizure. 31 ALR2d 1078.

that they answer such question reasonably; the Fourth Amendment is no more violated when officers enter without a warrant because they reasonably, though erroneously, believe that the person who has consented to their entry is a resident of the premises than it is violated when they enter without a warrant because they reasonably, though erroneously, believe that they are in pursuit of a violent felon who is about to escape; as with other factual determinations bearing upon search and seizure, determination of a person's consent to enter premises must be judged against an objective standard of whether the facts available to the officer at the moment warrant a person of reasonable caution in the belief that the consenting party has authority over the premises—if not, then warrantless entry without further inquiry is unlawful unless authority actually exists, but, if so, the search is valid. (Marshall, Brennan, and Stevens, JJ., dissented from this holding.)

[See annotation p 850, infra]

Search and Seizure §§ 9, 14, 25 — warrantless entry of home — consent

2. The Federal Constitution's Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects; however, such prohibition does not apply to situations in which voluntary consent has been obtained, either from the individual whose property is searched or from a third party who possesses common authority over the premises.

[See annotation p 850, infra]

Evidence § 380; Search and Seizure §§ 9, 14 — entry of home — consent by third party — common authority — burden of proof

3. For purposes of determining, under the Federal Constitution's Fourth Amendment, whether consent to enter a person's home has been obtained from a third party who possesses "common authority" over the premises, the requisite common authority rests on mutual use of the property by persons generally having joint access or control for most purposes; the burden of establishing such common authority rests upon the state.

[See annotation p 850, infra]

Evidence § 980 — sufficiency — consent to entry of apartment — common authority

4. For purposes of determining, under the Federal Constitution's Fourth Amendment, whether consent to enter an accused's home has been obtained by police officers from a third party who possesses "common authority" over the premises, a state does not sustain its burden of establishing that a woman who consented to entry of an accused's apartment possessed common authority over the apartment, where the evidence shows that (1) the woman, along with her two small children, had moved out of the apartment almost a month before the officers entered the apartment, and had taken her and her children's clothing with her, though leaving behind some furniture and household effects, (2) after moving out, the woman sometimes spent the night at the apartment, but never invited her friends there and never went there herself when the accused was not at home, (3) the woman's name was not on the apartment lease, and she did not contribute to the rent, and (4) the woman had a key to the apartment, which key the woman stated at trial had been taken without the accused's knowl-

edge, although the woman testified at a preliminary hearing that the accused had given her the key.

[See annotation p 850, infra]

Appeal § 500 — review of state court decision — adequate state grounds — consent to warrantless entry

5a, 5b. The United States Supreme Court has jurisdiction to review a state appellate court decision insofar as the state appellate court rested its decision on federal law, rather than upon an adequate and independent state ground—notwithstanding the assertion that the state's constitution provides greater protection than is afforded under the Federal Constitution's Fourth Amendment, and that the state appellate court relied upon such fact when it determined that a reasonable belief by the police that a third party had common authority over an accused's apartment to consent to the warrantless entry of such apartment was insufficient—where (1) the state appellate court's opinion contains no plain statement that its decision rests on state law, (2) the opinion does not rely on, or even mention, any specific provision of the state constitution, nor even the state constitution generally, and (3) the state cases cited by the opinion rely upon no constitutional provisions other than the Federal Constitution's Fourth and Fourteenth Amendments.

Appeal § 487 — review of state court decision — adequate state grounds

6. When a state court decision is clearly based on state law that is both adequate and independent, the United States Supreme Court will not review the decision; on the other hand, when a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, the Supreme Court requires that the decision contain a plain statement that it rests upon adequate and independent state grounds, otherwise the Supreme Court will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Criminal Law § 46 — waiver of rights by accused

7. An accused's waiver of his trial rights cannot be given effect unless such waiver is knowing and intelligent.

Criminal Law § 46; Evidence § 681; Search and Seizure § 14 — violation of Fourth Amendment — waiver of rights

8. Evidence seized in violation of the Federal Constitution's Fourth Amendment may not be introduced on the basis of a trial court's mere reasonable belief—derived from statements by unauthorized persons—that the accused has waived his objection; however, nothing, either in the purposes behind requiring a knowing and intelligent waiver of an accused's trial rights or in the practical application of such a requirement, suggests that it ought to be extended to the Fourth Amendment's guarantee against unreasonable searches and seizures.

Evidence § 681; Search and Seizure §§ 9, 14 — Fourth Amendment — exclusionary rule — reasonableness of search of house — consent

9. Under the exclusionary rule, an accused is assured that no evidence seized in violation of the Federal Constitution's Fourth Amendment will be introduced at his trial unless

he consents; under the Fourth Amendment itself, the accused is assured not that no government search of his house will occur unless he consents, but that no such search will occur that is "unreasonable"; various elements can make a search of a person's house "reasonable" pursuant to the Fourth Amendment, one of which is the consent of the person or his cotenant.

[See annotation p 850, infra]

Search and Seizure § 5 — Fourth Amendment — objective of search

10. For purposes of the Federal Constitution's Fourth Amendment, the fundamental objective that alone validates all unconsented government searches is the seizure of persons who have committed or are about to commit crimes, or of evidence related to crimes.

Search and Seizure § 5 — Fourth Amendment — unconsented searches — requirement of reasonableness

11a, 11b. The "reasonableness" requirement of the Federal Constitution's Fourth Amendment, as applied to an unconsented government search, does not demand that the government be factually correct in its assessment that such a search will produce the seizure of persons who have committed or are about to commit crimes, or of evidence related to crimes; in order to satisfy such requirement, what is generally demanded of the many factual determinations that must regularly be made by agents of the government—whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the Fourth Amendment's warrant requirement—is not that they always be correct, but that they always be reasonable, and any mistakes made must be those of reasonable persons acting on facts leading sensibly to their conclusions of probability.

Search and Seizure § 27 — warrants — probable cause

12. Search warrants need only be supported by probable cause, which demands no more than a proper assessment of probabilities in particular factual contexts; if a magistrate, based upon seemingly reliable but factually inaccurate information, issues a warrant for the search of a house in which a sought-after felon is not present, has never been present, and was never likely to have been present, the owner of the house suffers one of the inconveniences all expose themselves to as the cost of living in a safe society, but does not suffer a violation of the Federal Constitution's Fourth Amendment.

Search and Seizure § 12 — search incident to arrest

13. A warrant is not required by the Federal Constitution's Fourth Amendment where a search is conducted incident to an arrest of a person.

Search and Seizure § 14 — apparent consent to search

14. When a claim of apparent consent to a search is raised, the issue is not whether the right to be free of searches has been waived, but whether the right, under the Federal Constitution's Fourth Amendment, to be free of unreasonable searches has been violated.

Appeal § 1692.1 — remand — issue not decided below

15. On certiorari to review a state appellate court judgment, the United States Supreme Court will

remand the case for consideration of the question whether, consistent with the Federal Constitution's Fourth Amendment, police officers possessed a reasonable belief that a third party had the authority to consent to the officers' entry of an accused's premises, where the Supreme Court holds that the state appellate court has erroneously ruled as a matter of law that a reasonable belief could not validate the officers' entry.

SYLLABUS BY REPORTER OF DECISIONS

Respondent was arrested in his apartment and charged with possession of illegal drugs, which the police had observed in plain view and seized. The officers did not have an arrest or search warrant, but gained entry to the apartment with the assistance of Gail Fischer, who represented that the apartment was "our[s]" and that she had clothes and furniture there, unlocked the door with her key, and gave the officers permission to enter. The trial court granted respondent's motion to suppress the seized evidence, holding that at the time she consented to the entry Fischer did not have common authority because she had moved out of the apartment. The court also rejected the State's contention that, even if Fischer did not have common authority, there was no Fourth Amendment violation if the police *reasonably believed* at the time of their entry that she possessed the authority to consent. The Appellate Court of Illinois affirmed.

Held:

1. The record demonstrates that the State has not satisfied its burden of proving that Fischer had "joint access or control for most purposes" over respondent's apartment, as is required under United States v Matlock, 415 US 164, 171, n 7, 39 L Ed 2d 242, 96 S Ct 988, to establish "common authority."

2. A warrantless entry is valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believe to possess common authority over the premises, but who in fact does not.

(a) Because the Appellate Court's opinion does not contain a "plain statement" that its decision rests on an adequate and independent state ground, it is subject to review by this Court. See Michigan v Long, 463 US 1032, 1040-1042, 77 L Ed 2d 1201, 103 S Ct 3469.

(b) What respondent is assured by the Fourth Amendment is not that no government search of his house will occur unless he consents; but that no such search will occur that is "unreasonable." As with many other factual determinations that must regularly be made by government agents in the Fourth Amendment context, the "reasonableness" of a police determination of consent to enter must be judged not by whether the police were correct in their assessment, but by the objective standard of whether the facts available at the moment would warrant a person of reasonable caution in the belief that the consenting party had authority over the premises. If not, then warrantless entry without further inquiry is unlawful unless authority actually exists. But if so, the search is valid. Stoner v California, 376 US 483, 11 L Ed 2d 856, 84 S Ct 889, reconciled.

(c) On remand, the appellate court must determine whether the police reasonably believed that Fischer had authority to consent to the entry into respondent's apartment.

Reversed and remanded.

Scalia, J., delivered the opinion of the Court, in which Rehnquist, C. J., and White, Blackmun, O'Connor, and Kennedy, JJ., joined. Marshall, J., filed a dissenting opinion, in which Brennan and Stevens, JJ., joined.

APPEARANCES OF COUNSEL

Joseph Claps argued the cause for petitioner.

Michael R. Dreeben argued the cause for the United States, as amicus curiae supporting petitioner, by special leave of court.

James W. Reilly argued the cause for respondent.

Briefs of Counsel, p 848, infra.

OPINION OF THE COURT

Justice **Scalia** delivered the opinion of the Court.

[1a] In United States v Matlock, 415 US 164, 39 L Ed 2d 242, 94 S Ct 988 (1974), this Court reaffirmed that a warrantless entry and search by law enforcement officers does not violate the Fourth Amendment's proscription of "unreasonable searches and seizures" if the officers have obtained the consent of a third party who possesses common authority over the premises. The present case presents an issue we expressly reserved in Matlock, see id., at 177, n 14, 39 L Ed 2d 242, 94 S Ct 988: Whether a warrantless entry is valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believe to possess common authority over the premises, but who in fact does not do so.

I

Respondent Edward Rodriguez was arrested in his apartment by law enforcement officers and charged with possession of illegal drugs. The police gained entry to the apartment with the consent and assistance of Gail Fischer, who had lived there with respondent for several months. The relevant facts leading to the arrest are as follows.

On July 26, 1985, police were summoned to the residence of Dorothy Jackson on South Wolcott in Chicago. They were met by Ms. Jackson's daughter, Gail Fischer, who showed signs of a severe beating. She told the officers that she had been assaulted by respondent Edward Rodriguez earlier that day in an apartment on South California Avenue. Fischer stated that Rodriguez was then asleep in the apartment, and she consented to travel there with the police in order to unlock the door with her key so that the officers could enter and arrest him. During this conversation, Fischer several times referred to the apartment on South California as "our" apartment, and said that she had clothes and furniture there. It is unclear whether she indicated that she currently lived at the apartment, or only that she used to live there.

The police officers drove to the apartment on South California, accompanied by Fischer. They did not obtain an arrest warrant for Rodriguez, nor did they seek a search warrant for the apartment. At the apartment, Fischer unlocked the door with her key and gave the officers permission to enter. They moved through the door into the living room, where they observed in plain view drug paraphernalia and containers filled with white powder that they believed (correctly, as later analysis showed) to be cocaine. They proceeded to the bedroom, where they found Rodriguez asleep and discovered additional containers of white powder in two open attaché cases. The officers arrested Rodriguez and seized the drugs and related paraphernalia.

Rodriguez was charged with possession of a controlled substance with intent to deliver. He moved to suppress all evidence seized at the time of his arrest, claiming that Fischer had vacated the apartment several weeks earlier and had no authority to consent to the entry. The Cook County Circuit Court granted the motion, holding that at the time she consented to the entry Fischer did not have common authority over the apartment. The Court concluded that Fischer was not a "usual resident" but rather an "infrequent visitor" at the apartment on South California, based upon its findings that Fischer's name was not on the lease, that she did not contribute to the rent, that she was not allowed to invite others to the apartment on her own, that she did not have access to the apartment when respondent was away, and that she had moved some of her possessions from the apartment. The Circuit Court also rejected the State's contention that, even if Fischer did not possess common authority over the premises, there was no Fourth Amendment violation if the police *reasonably believed* at the time of their entry that Fischer possessed the authority to consent.

The Appellate Court of Illinois affirmed the Circuit Court in all respects. The Illinois Supreme Court denied the State's Petition for Leave to Appeal, 125 Ill 2d 572, 537 **[497 US 181]** NE2d 816 (1989), and we granted certiorari. 493 US 932, 107 L Ed 2d 311, 110 S Ct 320 (1989).

II

[2] The Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects. Payton v New York, 445 US 573, 63 L Ed 2d 639, 100 S Ct 1371 (1980); Johnson v United States, 333 US 10, 92 L Ed 436, 68 S Ct 367 (1948). The prohibition does not apply, however, to situations in which voluntary consent has been obtained, either from the individual whose property is searched, see Schneckloth v Bustamonte, 412 US 218, 36 L Ed 2d 854, 93 S Ct 2041 (1973), or from a third party who possesses common authority over the premises, see United States v Matlock, supra, at 171, 39 L Ed 2d 242, 94 S Ct 988. The State of Illinois contends that that exception applies in the present case.

[3, 4] As we stated in Matlock, supra, at 171, n 7, 39 L Ed 2d 242, 94 S Ct 988, "[c]ommon authority" rests "on mutual use of the property by persons generally having joint access or control for most purposes . . . ." The burden of establishing that common authority rests upon the State. On the basis of this record, it is clear that burden was not sustained. The evidence showed that although Fischer, with her two small children, had lived with Rodriguez beginning in December 1984, she had moved out on July 1, 1985, almost a month before the search at issue here, and had gone to live with her mother. She took her and her children's clothing with her, though leaving behind some furniture and household effects. During the period after July 1 she sometimes spent the night at Rodriguez's apartment, but never invited her friends there, and never went there herself when he was not home. Her name was not on the lease nor did she contribute to the rent. She had a key to the apartment, which she said at trial she had taken without Rodriguez's knowledge (though she testified at the preliminary hearing that Rodriguez had given her the key). On these facts the State has not established that, with respect to the South California apartment, Fischer had

[497 US 182]

"joint access or control for most purposes." To the contrary, the Appellate Court's determination of no common authority over the apartment was obviously correct.

III

A

[5a] The State contends that, even if Fischer did not in fact have authority to give consent, it suffices to validate the entry that the law enforcement officers reasonably believed she did. Before reaching the merits of that contention, we must consider a jurisdictional objection: that the decision below rests on an adequate and independent state ground. Respondent asserts that the Illinois Constitution provides greater protection than is afforded under the Fourth Amendment, and that the Appellate Court relied upon this when it determined that a reasonable belief by the police officers was insufficient.

[5b, 6] When a state-court decision is clearly based on state law that is both adequate and independent, we will not review the decision. Michigan v Long, 463 US 1032, 1041, 77 L Ed 2d 1201, 103 S Ct 3469 (1983). But when "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law," we require that it contain a " 'plain statement' that [it] rests upon adequate and independent state grounds," id., at 1040, 1042, 77 L Ed 2d 1201, 103 S Ct 3469; otherwise, "we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." Id., at 1041, 77 L Ed 2d 1201, 103 S Ct 3469. Here, the Appellate Court's opinion contains no "plain statement" that its decision rests on state law. The opinion does not rely on (or even mention) any specific provision of the Illinois Constitution, nor even the Illinois Constitution generally. Even the Illinois cases cited by the opinion rely upon no constitutional provisions other than the Fourth and Fourteenth Amendments of the United States Constitution. We conclude that the Appellate Court of Illinois rested its decision on federal law.

[497 US 183]

B

On the merits of the issue, respondent asserts that permitting a reasonable belief of common authority to validate an entry would cause a defendant's Fourth Amendment rights to be "vicariously waived." Brief for Respondent 32. We disagree.

[7, 8] We have been unyielding in our insistence that a defendant's waiver of his trial rights cannot be given effect unless it is "knowing" and "intelligent." Colorado v Spring, 479 US 564, 574-575, 93 L Ed 2d 954, 107 S Ct 851 (1987); Johnson v Zerbst, 304 US 458, 82 L Ed 1461, 58 S Ct 1019, 146 ALR 357 (1938). We would assuredly not permit, therefore, evidence seized in violation of the Fourth Amendment to be introduced on the basis of a trial court's mere "reasonable belief"—derived from statements by unauthorized persons—that the defendant has waived his objection. But one must make a distinction between, on the one hand, trial rights that *derive* from the violation of constitutional guarantees and, on the other hand, the nature of those constitutional guarantees themselves. As we said in Schneckloth:

> "There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment. Nothing, either in the purposes behind requiring a 'knowing' and 'intelligent' waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures." 412 US, at 241, 36 L Ed 2d 854, 93 S Ct 2041.

[9] What Rodriguez is assured by the trial right of the exclusionary rule, where it applies, is that no evidence seized in violation of the Fourth Amendment will be introduced at his trial unless he consents. What he is assured by the Fourth Amendment itself, however, is not that no government search of his house will occur unless he consents; but that no such search will occur that is "unreasonable." US Const, Amdt 4. There are various elements, of course,

that can make a search of a person's house "reasonable"—one of which is the consent of the person or his cotenant. The essence of respondent's argument is that we should impose upon this element a requirement that we have not imposed upon other elements that regularly compel government officers to exercise judgment regarding the facts: namely, the requirement that their judgment be not only responsible but correct.

[10, 11a, 12] The fundamental objective that alone validates all unconsented government searches is, of course, the seizure of persons who have committed or are about to commit crimes, or of evidence related to crimes. But "reasonableness," with respect to this necessary element, does not demand that the government be factually correct in its assessment that that is what a search will produce. Warrants need only be supported by "probable cause," which demands no more than a proper "assessment of probabilities in particular factual contexts . . . ." Illinois v Gates, 462 US 213, 232, 76 L Ed 2d 527, 103 S Ct 2317 (1983). If a magistrate, based upon seemingly reliable but factually inaccurate information, issues a warrant for the search of a house in which the sought-after felon is not present, has never been present, and was never likely to have been present, the owner of that house suffers one of the inconveniences we all expose ourselves to as the cost of living in a safe society; he does not suffer a violation of the Fourth Amendment.

Another element often, though not

invariably, required in order to render an unconsented search "reasonable" is, of course, that the officer be authorized by a valid warrant. Here also we have not held that "reasonableness" precludes error with respect to those factual judgments that law enforcement officials are expected to make. In Maryland v Garrison, 480 US 79, 94 L Ed 2d 72, 107 S Ct 1013 (1987), a warrant supported by probable cause with respect to one apartment was erroneously issued for an entire floor that was divided (though not clearly) into two apartments. We upheld the search of the apartment not properly covered by the warrant. We said:

[497 US 185]

> "[T]he validity of the search of respondent's apartment pursuant to a warrant authorizing the search of the entire third floor depends on whether the officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable. Here it unquestionably was. The objective facts available to the officers at the time suggested no distinction between [the suspect's] apartment and the third-floor premises." Id., at 88, 94 L Ed 2d 72, 107 S Ct 1013.

[13] The ordinary requirement of a warrant is sometimes supplanted by other elements that render the unconsented search "reasonable." Here also we have not held that the Fourth Amendment requires factual accuracy. A warrant is not needed, for example, where the search is incident to an arrest. In Hill v California, 401 US 797, 28 L Ed 2d 484, 91 S Ct 1106 (1971), we upheld a search incident to an arrest, even though the arrest was made of the wrong person. We said:

> "The upshot was that the officers in good faith believed Miller was Hill and arrested him. They were quite wrong as it turned out, and subjective good-faith belief would not in itself justify either the arrest or the subsequent search. But sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time." Id., at 803-804, 28 L Ed 2d 484, 91 S Ct 1106.

[11b] It would be superfluous to multiply these examples. It is apparent that in order to satisfy the "reasonableness" requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government—whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the warrant requirement—is not that they always be correct, but that they always be reasonable.

[497 US 186]

As we put it in Brinegar v United States, 338 US 160, 176, 93 L Ed 1879, 69 S Ct 1302 (1949):

> "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be

those of reasonable men, acting on facts leading sensibly to their conclusions of probability."

[1b] We see no reason to depart from this general rule with respect to facts bearing upon the authority to consent to a search. Whether the basis for such authority exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment; and all the Fourth Amendment requires is that they answer it reasonably. The Constitution is no more violated when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises, than it is violated when they enter without a warrant because they reasonably (though erroneously) believe they are in pursuit of a violent felon who is about to escape. See Archibald v Mosel, 677 F2d 5 (CA1 1982).*

[497 US 187]

[14] Stoner v California, 376 US 483, 11 L Ed 2d 856, 84 S Ct 889 (1964), is in our view not to the contrary. There, in holding that police had improperly entered the defendant's hotel room based on the consent of a hotel clerk, we stated that "the rights protected by the Fourth Amendment are not to be eroded . . . by unrealistic doctrines of 'apparent authority.'" Id., at 488, 11 L Ed 2d 856, 84 S Ct 889. It is ambiguous, of course, whether the word "unrealistic" is descriptive or limiting—that is, whether we were condemning as unrealistic all reliance upon apparent authority, or whether we were condemning only such reliance upon apparent authority as is unrealistic. Similarly ambiguous is the opinion's earlier statement that "there [is no] substance to the claim that the search was reasonable because the police, relying upon the night clerk's expressions of consent, had a reasonable basis for the belief that the clerk had authority to consent to the search." Ibid. Was there no substance to it because it failed as a matter of law, or because the facts could not possibly support it? At one point the opinion does seem to speak clearly:

> "It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an

---

* Justice Marshall's dissent rests upon a rejection of the proposition that searches pursuant to valid third-party consent are "generally reasonable." Post, at 196, 111 L Ed 2d, at 166. Only a warrant or exigent circumstances, he contends, can produce "reasonableness"; consent validates the search only because the object of the search thereby "limit[s] his expectation of privacy," post, at 198, 111 L Ed 2d, at 167, so that the search becomes not really a search at all. We see no basis for making such an artificial distinction. To describe a consented search as a noninvasion of privacy and thus a nonsearch is strange in the extreme. And while it must be admitted that this ingenious device can explain why consented searches are lawful, it cannot explain why seemingly consented searches are "unreasonable," which is all that the Constitution forbids. See Delaware v Prouse, 440 US 648, 653-654, 59 L Ed 2d 660, 99 S Ct 1391 (1979) ("The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials"). The only basis for contending that the constitutional standard could not possibly have been met here is the argument that reasonableness must be judged by the facts as they were, rather than by the facts as they were known. As we have discussed in text, that argument has long since been rejected.

> agent." Id., at 489, 11 L Ed 2d 856, 84 S Ct 889.

But as we have discussed, what is at issue when a claim of apparent consent is raised is not whether the right to be free of searches has been *waived,* but whether the right to be free of *unreasonable* searches has been *violated.* Even if one does not think the Stoner opinion had this subtlety in mind, the supposed clarity of its foregoing statement is immediately compromised, as follows:

> "It is true that the night clerk clearly and unambiguously consented to the search. But there is nothing in the record to indicate that *the police had any basis whatsoever to believe that* the night clerk had been authorized by the petitioner to permit the police to search the petitioner's room." Ibid. (emphasis added).

The italicized language should have been deleted, of course, if the statement two sentences earlier meant that an appearance of authority could never validate a search. In the last analysis, one must admit that the rationale of Stoner was ambiguous—and perhaps deliberately so. It is at least a reasonable reading of the case, and perhaps a preferable one, that the police could not rely upon the obtained consent because they knew it came from a hotel clerk, knew that the room was rented and exclusively occupied by the defendant, and could not reasonably have believed that the former had general access to or control over the latter. Similarly ambiguous in its implications (the Court's opinion does not even allude to, much less discuss the effects of, "reasonable belief") is Chapman v United States, 365 US 610, 5 L Ed 2d 828, 81 S Ct 776 (1961). In sum, we were correct in Matlock, 415 US, at 177, n 14, 39 L Ed 2d 242, 94 S Ct 988, when we regarded the present issue as unresolved.

[1c] As Stoner demonstrates, what we hold today does not suggest that law enforcement officers may always accept a person's invitation to enter premises. Even when the invitation is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry. As with other factual determinations bearing upon search and seizure, determination of consent to enter must "be judged against an objective standard: would the facts available to the officer at the moment . . . 'warrant a man of reasonable caution in the belief' " that the consenting party had authority over the premises? Terry v Ohio, 392 US 1, 21-22, 20 L Ed 2d 889, 88 S Ct 1868 (1968). If not, then warrantless entry without further inquiry is unlawful unless authority actually exists. But if so, the search is valid.

* * *

[15] In the present case, the Appellate Court found it unnecessary to determine whether the officers reasonably believed that Fischer had the authority to consent, because it ruled as a matter of law that a reasonable belief could not validate the entry. Since we find that ruling to be in error, we remand for consideration of that question. The judgment of the Illinois Appellate Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

SEPARATE OPINION

Justice **Marshall,** with whom Justice **Brennan** and Justice **Stevens** join, dissenting.

Dorothy Jackson summoned police officers to her house to report that her daughter Gail Fischer had been beaten. Fischer told police that Ed Rodriguez, her boyfriend, was her assaulter. During an interview with Fischer, one of the officers asked if Rodriguez dealt in narcotics. Fischer did not respond. Fischer did agree, however, to the officers' request to let them into Rodriguez's apartment so that they could arrest him for battery. The police, without a warrant and despite the absence of an exigency, entered Rodriguez's home to arrest him. As a result of their entry, the police discovered narcotics that the State subsequently sought to introduce in a drug prosecution against Rodriguez.

The majority agrees with the Illinois Appellate Court's determination that Fischer did not have authority to consent to the officers' entry of Rodriguez's apartment. Ante, at 181-182, 111 L Ed 2d, at 156-157. The Court holds that the warrantless entry into Rodriguez's home was nonetheless valid if the officers reasonably believed that Fischer had authority to consent. Ante, at this page, 111 L Ed 2d, at 161. The majority's defense of this position rests on a misconception of the basis for third-party consent searches. That

[497 US 190]

such searches do not give rise to claims of constitutional violations rests not on the premise that they are "reasonable" under the Fourth Amendment, see ante, at 183-184, 111 L Ed 2d, at 157-158, but on the premise that a person may voluntarily limit his expectation of privacy by allowing others to exercise authority over his possessions. Cf. Katz v United States, 389 US 347, 351, 19 L Ed 2d 576, 88 S Ct 507 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection"). Thus, an individual's decision to permit another "joint access [to] or control [over the property] for most purposes," United States v Matlock, 415 US 164, 171, n 7, 39 L Ed 2d 242, 94 S Ct 988 (1974), limits that individual's reasonable expectation of privacy and to that extent limits his Fourth Amendment protections. Cf. Rakas v Illinois, 439 US 128, 148, 58 L Ed 2d 387, 99 S Ct 421 (1978) (because passenger in car lacked "legitimate expectation of privacy in the glove compartment," Court did not decide whether search would violate Fourth Amendment rights of someone who had such expectation). If an individual has not so limited his expectation of privacy, the police may not dispense with the safeguards established by the Fourth Amendment.

The baseline for the reasonableness of a search or seizure in the home is the presence of a warrant. Skinner v Railway Labor Executives' Assn. 489 US 602, 103 L Ed 2d 639, 109 S Ct 1402 (1989). Indeed, "searches and seizures inside a home without a warrant are presumptively unreasonable." Payton v New York, 445 US 573, 586, 63 L Ed 2d 639, 100 S Ct 1371 (1980). Exceptions to the warrant requirement must therefore serve "compelling" law enforcement goals. Mincey v Arizona, 437 US 385, 394, 57 L Ed 2d 290, 98 S Ct 2408 (1978). Because the sole law enforcement purpose underlying third-party consent searches is avoiding the inconvenience of securing a warrant, a departure from the warrant requirement is not justified simply because an officer reasonably believes a third party has consented to a search of the defendant's home. In holding otherwise, the majority ignores our longstanding view that "the informed and deliberate determinations

of magistrates . . . as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests." United States v Lefkowitz, 285 US 452, 464, 76 L Ed 877, 52 S Ct 420, 82 ALR 775 (1932).

I

The Fourth Amendment provides that "[t]he right of the people to be secure in their . . . houses . . . shall not be violated." We have recognized that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." United States v United States District Court, Eastern District of Michigan, 407 US 297, 313, 32 L Ed 2d 752, 92 S Ct 2125 (1972). We have further held that "a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions." Coolidge v New Hampshire, 403 US 443, 474, 30 L Ed 2d 120, 92 S Ct 26 (1971). Those exceptions must be crafted in light of the warrant requirement's purposes. As this Court stated in McDonald v United States, 335 US 451, 29 L Ed 2d 564, 91 S Ct 2022 (1948):

> "The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals." Id., at 455-456, 29 L Ed 2d 564, 91 S Ct 2022.

The Court has tolerated departures from the warrant requirement only when an exigency makes a warrantless search imperative to the safety of the police and of the community. See, e.g., id., at 456, 29 L Ed 2d 564, 91 S Ct 2022 ("We cannot be true to that

constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative"); Warden v Hayden, 387 US 294, 18 L Ed 2d 782, 87 S Ct 1642 (1967) (hot pursuit); Chimel v California, 395 US 752, 23 L Ed 2d 685, 89 S Ct 2034 (1969) (interest in officers' safety justifies search incident to an arrest); Michigan v Tyler, 436 US 499, 509, 56 L Ed 2d 486, 92 S Ct 1942 (1978) ("compelling need for official action and no time to secure a warrant" justifies warrantless entry of burning building). The Court has often heard, and steadfastly rejected, the invitation to carve out further exceptions to the warrant requirement for searches of the home because of the burdens on police investigation and prosecution of crime. Our rejection of such claims is not due to a lack of appreciation of the difficulty and importance of effective law enforcement, but rather to our firm commitment to "the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law." Mincey, supra, at 393, 57 L Ed 2d 290, 98 S Ct 2408 (citing United States v Chadwick, 433 US 1, 6-11, 53 L Ed 2d 538, 97 S Ct 2476 (1977)).

In the absence of an exigency, then, warrantless home searches and seizures are unreasonable under the Fourth Amendment. The weighty constitutional interest in preventing unauthorized intrusions into the home overrides any law enforcement interest in relying on the reasonable but potentially mistaken belief that a third party has authority to consent to such a search or seizure. Indeed, as the present case illustrates, only the minimal interest in avoiding the inconvenience of obtaining a warrant weighs in on the law enforcement side.

Against this law enforcement interest in expediting arrests is "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Silverman v United States, 365 US 505, 511, 5 L Ed 2d 734, 81 S Ct 679, 97 ALR2d 1277 (1961). To be sure, in some cases in which police officers reasonably rely on a

third party's consent, the consent will prove valid, no intrusion will result, and the police will have been spared the inconvenience of securing a warrant. But in other cases, such as this one, the authority claimed by the third party will be false. The reasonableness of police conduct must be measured in light of the possibility that the target has not consented. Where "[n]o reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate," the Constitution demands that the warrant procedure be observed. Johnson v United States, 333 US 10, 15, 92 L Ed 436, 68 S Ct 367 (1948). The concerns of expediting police work and avoiding paperwork "are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement." Ibid. In this case, as in Johnson, "[n]o suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction. . . . If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required." Ibid.

Unlike searches conducted pursuant to the recognized exceptions to the warrant requirement, see supra, at 191-192, 111 L Ed 2d, at 163, third-party consent searches are not based on an exigency and therefore serve no compelling social goal. Police officers, when faced with the choice of relying on consent by a third party or securing a warrant, should secure a warrant and must therefore accept the risk of error should they instead choose to rely on consent.

II

Our prior cases discussing searches based on third-party consent have never suggested that such searches are "reasonable." In United

States v Matlock, this Court upheld a warrantless search conducted pursuant to the consent of a

third party who was living with the defendant. The Court rejected the defendant's challenge to the search, stating that a person who permits others to have "joint access or control for most purposes . . . assume[s] the risk that [such persons] might permit the common area to be searched." 415 US, at 171, n 7, 39 L Ed 2d 242, 94 S Ct 988; see also Frazier v Cupp, 394 US 731, 740, 22 L Ed 2d 684, 89 S Ct 1420 (1969) (holding that defendant who left a duffel bag at another's house and allowed joint use of the bag "assumed the risk that [the person] would allow someone else to look inside"). As the Court's assumption-of-risk analysis makes clear, third-party consent limits a person's ability to challenge the reasonableness of the search only because that person voluntarily has relinquished some of his expectation of privacy by sharing access or control over his property with another person.

A search conducted pursuant to an officer's reasonable but mistaken belief that a third party had authority to consent is thus on an entirely different constitutional footing from one based on the consent of a third party who in fact has such authority. Even if the officers reasonably believed that Fischer had authority to consent, she did not, and Rodriguez's expectation of privacy was therefore undiminished. Rodriguez accordingly can challenge the warrantless intrusion into his home as a violation of the Fourth Amendment. This conclusion flows directly from Stoner v California, 376 US 483, 11 L Ed 2d 856, 84 S Ct 889 (1964). There, the Court required the suppression of evidence seized in reliance on a hotel clerk's consent to a warrantless search of a guest's room. The Court reasoned that the guest's right to be free of unwarranted intrusion "was a right . . . which only [he] could waive by word or deed, either directly or through an agent." Id., at 489, 11 L Ed 2d 856, 84 S Ct 889. Accordingly, the Court rejected resort to "unrealistic doctrines of 'apparent authority' " as a means of upholding the search to which the guest had not consented. Id., at 488, 11 L Ed 2d 856, 84 S Ct 889.[1]

---

[1] The majority insists that the rationale of Stoner is "ambiguous—and perhaps deliberately so" with respect to the permissibility of third-party searches where the suspect has not conferred actual authority on the third party. Ante, at 188, 111 L Ed 2d, at 161. Stoner itself is clear, however, today's majority manufactures the ambiguity. When the Stoner Court stated that the Fourth Amendment is to not to be eroded "by unrealistic doctrines of 'apparent authority,' " 376 US, at 488, 11 L Ed 2d 856, 84 S Ct 889, and that "only the petitioner could waive by word or deed" his freedom from a warrantless search, id., at 489, 11 L Ed 2d 856, 84 S Ct 889, the Court rejected precisely the proposition that the majority today adopts.

The majority regards Stoner's rejection of "unrealistic doctrines of 'apparent authority' " as ambiguous on the theory that the Court might have been referring only to unreasonable *applications* of such doctrines and not to the doctrines themselves. Ante, at 187, 111 L Ed 2d, at 160-161. But Stoner's express description of apparent authority *doctrines* as unrealistic cannot be viewed as mere happenstance. The Court in fact used the word "applications" in the same sentence to refer to misapplications of the *actual* authority doctrine: "Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.' " 376 US, at 488, 11 L Ed 2d 856, 84 S Ct 889 (emphasis added). The full sentence thus unambiguously confirms that Stoner rejected any reliance on *apparent* authority doctrines.

Nor did the Stoner Court leave open the door for a police officer to rely on a reason-

III

Acknowledging that the third party in this case lacked authority to consent, the majority seeks to rely on cases suggesting that reasonable but mistaken factual judgments by police will not invalidate otherwise reasonable searches. The majority reads these cases as establishing a "general rule" that "what is generally demanded of the many factual determinations that must regularly be made by agents of the government—whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the

warrant requirement—is not that they always be correct, but that they always be reasonable." Ante, at 185-186, 111 L Ed 2d, at 159.

The majority's assertion, however, is premised on the erroneous assumption that third-party consent searches are generally reasonable. The cases the majority cites thus provide no support for its holding. In Brinegar v United States, 338 US 160, 93 L Ed 1879, 69 S Ct 1302 (1949), for example, the Court confirmed the unremarkable proposition that police need only probable cause, not absolute certainty, to justify the arrest of a suspect on a highway. As Brinegar makes clear, the possibility of factual error is built into the probable cause standard, and such a standard, by its very definition, will in some cases result in the arrest of a suspect who has not actually committed a crime. Because probable cause defines the reasonableness of searches and seizures outside of the home, a search is reasonable under the Fourth Amendment whenever that standard is met, notwithstanding the possibility of "mistakes" on the part of police. Id., at 176, 93 L Ed 1879, 69 S Ct 1302. In contrast, our cases have already struck the balance against warrantless home intrusions in the absence of an exigency. See supra, at 191-192, 111 L Ed 2d, at 163. Because reasonable factual errors by law enforcement officers will not validate unreasonable searches, the reasonableness of the officer's mistaken belief that the third party had authority to consent is irrelevant.[2]

---

able but mistaken belief in a third party's authority to consent when it remarked that "there is nothing in the record to indicate that the police had any basis whatsoever to believe that the night clerk had been authorized by the petitioner to permit the police to search the petitioner's room." Id., at 489, 11 L Ed 2d 856, 84 S Ct 889. Stating that a defendant must "by word or deed" waive his rights, ibid., is not inconsistent with noting that, in a particular case, the absence of actual waiver is confirmed by the police's inability to identify any basis for their contention that waiver had indeed occurred.

[2] The same analysis applies to Hill v California, 401 US 797, 28 L Ed 2d 484, 91 S Ct 1106 (1971), where the Court upheld a search incident to an arrest in which officers reasonably but mistakenly believed that the person arrested in the defendant's home was the defendant. The Court refused to disturb the state court's holding that " '[w]hen the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest.' " Id., at 802, 28 L Ed 2d 484, 91 S Ct 1106 (brackets in original) (quoting People v Hill, 69 Cal 2d 550, 553, 446 P2d 521, 523 (1968)). Given that the Court decided Hill before the extension of the warrant requirement to arrests in the home, Payton v New York, 445 US 573, 63 L Ed 2d 639, 100 S Ct 1371 (1980), Hill should be understood no less than Brinegar as simply a gloss on the meaning of "probable cause." The holding in Hill rested on the fact that the police had probable cause to believe that Hill had committed a crime. In such circum-

[497 US 197]

The majority's reliance on Maryland v Garrison, 480 US 79, 94 L Ed 2d 72, 107 S Ct 1013 (1987), is also misplaced. In Garrison, the police obtained a valid warrant for the search of the "third floor apartment" of a building whose third floor in fact housed two apartments. Id., at 80, 94 L Ed 2d 72, 107 S Ct 1013. Although the police had probable cause to search only one of the apartments, they entered both apartments because "[t]he objective facts available to the officers at the time suggested no distinction between [the apartment for which they legitimately had the warrant and the entire third floor]." Id., at 88, 94 L Ed 2d 72, 107 S Ct 1013. The Court held that the officers' reasonable mistake of fact did not render the search unconstitutional. Id., at 88-89, 94 L Ed 2d 72, 107 S Ct 1013. As in Brinegar, the Court's decision was premised on the general reasonableness of the type of police action involved. Because searches based on warrants are generally reasonable, the officers' reasonable mistake of fact did not render their search "unreasonable." This reasoning is evident in the Court's conclusion that little would be gained by adopting additional burdens "over and above the bedrock requirement that, with the exceptions we have traced in our cases, the police may conduct searches only pursuant to a reasonably detailed warrant." Garrison, supra, at 89, n 14, 94 L Ed 2d 72, 107 S Ct 1013.

Garrison, like Brinegar, thus tells us nothing about the reasonableness under the Fourth Amendment of a warrantless arrest in the home based on an officer's reasonable but mistaken belief that the third party consenting to the arrest was empowered to do so. The majority's glib assertion that "[i]t would be superfluous to multiply" its citations to cases like Brinegar, Hill, and Garrison, ante, at 185, 111 L Ed 2d, at 159, is thus correct, but for a reason entirely different than the majority suggests. Those cases provide no illumination of the issue raised in this case, and further citation to like cases would be

[497 US 198]

as superfluous as the discussion on which the majority's conclusion presently depends.

IV

Our cases demonstrate that third-party consent searches are free from constitutional challenge only to the extent that they rest on consent by a party empowered to do so. The majority's conclusion to the contrary ignores the legitimate expectations of privacy on which individuals are entitled to rely. That a person who allows another joint access to his property thereby limits his expectation of privacy does not justify trampling the rights of a person who has not similarly relinquished any of his privacy expectation.

Instead of judging the validity of consent searches, as we have in the past, based on whether a defendant has in fact limited his expectation of privacy, the Court today carves out an additional exception to the warrant requirement for third-party consent searches without pausing to consider whether " 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment," Mincey, 437 US, at 394, 57 L Ed 2d 290, 98 S Ct 2408 (citations omitted). Where this free-floating creation of "reasonable" exceptions to the warrant requirement will end, now that the Court has departed from the balancing approach that has long been part of our Fourth

---

stances, the reasonableness of the arrest for which the police had probable cause was not undermined by the officers' factual mistake regarding the identity of the person arrested.

Amendment jurisprudence, is unclear. But by allowing a person to be subjected to a warrantless search in his home without his consent and without exigency, the majority has taken away some of the liberty that the Fourth Amendment was designed to protect.

EDITOR'S NOTE

An annotation on "Validity, under Federal Constitution's Fourth Amendment, of search conducted pursuant to consent," appears p 850, infra.

[497 US 199]

KANSAS AND MISSOURI, ETC., Petitioners

v

UTILICORP UNITED INC.

497 US 199, 111 L Ed 2d 169, 110 S Ct 2807

[No. 88-2109]

Argued April 16, 1990. Decided June 21, 1990.

Decision: Utility alone, and not states on behalf of utility customers, held to have standing to bring antitrust suit under § 4 of Clayton Act against natural gas suppliers allegedly overcharging utility.

SUMMARY

Section 4 of the Clayton Act (15 USCS § 15) authorizes "any person who shall be injured" by an antitrust violation to sue for treble damages, costs, and attorneys' fees; § 4C(a)(1) of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 USCS § 15c(a)(1)) authorizes state attorneys general to bring parens patriae actions on behalf of natural persons residing in their states to secure monetary relief for injury sustained by such persons as a result of antitrust violations. Alleging that certain natural gas producers and a gas pipeline company had conspired to inflate gas prices in violation of the federal antitrust laws, various plaintiffs—including public utility companies which purchased gas from the pipeline company in order to service customers in Kansas and Missouri, and the states of Kansas and Missouri, acting in part as parens patriae on behalf of residential consumers who purchased gas from the utilities—brought actions under § 4 against the producers and the pipeline company in the United States District Court for the District of Kansas. The producers and the pipeline company asserted that the utilities lacked standing to bring such an action under § 4, because they had passed all of the allegedly illegal price increase on to their customers and thus had suffered no antitrust "injury." The District Court, however, (1) interpreted United States Supreme Court precedents as holding that direct purchasers from antitrust violators suffer injury for purposes of § 4 to the full extent of an alleged overcharge even if all or part of that overcharge is passed on to customers, whereas those customers, as indirect purchasers, suffer no such injury; (2) granted the plaintiff utilities' motion

Briefs of Counsel, p 868, infra.

for partial summary judgment disallowing the "pass-on" defense; and (3) treating the utilities' motion as a motion to dismiss the states' parens patriae claims, granted that motion (695 F Supp 1109). On the states' interlocutory appeal, the United States Court of Appeals for the Tenth Circuit affirmed the dismissals (866 F2d 1286).

On certiorari, the United States Supreme Court affirmed. In an opinion by Kennedy, J., joined by Rehnquist, Ch. J., and Stevens, O'Connor, and Scalia, JJ., it was held that (1) when suppliers overcharge a regulated public utility for natural gas, in violation of the federal antitrust laws, and the utility passes on the overcharge to its customers, only the utility has a cause of action under § 4, because only the utility, as a direct purchaser, has suffered injury within the meaning of § 4; (2) the direct-purchaser rule's purpose of avoiding the complications of apportioning damages is applicable in a case involving a regulated utility, even though such utilities allegedly can pass on all of an overcharge to their customers, because the utility remains an injured party and must remain in the suit, given that the utility might have been able to raise its rates in the absence of increased costs and also that the pass-on process may take time; (3) an exception to the rule may be unnecessary, as state regulators might require utilities to pass on at least some of the recovery obtained in a § 4 suit; (4) even though bringing all classes of purchasers together in a single lawsuit may reduce the risk of multiple recovery which the rule was intended to eliminate, this reduction comes at too great a cost in complexity of litigation; (5) an exception to the rule in utility cases would not better secure the goal of vigorous antitrust enforcement, as (a) utilities do not lack incentive to prosecute § 4 actions and in fact have a record of vigorous antitrust enforcement, whereas (b) consumers may lack the ability to detect improper pricing by suppliers, and (c) state attorneys general can bring parens patriae actions on behalf of only resident natural persons and may hesitate to bring suit in cases involving smaller and speculative harm to consumers; (6) although a possible exception to the rule has been suggested if an indirect purchaser buys under a pre-existing cost-plus contract, such an exception would not apply in the case at hand, where the utility customers made no commitment to purchase any particular quantity and the utility had no guarantee of a particular profit, and the need to inquire into the precise operation of market forces would negate the simplicity and certainty that could justify a cost-plus contract exception; and (7) § 4C(a)(1) does not authorize a parens patriae action in such a case, because the utility is the injured party.

White, J., joined by Brennan, Marshall, and Blackmun, JJ., dissented, expressing the view that the case at hand raises none of the concerns which underlie the direct-purchaser rule, and that the rule should not be applied so as to deny the states standing to sue, because (1) the courts below assumed that there had been a perfect and provable pass-on of the allegedly illegal overcharge, and the issue should be decided on that basis; (2) where it is clear that the entire overcharge is passed through, the extent of the injury to indirect purchasers can easily be determined by examining their utility bills; (3) the problem of separating the price increase attributable to anticompetitive conduct from the price increase attributable to legitimate factors is not peculiar to indirect-purchaser suits; (4) granting standing in the case at hand would enhance enforcement of the antitrust laws, as, given that the pass-through of the overcharge is complete and easily demonstrated, the indirect purchasers—and the states in their parens patriae capacity—can readily discover their injury, whereas, though the utility could sue to recover lost profits, it has no incentive to seek a recovery of the overcharge which it has passed on; and (5) where there is a perfect and provable pass-through, there is no danger of multiple recovery of damages for the same anticompetitive conduct.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Restraints of Trade, Monopolies, and Unfair Trade Practices § 67 — damages suit — direct-purchaser rule — public utilities

1a-1c. When suppliers overcharge a regulated public utility for natural gas, in violation of the federal antitrust laws, and the utility passes on the overcharge to its customers, only the utility has a cause of action under § 4 of the Clayton Act (15 USCS § 15)—which authorizes any person injured by an antitrust violation to sue for treble damages, costs, and attorneys' fees—because only the utility, as a direct purchaser, has suffered injury within the meaning of § 4; thus, a state may not, as parens patriae, maintain an action

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 246, 289, 296, 300, 310, 360

24 Federal Procedure, L Ed, Monopolies and Restraints of Trade §§ 54:164-54:169, 54:177, 54:191

24 Am Jur Trials 1, Defending Antitrust Lawsuits

15 USCS §§ 15(a), 15c(a)(1)

US L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices § 67

Index to Annotations, Parens Patriae; Restraints of Trade and Monopolies; States

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Standing to sue, under § 4 of the Clayton Act (15 USCS § 15) and predecessor statute, to recover treble damages for antitrust violation—Supreme Court cases. 73 L Ed 2d 1427.

"Target area" doctrine as basis for determining standing to sue under § 4 of Clayton Act (15 USCS § 15) allowing treble damages for violation of antitrust laws. 70 ALR Fed 637.

Right of retail buyer of price-fixed product to sue manufacturer on federal antitrust claim. 55 ALR Fed 919.

Authority of state to sue as parens patriae to recover treble damages under § 4 of Clayton Act (15 USCS § 15). 23 ALR Fed 878.

Liability in damages for price-fixing in violation of federal antitrust laws as affected by plaintiff's passing excessive charges on to his own customers. 1 ALR Fed 500.

against the suppliers on behalf of the utility's customers, who as indirect purchasers have not suffered injury for purposes of § 4. (White, Brennan, Marshall, and Blackmun, JJ., dissented from this holding.)

Restraints of Trade, Monopolies, and Unfair Trade Practices § 67 — damages suit — public utilities — apportionment of costs

2a-2c. No exception to the rule that only a direct purchaser from an alleged antitrust violator, and not the direct purchaser's customers, suffers an injury within the meaning of § 4 of the Clayton Act (15 USCS § 15)—which authorizes any person injured by an antitrust violation to sue for treble damages, costs, and attorneys' fees—is warranted in cases where the direct purchasers are regulated public utilities, as the rule's purpose of avoiding the need to apportion overcharges between direct and indirect purchasers is applicable in such cases, despite the argument that a utility which passes on its costs pursuant to state regulation allegedly passes on the entire overcharge and thus allegedly obviates litigation over the apportionment of the overcharge, because (1) an overcharge may injure a utility, apart from lost business, even if the utility raises its rates to offset the increased costs, since the utility might have been able to raise its rates in the absence of increased costs but will not enjoy the benefit of a raise because of those costs; (2) the existence of state regulation does not simplify the problem of proving what the direct purchaser could have done in the absence of the overcharges, but instead adds another level of complexity, as a court examining such a question will have to determine what state regulators would allow, a case-by-case inquiry turning on the intricacies of state law; (3) the existence of such potential injury requires that the utility remain in the case, so that the addition of indirect purchasers would require the development of an apportionment formula; (4) apportionment may also be necessary because, even if a utility can pass on 100 percent of its costs at some point, the regulatory process and other factors may delay the passing-on process and force the utility to pay some of the increased costs in the interim; and (5) the regulation of utilities may make an exception to the direct-purchaser rule unnecessary, as state regulators might require utilities to pass on at least some of the recovery obtained in a § 4 suit. (White, Brennan, Marshall, and Blackmun, JJ., dissented from this holding.)

Restraints of Trade, Monopolies, and Unfair Trade Practices § 67 — damages suit — public utilities — multiple recovery

3a-3c. No exception to the rule that only a direct purchaser from an alleged antitrust violator, and not the direct purchaser's customers, suffers an injury within the meaning of § 4 of the Clayton Act (15 USCS § 15)—which authorizes any person injured by an antitrust violation to sue for treble damages, costs, and attorneys' fees—is warranted in cases where the direct purchasers are regulated public utilities, even though bringing all classes of direct and indirect purchasers together in a single lawsuit may reduce the risk of multiple recovery which the rule is intended to eliminate, because (1) that reduction comes at too great a cost, as expansion of the case to bring all of the potential plaintiffs together risks the confusion, cost, and error inherent in complex litigation, and (2) such expansion would serve little purpose, as state regulatory law may provide appropriate relief to consumers even if they cannot sue under § 4. (White, Brennan, Marshall, and Blackmun, JJ., dissented from this holding.)

Restraints of Trade, Monopolies, and Unfair Trade Practices § 67 — damages suit — public utilities — enforcement incentives

4a-4c. Although the argument for an exception, in cases involving antitrust violations against regulated public utilities, to the rule that only a direct purchaser from an alleged antitrust violator, and not the direct purchaser's customers, suffers an injury within the meaning of § 4 of the Clayton Act (15 USCS § 15)—which authorizes any person injured by an antitrust violation to sue for treble damages, costs, and attorneys' fees—might be stronger if it were shown that interpreting § 4 so as to allow such an exception would better secure the goal of vigorous enforcement of the antitrust laws, no such exception is warranted by such utilities' supposed lack of incentive to prosecute § 4 actions, even though utilities allegedly can pass on their excess costs to customers and allegedly may be required to pass on damages recovered in a § 4 action, since (1) utilities may bring § 4 actions in some instances for fear that regulators will not allow them to shift known and avoidable overcharges onto their customers; (2) no authority has been cited to the effect that a utility winning a § 4 action would have to pay the entire exemplary portion of its treble damages award to its customers; and (3) utilities have an established record of diligent antitrust enforcement, whereas (a) consumers may lack the expertise and experience necessary for detecting improper pricing by a utility's suppliers, and (b) state attorneys general, though possessing greater expertise, may hesitate to bring parens patriae actions in cases involving smaller and more speculative harm to consumers and, in any event, can bring such actions on behalf of only resident natural persons. (White, Brennan, Marshall, and Blackmun, JJ., dissented from this holding.)

Restraints of Trade, Monopolies, and Unfair Trade Practices § 67 — damages suit — exceptions to direct-purchaser rule

5a-5c. Although the rationales underlying the rule that only a direct purchaser from an alleged antitrust violator suffers an injury within the meaning of § 4 of the Clayton Act (15 USCS § 15)—which authorizes any person injured by an antitrust violation to sue for treble damages, costs, and attorneys' fees—will not apply with equal force in all cases, no exceptions to the rule should be carved out for particular types of markets, since the possibility of allowing exceptions, even in meritorious cases, would undermine the rule.

Restraints of Trade, Monopolies, and Unfair Trade Practices § 67 — damages suit — public utilities — cost-plus contracts

6a, 6b. Although a departure from the rule that only a direct purchaser from an alleged antitrust violator, and not the direct purchaser's customers, suffers an injury within the meaning of § 4 of the Clayton Act

(15 USCS § 15)—which authorizes any person injured by an antitrust violation to sue for treble damages, costs, and attorneys' fees—may be necessary with regard to a case in which an indirect purchaser buys under a pre-existing cost-plus contract, where the direct purchaser will bear no portion of an overcharge and otherwise suffer no injury, such a departure does not justify an exception to the rule in a particular case where suppliers have allegedly overcharged a regulated public utility for natural gas and states seek to bring parens patriae actions on behalf of the utility's customers, since (1) the utility customers in question made no commitment to purchase any particular quantity of gas, and the utility itself had no guarantee of any particular profit; (2) even though the utility raised its prices to cover its costs, its precise injury cannot be ascertained, because it is not known what might have happened in the absence of an overcharge; and (3) even if the utility customers have a highly inelastic demand for gas, the need to inquire into the precise operation of market forces would negate the simplicity and certainty that could justify a cost-plus contract exception.

Restraints of Trade, Monopolies, and Unfair Trade Practices § 67 — damages suit — public utilities — parens patriae

7a-7c. State attorneys general may not maintain an action under § 4 of the Clayton Act (15 USCS § 15)—which authorizes any person injured by an antitrust violation to sue for treble damages, costs, and attorneys' fees—on behalf of public utility customers who have allegedly borne the burden of inflated natural gas prices imposed on a utility by its suppliers, even though state attorneys general are authorized under § 4C(a)(1) of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 USCS § 15c(a)(1)) to bring actions as parens patriae on behalf of natural persons residing in their states who have suffered antitrust injuries, and even though state attorneys general may thus bring actions on behalf of consumers who have suffered injuries within the meaning of § 4, because in such a case, it is the utility that is the injured party under the antitrust laws, and the predicate for a parens patriae action has not been established. (White, Brennan, Marshall, and Blackmun, JJ., dissented in part from this holding.)

SYLLABUS BY REPORTER OF DECISIONS

The respondent—an investor-owned public utility operating in the petitioner States—and other utilities and natural gas purchasers filed suit in the District Court against a pipeline company and five gas producers under § 4 of the Clayton Act, which authorizes any person injured by a violation of the antitrust laws to sue for treble damages. The utilities alleged that the defendants had unlawfully conspired to inflate the price of gas that they supplied to the utilities, and sought treble damages for both the amount overcharged and the decrease in sales to customers caused by the overcharge. The petitioner States filed separate § 4 actions in the District Court against the same defendants for the alleged antitrust violation, asserting, inter alia, parens patriae claims on behalf of all natural persons residing in the States who had purchased gas from any utility at inflated prices. The court consolidated all of the actions and granted the utilities partial summary judgment with respect to the defendants' defense that, since the utilities had passed through all of the alleged overcharge to their customers, the utilities lacked standing because they had suffered no antitrust injury as required by § 4. In light of its conclusion that, under Hanover Shoe, Inc. v United Shoe Machinery Corp. 392 US 481, 20 L Ed 2d 1231, 88 S Ct 2224, and Illinois Brick Co. v Illinois, 431 US 720, 52 L Ed 2d 707, 97 S Ct 2061, the utilities had suffered antitrust injury as direct purchasers but their customers, as indirect purchasers, had not, the court dismissed the States' parens patriae claims. The Court of Appeals affirmed the dismissals.

Held: When suppliers violate antitrust laws by overcharging a public utility for natural gas, and the utility passes on the overcharge to its customers, only the utility has a cause of action under § 4 because it alone has suffered antitrust injury.

1. Three rationales underlie the indirect purchaser rule adopted in Hanover Shoe and Illinois Brick: (1) establishing the amount of an overcharge shifted to indirect purchasers would normally prove insurmountable in light of the wide range of considerations influencing a company's pricing decisions; (2) a pass-on defense would reduce the effectiveness of § 4 actions by diminishing the recovery available to any potential plaintiff; and (3) allowing suits by indirect purchasers would risk multiple liability because the alleged antitrust violators could not use a pass-on defense in an action by the direct purchasers.

2. The aforesaid rationales compel the conclusion that no exception to the indirect purchaser rule should be made for suits involving regulated public utilities that pass on all of their costs to their customers.

(a) Allowing indirect suits in such cases might necessitate complex cost apportionment calculations, since a utility bears at least some portion of a passed-on overcharge to the extent that it could have sought and gained state permission to raise its rates in the absence of the overcharge, cf. Hanover Shoe, supra, at 493, and n 9, 20 L Ed 2d 1231, 88 S Ct 2224, and since various factors, such as the need to seek regulatory approval, may delay the passing-on process and thereby require the utility, in the interim, to bear some of the overcharge's costs in the form of lower earnings. Here, the certified question leaves unclear whether the respondent could have raised its prices prior to the overcharge, whether it had passed on "most or all" of its costs at the time of its suit, and even the means by which the pass through occurred. Proof of these preliminary issues, which are irrelevant to the defendants' liability, would turn upon the intricacies of state law, and, if it were determined that respondent had borne some of the costs, would require the adoption of an apportionment formula, the very complexity that Hanover Shoe and Illinois Brick sought to avoid. Moreover, creating an exception in such cases would make little sense when, in light of all its difficulty, its practical significance is diminished by the fact that some States require utilities to pass on at least some of the recovery obtained in a § 4 suit to their customers.

(b) Even if the risk of multiple recoveries would be eliminated by allowing the petitioners to recover only the amount of the overcharge and the respondent to recover only damages for its lost sales in a single lawsuit, the additional complexity thereby introduced into a case that already has become quite complicated argues strongly for retaining the indirect purchaser rule. See Illinois Brick, supra, at 731, n 11, 52 L Ed 2d 707, 97 S Ct 2061.

(c) Allowing indirect suits by utility customers would not better promote the goal of vigorous enforcement of the antitrust laws. The petitioners' argument that utilities lack incentives to sue overcharging suppliers is unpersuasive, since utilities may bring § 4 actions in some instances for fear that regulators will not allow them to shift known and avoidable overcharges on to their customers; since there is no authority indicating that utilities, which may have to pass on § 4 damages recovered, would also have to pay the entire exemplary portion of these damages to customers; and since utilities, in fact, have an established record of diligent and successful antitrust enforcement. On the other hand, indirect purchaser actions might be ineffective because consumers may lack the expertise and experience necessary to detect improper pricing by a utility's suppliers, while state attorneys general may hesitate to exercise the parens patriae device in cases involving smaller, more speculative harm to consumers, and, in any event, may sue only on behalf of resident natural persons, leaving nonresidents and small businesses to fend for themselves.

(d) Although the rationales of Hanover Shoe and Illinois Brick may not apply with equal force in all instances, ample justifications exist for the Court's stated decision not to carve out exceptions to the indirect purchaser rule for particular types of markets. Illinois Brick, supra, at 744-745, 52 L Ed 2d 707, 97 S Ct 2061. Even assuming that any economic assumptions underlying the rule might be disproved in a specific case, it would be an unwarranted and counterproductive exercise to litigate a series of exceptions.

3. The suggestion in Hanover Shoe, supra, at 494, 20 L Ed 2d 1231, 88 S Ct 2224, and Illinois Brick, supra, at 736, 52 L Ed 2d 707, 97 S Ct 2061, that a departure from the indirect purchaser rule may be necessary when such a purchaser buys under a pre-existing cost-plus contract does not justify an exception in this case, since the respondent did not sell gas to its customers under such a contract. Even if an exception could be created for situations that merely resemble those governed by such contracts, that exception could not be applied here, since there is no certainty that the respondent has borne no portion of the overcharge and otherwise suffered no injury.

4. Section 4C of the Hart-Scott-Rodino Antitrust Improvements Act of 1976—which authorizes States to bring parens patriae actions on behalf of resident natural persons to secure monetary relief for property injury sustained by reason of certain antitrust violations—does not authorize the petitioners to sue on behalf of consumers notwithstanding the consumers' status as indirect purchasers. Section 4C did not establish any new substantive liability, but simply created a new procedural device to enforce existing rights of recovery under § 4 of the Clayton Act, Illinois Brick, supra, at 734, n 14, 52 L Ed 2d 707, 97 S Ct 2061, which rights belong to the respondent in this case.

866 F2d 1286, affirmed.

Kennedy, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Stevens, O'Connor, and Scalia, JJ., joined. White, J., filed a dissenting opinion, in which Brennan, Marshall, and Blackmun, JJ., joined.

APPEARANCES OF COUNSEL

Thomas J. Greenan argued the cause for petitioners.

Floyd R. Finch, Jr. argued the cause for respondent.

Lawrence S. Robbins argued the cause for the United States, as amicus curiae, supporting respondent, by special leave of court.

Briefs of Counsel, p 868, infra.

OPINION OF THE COURT

[497 US 203]

Justice **Kennedy** delivered the opinion of the Court.

[1a] Section 4 of the Clayton Act, 38 Stat 731, as amended, 15 USC § 15 [15 USCS § 15], authorizes any person injured by a violation of

[497 US 204]

the antitrust laws to sue for treble damages, costs, and an attorney's fee. We must decide who may sue under § 4 when, in violation of the antitrust laws, suppliers overcharge a public utility for natural gas and the utility passes on the overcharge to its customers. Consistent with Hanover Shoe, Inc. v United Shoe Machinery Corp. 392 US 481, 20 L Ed 2d 1231, 88 S Ct 2224 (1968), and Illinois Brick Co. v Illinois, 431 US 720, 52 L Ed 2d 707, 97 S Ct 2061 (1977), we hold that only the utility has the cause of action because it alone has suffered injury within the meaning of § 4.

I

The respondent, UtiliCorp United Inc., an investor-owned public utility operating in Kansas and Western Missouri, purchased natural gas from a pipeline company for its own use and for resale to its commercial and residential customers. Together with a second utility and several other gas purchasers, the respondent sued the pipeline company and five gas production companies in the United States District Court for the District of Kansas. The utilities alleged that the defendants had conspired to inflate the price of their gas in violation of the antitrust laws. They sought treble damages, pursuant to § 4 of the Clayton Act, for both the amount overcharged by the pipeline company and the decrease in sales to their customers caused by the overcharge.

The petitioners, the States of Kansas and Missouri, initiated separate § 4 actions in the District Court against the same defendants for the alleged antitrust violation. Acting as parens patriae, the petitioners asserted the claims of all natural persons residing within Kansas and Missouri who had purchased gas from any utility at inflated prices. They also

[497 US 205]

asserted claims as representatives of state agencies, municipalities, and other political subdivisions that had purchased gas from the defendants. The District Court consolidated all of the actions.

The defendants, in their answer, asserted that the utilities lacked standing under § 4. They alleged that, pursuant to state and municipal regulations and tariffs filed with state regulatory agencies, the utilities had passed through the entire wholesale cost of the natural gas to their customers. As a result, the defendants contended, the utility customers had paid 100 percent of the alleged overcharge, and the utilities had suffered no antitrust injury as required by § 4.

The utilities moved for partial summary judgment with respect to this defense, and the District Court granted their motion. The court ruled that our decisions in Hanover Shoe and Illinois Brick controlled its interpretation of § 4. It read these cases to hold that a direct purchaser from an antitrust violator suffers injury to the full extent of an illegal overcharge even if it passes on some or all of the overcharge to its customers. The District Court concluded that utilities, as direct purchasers, had suffered antitrust injury, but that their customers, as indirect purchasers, had not.

In light of its ruling, the District Court chose to treat the partial summary judgment motion as a motion to dismiss the petitioners' parens patriae claims. It then granted this motion but allowed the petitioners to take an interlocutory appeal under 28 USC § 1292(b) [28 USCS § 1292(b)]. It certified the following question to the Court of Appeals:

> "In a private antitrust action under 15 USC § 15 [15 USCS § 15] involving claims of price fixing against the producers of natural gas, is a State a proper plaintiff as parens patriae for its citizens who paid inflated prices for natural gas, when the lawsuit already includes as plaintiffs those public utilities who paid the inflated prices upon direct purchase from the producers and who subsequently passed on most or all of the price increase to the citizens
>
>
>
> of the State?" In re Wyoming Tight Sands Antitrust Cases, 695 F Supp 1109, 1120 (Kan 1988).

The Court of Appeals answered the question in the negative. It agreed with District Court that Hanover Shoe and Illinois Brick required dismissal of the parens patriae claims. See In re Wyoming Tight Sands Antitrust Cases, 866 F2d 1286, 1294 (CA10 1989). We granted certiorari to resolve a conflict between this decision and Illinois ex rel. Hartigan v Panhandle Eastern Pipe Line Co., 852 F2d 891 (CA7 1988) (en banc). 493 US 1041, 107 L Ed 2d 829, 110 S Ct 833 (1990). We now affirm.

II

Section 4 of the Clayton Act provides in full:

> "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 USC § 15(a) [15 USCS § 15(a)].

As noted by the District Court and the Court of Appeals, we have applied this section in two cases involving allegations that a direct purchaser had passed on an overcharge to its customers.

In Hanover Shoe, Inc. v United Shoe Machinery Corp., supra, Hanover alleged that United had monopolized the shoe manufacturing machinery industry in violation of § 2 of the Sherman Act, 26 Stat 209, as amended, 15 USC § 2 [15 USCS § 2]. It sought treble damages under § 4 of the Clayton Act for overcharges paid in leasing certain machinery from United. United defended, in part, on the ground that Hanover had passed on the overcharge to its customers and, as a result, had suffered no injury. We rejected the defense for two reasons. First, noting that a wide range of considerations may influence a company's pricing decisions, we concluded that

establishing the amount of an overcharge shifted to indirect purchasers "would normally prove insurmountable." 392 US, at 493, 20 L Ed 2d 1231, 88 S Ct 2224. Second, we reasoned that a pass-on defense would reduce the effectiveness of § 4 actions by diminishing the recovery available to any potential plaintiff. See id., at 494, 20 L Ed 2d 1231, 88 S Ct 2224.

In Illinois Brick Co. v Illinois, 431 US 720, 52 L Ed 2d 707, 97 S Ct 2061 (1977), we applied these considerations to reach a similar result. The State of Illinois sued Illinois Brick and other concrete block manufacturers for conspiring to raise the cost of concrete blocks in violation of § 1 of the Sherman Act, 26 Stat 209, as amended, 15 USC § 1 [15 USCS § 1]. We ruled that the State had suffered no injury within the meaning of § 4 because Illinois Brick had not sold any concrete blocks to it. The company, instead, had sold the blocks to masonry subcontractors, who in turn had sold them to the State's general contractors. We decided that, because Illinois Brick could not use a pass-on defense in an action by direct purchasers, it would risk multiple liability to allow suits by indirect purchasers. See 431 US, at 730-731, 52 L Ed 2d 707, 97 S Ct 2061. We declined to overrule Hanover Shoe or to create exceptions for any particular industries. See 431 US, at 735-736, 744-745, 52 L Ed 2d 707, 97 S Ct 2061.

[1b] Like the State of Illinois in Illinois Brick, the consumers in this case have the status of indirect purchasers. In the distribution chain, they are not the immediate buyers from the alleged antitrust violators. They bought their gas from the utilities, not from the suppliers said to have conspired to fix the price of the gas. Unless we create an exception to the direct purchaser rule established in Hanover Shoe and Illinois Brick, any antitrust claim against the defendants is not for them, but for the utilities to assert.

[2a, 3a, 4a, 5a, 6a, 7a] The petitioners ask us to allow them to press the consumers' claims for three reasons. First, they assert that none of the rationales underlying Hanover Shoe or Illinois Brick exist in cases involving regulated public utilities. Second, they argue that we should apply an exception, suggested in

Illinois Brick, for actions based upon cost-plus contracts. Third, they maintain that § 4C of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat 1394, as amended, 15 USC § 15c [15 USCS § 15c], authorizes them to assert claims on behalf of utility customers even if the customers could not assert any claims themselves. Affirming the Court of Appeals, we reject each of these contentions in turn.

III

[2b, 3b, 4b, 5b] The petitioners assert that we should allow indirect purchaser suits in cases involving regulated public utilities that pass on 100 percent of their costs to their customers. They maintain that our concerns in Hanover Shoe and Illinois Brick about the difficulties of apportionment, the risk of multiple recovery, and the diminution of incentives for private antitrust enforcement would not exist in such cases. We disagree. Although the rationales of Hanover Shoe and Illinois Brick may not apply with equal force in all instances, we find it inconsistent with precedent and imprudent in any event to create an exception for regulated public utilities.

A

[2c] The direct purchaser rule serves, in part, to eliminate the complications of apportioning overcharges between direct and indirect purchasers. See Hanover Shoe, supra, at 493, 20 L Ed 2d 1231, 88 S Ct 2224; Illinois Brick, supra, at 740-742, 52 L Ed 2d 707, 97 S Ct 2061; Blue Shield of Va. v McCready, 457 US 465, 475, n 11, 73 L Ed 2d 149, 102 S Ct 2540 (1982). The petitioners find the rule unnecessary, in this respect, when a utility passes on its costs to its customers pursuant to state regulations or tariffs filed with a utility commission. In such cases, they assert, the customers pay the entire overcharge, obviating litigation over its apportionment. They maintain that they can prove the exact injury to the residential customers whom they represent because the respondent made periodic public filings showing the volume and price of gas that it sold to these consumers. They ask us to allow them to sue for

[497 US 209]

the entire amount of the overcharge and to limit the respondent's recovery to damages for its lost business.

The petitioners have oversimplified the apportionment problem in two respects. First, an overcharge may injure a utility, apart from the question of lost business, even if the utility raises its rates to offset its increased costs. As we explained in Hanover Shoe:

> "The mere fact that a price rise followed an unlawful cost increase does not show that the sufferer of the cost increase was undamaged. His customers may have been ripe for his price rise earlier; if a cost rise is merely the occasion for a price increase a businessman could have imposed absent the rise in his costs, the fact that he was earlier not enjoying the benefits of the higher price should not permit the supplier who charges an unlawful price to take those benefits from him without being liable for damages. This statement merely recognizes the usual principle that the possessor of a right can recover for its unlawful deprivation whether or not he was previously exercising it." 392 US, at 493, n 9, 20 L Ed 2d 1231, 88 S Ct 2224.

In other words, to show that a direct purchaser has borne no portion of an overcharge, the indirect purchaser would have to prove, among other things, that the direct purchaser could not have raised its rates prior to the overcharge.

In Hanover Shoe, however, we decided not to allow proof of what the direct purchaser might have done because of the "nearly insuperable difficulty" of the issue. Id., at 493, 20 L Ed 2d 1231, 88 S Ct 2224. The petitioners assume that the presence of state regulation would make the proof less difficult here. We disagree. The state regulation does not simplify the problem but instead imports an additional level of complexity. To decide whether a utility has borne an overcharge, a court would have to consider not only the extent to which market conditions would have allowed the utility to raise its rates prior to the overcharge, as in the case of an unregulated business, but also what the state regulators would have allowed. In particular, [497 US 210] to decide that an overcharge did not injure a utility, a court would have to determine that the State's regulatory schemes would have barred any rate increase except for the amount reflected by cost increases. Proof of this complex preliminary issue, one irrelevant to the liability of the defendant, would proceed on a case-by-case basis and would turn upon the intricacies of state law.

From the certified question in this case, we do not know whether the respondent could have raised its prices prior to the overcharge. Its customers may have been willing to pay a greater price, and the Kansas and Missouri regulators may have allowed a rate increase based on factors other than strict costs. See Midwest Gas Users Assn. v State Corporation Comm'n, 5 Kan App 2d 653, 661, 623 P2d 924, 931 (1981); State ex rel. Associated Natural Gas Co. v Public Service Comm'n, 706 SW2d 870, 879-880 (Mo App 1985). To the extent that the respondent could have sought and gained permission to raise its rates in the absence of an overcharge, at least some portion of the overcharge is being borne by it; whether by overcharge or by increased rates, consumers would have been paying more for natural gas than they had been paying in the past. Because of this potential injury, the respondent must remain in the suit. If we were to add indirect purchasers to the action, we would have to devise an apportionment formula. This is the very complexity that Hanover Shoe and Illinois Brick sought to avoid.

Second, difficult questions of timing might necessitate apportioning overcharges if we allowed indirect suits by utility customers. Even if, at some point, a utility can pass on 100 percent of its costs to its customers, various factors may delay the passing-on process. Some utilities must seek approval from the governing regulators prior to raising their rates. Other utilities, pursuant to purchase gas adjustment clauses (PGA's) filed with state regulators, may adjust their rates to reflect changes in their wholesale costs according to prearranged formulas without seeking regulatory approval in [497 US 211] each instance. Yet, even utilities that use PGA's often encounter some delay. See Brief for State of Illinois as Amicus Curiae 9, n 11 (describing the various time lags under a typical PGA between the increase in a utility's wholesale costs and the rise in consumer rates). During any period in which a utility's costs rise before it may adjust its rates, the utility will bear the costs in the form of lower earnings. See S. Breyer, Regulation and its Reform 48-49 (1982). Even after the utility raises its rates, moreover, the pass-through process may take time to complete. During this time, the utility and its customers each would pay for some of the increased costs.

In this case, we could not deprive the respondent of its § 4 action without first determining that the passing-on process in fact had allowed it to shift the entire overcharge to its customers. The certified question, however, leaves unclear whether the respondent had passed on "most or all" of its costs at the time of the suit. In addition, even the means by which the pass-through occurred remain unsettled. The petitioners allege that, pursuant to formulas in PGA's filed with the Kansas Corporation Commission and the Missouri Public Service Commission, the respondent "automatically" adjusted some of its rates to reflect increases in the wholesale cost of gas. Brief for Petitioners 5, n 5. The respondent, however, maintains that PGA's did not govern all of its sales. See Brief for Respondent 17. The difficulties posed by issues of this sort led us to adopt the direct purchaser rule, and we must decline to create an exception that would require their litigation. As we have stated before: "[T]he task of disentangling overlapping damages claims is not lightly to be imposed upon potential antitrust litigants, or upon the judicial system." McCready, 457 US, at 475, n 11, 73 L Ed 2d 149, 102 S Ct 2540.

In addition to these complications, the regulation of utilities itself may make an exception to Illinois Brick unnecessary. Our decisions in Hanover Shoe and Illinois Brick often deny relief to consumers who have paid inflated prices

[497 US 212]

because of their status as indirect purchasers. See 2 P. Areeda & D. Turner, Antitrust Law § 337e, pp 193-194 (1978); Harris & Sullivan, Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis, 128 U Pa L Rev 269, 342 (1979). Although one might criticize Illinois Brick for this consequence in other circumstances, the criticism may have less validity in the context of public utilities. Both the Court of Appeals in this case and the Seventh Circuit in Illinois ex rel. Hartigan v Panhandle Eastern Pipeline Co., 852 F2d 891 (CA7 1988), have suggested that state regulators would require the utilities to pass on at least some of the recovery obtained in a § 4 suit. See Wyoming Tight Sands, 866 F2d, at 1291; Panhandle Eastern, supra, at 895. State regulators have followed this approach elsewhere. See, e.g., Louisiana Power & Light Co., Ex Parte, Nos. U-17906, U-12636, U-17649, 1989 La PUC LEXIS 3, *31-*32 (Mar. 1, 1989) (requiring Louisiana Power & Light Co., which won a $190 million judgment against United Gas Pipe Line Co., to flow the proceeds back to ratepayers through reduced rates over a 5-year period). If Kansas and Missouri impose similar requirements, then even if the customers cannot sue the alleged antitrust violaters, they may receive some of the compensation obtained by the respondent. Creating an exception to allow apportionment in violation of Illinois Brick would make little sense when, in light of all its difficulty, its practical significance is so diminished.

B

[3c] The Illinois Brick rule also serves to eliminate multiple recoveries. See Illinois Brick, 431 US, at 730-731, 52 L Ed 2d 707, 97 S Ct 2061; McCready, supra, at 474, 73 L Ed 2d 149, 102 S Ct 2540. The petitioners assert that no risk of multiple recovery would exist here, if we allowed them to sue, because the direct and indirect purchasers would be seeking different, not duplicative, damages; the petitioners would recover the amount of the overcharge and the utilities would recover damages for their lost sales. Leaving [497 US 213] aside the apportionment issue, we reject the argument in this case, just as we did in Illinois Brick. Bringing all classes of direct and indirect purchasers together in a single lawsuit may reduce the risk of multiple recovery, but the reduction comes at too great a cost. See Illinois Brick, supra, at 731, n 11, 52 L Ed 2d 707, 97 S Ct 2061.

This case already has become quite complicated. It involves numerous utilities and other companies operating in several States under federal, state, and municipal regulation and, in some instances, under no rate regulation at all. Even apart from gas sold to customers, the utilities seek damages for lost sales and for gas purchased for their own use. The petitioners, in addition to their parens patriae claims, are asserting direct claims on behalf of numerous state agencies. Other direct purchasers also seek several measures of damages. Allowing the petitioners to proceed on behalf of consumers would complicate the proceedings further. Even if they could represent consumers residing in Kansas and Missouri, they could not represent industrial and commercial purchasers or consumers from other States. See 15 USC § 15c(a)(1) [15 USCS § 15c(a)(1)] (extending parens patriae representation only to resident natural persons). These unrepresented consumers might seek intervention and further delay the prompt determination of the suit. The expansion of the case would risk the confusion, costs, and possibility of error inherent in complex litigation. At the same time, however, it might serve little purpose because, as noted above, state regulatory law may provide appropriate relief to consumers even if they cannot sue under § 4. As in Illinois Brick, we continue to believe that "even if ways could be found to bring all potential plaintiffs together in one huge action, the complexity thereby introduced into treble-damages proceedings argues strongly for retaining the Hanover Shoe rule." 431 US, at 731, n 11, 52 L Ed 2d 707, 97 S Ct 2061.

[497 US 214]

C

[4c] We have maintained, throughout our cases, that our interpretation of § 4 must promote the vigorous enforcement of the antitrust laws. See Hanover Shoe, 392 US, at 493, 20 L Ed 2d 1231, 88 S Ct 2224; Illinois Brick, supra, at 746, 52 L Ed 2d 707, 97 S Ct 2061; McCready, supra, at 475, n 11, 73 L Ed 2d 149, 102 S Ct 2540; California v ARC America Corp. 490 US 93, 120, n 6, 104 L Ed 2d 86, 109 S Ct 1661 (1989). If we were convinced that indirect suits would secure this goal better in cases involving utilities, the argument to interpret § 4 to create the exception sought by the petitioners might be stronger. On balance, however, we do not believe that the petitioners can prevail in this critical part of the case. The petitioners assert that utilities, such as the respondent, lack the incentive to prosecute § 4 cases for two reasons. First, they state that utilities, by law, may pass on their costs to customers. Second, they surmise that utilities might have to pass on damages recovered in a § 4 action. In other words, according to the petitioners, utilities lose nothing if they do not sue and gain nothing if they do sue. In contrast, the petitioners maintain, the large aggregate claims of residential consumers will give state attorneys general ample motivation to sue in their capacity as parens patriae.

The petitioners' argument does not persuade us that utilities will lack incentives to sue overcharging suppliers. Utilities may bring § 4 actions in some instances for fear that regulators will not allow them to shift known and avoidable overcharges on to their customers. See Kan Stat Ann § 66-128a (1985) (allowing the state commission to "review and evaluate the efficiency or prudence of any actions . . . of any public utility or common carrier for the purpose of establishing fair and reasonable rates"); Mo Rev Stat § 393.150 (1986) (interpreted in State ex rel. Associated Natural Gas Co. v Public Service Comm'n, 706 SW2d 870, 879-880 (Mo App 1985), to give regulators "considerable discretion" in setting gas rates). In addition, even if state law would require a utility to reimburse its customers for recovered overcharges, a utility may seek treble damages in a § 4 action.

[497 US 215]

The petitioners have cited no authority indicating that a victorious utility would have to pay the entire exemplary portion of these damages to its customers.

Utilities, moreover, have an established record of diligent antitrust enforcement, having brought highly successful § 4 actions in many instances. The well-known group of actions from the 1960's involving overcharges for electrical generating equipment provides an excellent example. In these cases, which involved "a series of horizontal price-fixing conspiracies characterized as the most shocking in the history of the Sherman Act, plaintiff utilities . . . recover[ed] in unprecedented sums" even though some of the utilities "passed on to their own customers whatever higher costs they incurred as a consequence of the alleged conspiracies." Pollock, Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine, 32 ABA Antitrust LJ 5, 10-11 (1966). The courts in these suits, even before the Hanover Shoe and Illinois Brick decisions, considered the pass-on issue and held that the causes of action were for the utilities to assert. See, e. g., Commonwealth Edison Co. v Allis-Chalmers Mfg. Co. 335 F2d 203, 208 (CA7 1964); Ohio Valley Electric Corp. v General Electric Co. 244 F Supp 914, 949-951 (SDNY 1965). Various factors may have prompted these and other utility actions. For example, in addition to the reasons stated above, the respondent asserts that, like any business, an investor-owned utility has an interest in protecting its market. But whatever the motivation for their § 4 suits, this history makes us quite hesitant to take from the utilities the responsibility for enforcing the antitrust laws.

Relying on indirect purchaser actions in utility cases might fail to promote antitrust enforcement for other reasons. Consumers may lack the expertise and experience necessary for detecting improper pricing by a utility's suppliers. See Landes & Posner, The Economics of Passing On: A Reply to Harris and Sullivan, 128 U Pa L Rev 1274, 1278-1279 (1980). Although state attorneys general have greater expertise,

[497 US 216]

they may hesitate to exercise the parens patriae device in cases involving smaller, more speculative harm to consumers. See Landes & Posner, Should Indirect Purchasers Have Standing to Sue Under the Antitrust

Laws? An Economic Analysis of the Rule of Illinois Brick, 46 U Chi L Rev 602, 613 (1979). See also Illinois Brick, 431 US, at 745, 52 L Ed 2d 707, 97 S Ct 2061 (stating that, in indirect actions, "the uncertainty of how much of an overcharge could be established . . . [and] the uncertainty of how that overcharge would be apportioned . . . would further reduce the incentive to sue"). And even when state attorneys general decide to bring parens patriae actions, they may sue only on behalf of resident natural persons. See 15 USC § 15c(a)(1) [15 USCS § 15c(a)(1)]. All others, including nonresidents and small businesses, might fail to enforce their claims because of the insignificance of their individual recoveries. For these reasons, we remain unconvinced that the exception sought by the petitioners would promote antitrust enforcement better than the current Illinois Brick rule.

D

[5c] The preceding conclusions bring us to a broader point. The rationales underlying Hanover Shoe and Illinois Brick will not apply with equal force in all cases. We nonetheless believe that ample justification exists for our stated decision not to "carve out exceptions to the [direct purchaser] rule for particular types of markets." Illinois Brick, 431 US, at 744, 52 L Ed 2d 707, 97 S Ct 2061. The possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule. As we have stated:

> "[T]he process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum would entail the very problems that the Hanover Shoe rule was meant to avoid. The litigation over where the line should be drawn in a particular class of cases would inject the same 'massive evidence and complicated theories' **[497 US 217]** into treble-damages proceedings, albeit at a somewhat higher level of generality." Id., at 744-745, 52 L Ed 2d 707, 97 S Ct 2061.

In sum, even assuming that any economic assumptions underlying the Illinois Brick rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions. Having stated the rule in Hanover Shoe, and adhered to it in Illinois Brick, we stand by our interpretation of § 4.

IV

[6b] The suggestion in Hanover Shoe and Illinois Brick that a departure from the direct purchaser rule may be necessary when an indirect purchaser buys under a pre-existing cost-plus contract does not justify an exception in this case. In Hanover Shoe, we stated:

> "We recognize that there might be situations—for instance, when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing-on defense not be permitted in this case would not be present." 392 US, at 494, 20 L Ed 2d 1231, 88 S Ct 2224.

We observed further in Illinois Brick:

> "In [a cost-plus contract] situation, the [direct] purchaser is insulated from any decrease in its sales as a

> result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price. The effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand that complicates the determination in the general case." 431 US, at 736, 52 L Ed 2d 707, 97 S Ct 2061.

The petitioners argue that the regulations and tariffs requiring the respondent to pass on its costs to the consumers place this case within the cost-plus contract exception. We disagree.

[497 US 218]

The respondent did not sell the gas to its customers under a pre-existing cost-plus contract. Even if we were to create an exception for situations that merely resemble those governed by such a contract, we would not apply the exception here. Our statements above show that we might allow indirect purchasers to sue only when, by hypothesis, the direct purchaser will bear no portion of the overcharge and otherwise suffer no injury. That certainty does not exist here.

The utility customers made no commitment to purchase any particular quantity of gas, and the utility itself had no guarantee of any particular profit. Even though the respondent raised its prices to cover its costs, we cannot ascertain its precise injury because, as noted above, we do not know what might have happened in the absence of an overcharge. In addition, even if the utility customers had a highly inelastic demand for natural gas, see Panhandle Eastern, 852 F2d, at 895, the need to inquire into the precise operation of market forces would negate the simplicity and certainty that could justify a cost-plus contract exception. See Illinois Brick, supra, at 742, 52 L Ed 2d 707, 97 S Ct 2061; P. Areeda & H. Hovencamp, Antitrust Law § 337.3c, pp 323-324 (Supp 1988). Thus, although we do not alter our observations about the possibility of an exception for cost-plus contracts, we decline to create the general exception for utilities sought by the petitioners.

V

[7b] The petitioners, in their final argument, contend that § 4C of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat 1394, as amended, 15 USC § 15c [15 USCS § 15c], authorizes them to sue on behalf of consumers even though the consumers, as indirect purchasers, have no cause of action of their own. Section 4C(a)(1) provides in relevant part:

> "Any attorney general of a State may bring a civil action in the name of such state as parens patriae on behalf of natural persons residing in such State . . . to secure monetary relief as provided in this section for injury sustained
>
> **[497 US 219]**
>
> by such natural persons to their property by reason of any violation of sections 1 to 7 of this title." 15 USC § 15c(a)(1) [15 USCS § 15c(a)(1)].

Because the Act, in their view, has the clear purpose of protecting consumers, see Kintner, Griffin, & Goldston, The Hart-Scott-Rodino Antitrust Improvements Act of 1976: An Analysis, 46 Geo Wash L Rev 1, 23 (1977), the petitioners contend that it must allow the States to sue on behalf of consumers notwithstanding their status as indirect purchasers.

[1c, 7c] We have rejected this argument before. We stated in Illinois Brick that § 4C did not establish any new substantive liability. Instead, "[i]t simply created a new procedural device—parens patriae actions by States on behalf of their citizens—to enforce existing rights of recovery under § 4 [of the Clayton Act]." 431 US, at 734, n 14, 52 L Ed 2d 707, 97 S Ct 2061. Section 4, as noted above, affords relief only to a person "injured in his business or property by reason of anything forbidden in the antitrust laws." 15 USC § 15(a) [15 USCS § 15(a)]. State attorneys general may bring actions on behalf of consumers who have such an injury. See, e. g., Pennsylvania v Mid-Atlantic Toyota Distributors, Inc. 704 F2d 125, 128 (CA4 1983) (suit on behalf of consumers injured by an alleged conspiracy to fix the price of cars). But here the respondent is the injured party under the antitrust laws, and the predicate for a parens patriae action has not been established. We conclude that the petitioners may not assert any claims on behalf of the customers.

Affirmed.

SEPARATE OPINION

Justice **White,** with whom Justice **Brennan,** Justice **Marshall,** and Justice **Blackmun** join, dissenting.

I dissent from the Court's opinion and judgment because it is inappropriate for the Court to deny standing to sue under § 4 of the Clayton Act, 15 USC § 15 [15 USCS § 15], to customers of a regulated utility in circumstances such as those presented in this case. By its plain language, § 4 reflects an " 'expansive remedial

purpose.' " Blue Shield of Va. v McCready, 457 US 465, 472, 73 L Ed 2d 149, 102 S Ct 2540 (1982) (citation omitted). It does not distinguish between classes of customers, but rather grants a cause of action to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ." 15 USC § 15(a) [15 USCS § 15(a)]. In enacting § 4, Congress sought to ensure that victims of anticompetitive conduct receive compensation. Blue Shield, supra, at 472, 73 L Ed 2d 149, 102 S Ct 2540; Pfizer, Inc. v India, 434 US 308, 314, 54 L Ed 2d 563, 98 S Ct 584 (1978).

In Illinois Brick Co. v Illinois, 431 US 720, 52 L Ed 2d 707, 97 S Ct 2061 (1977), we held that certain indirect purchasers of concrete block lacked standing to challenge the manufacturer's business practices under the antitrust laws because they could not be deemed to have suffered injury from the alleged illegal conduct. This suit, however, is very different from Illinois Brick. That case involved a competitive market where concrete block manufacturers sold to masonry contractors who in turn sold to general contractors who in turn sold to the Illinois Brick respondents; this case involves a highly regulated market where utilities possessing natural monopolies purchase gas from natural gas suppliers and then sell the gas to residential customers. Illinois Brick did not hold that, in all circumstances, indirect purchasers lack § 4 standing. Indeed, just last Term we observed that under Illinois Brick "indirect purchasers might be allowed to bring suit in cases in which it would be easy to prove the extent to which the overcharge was passed on to them." California v ARC America Corp. 490 US 93, 102, and n 6, 104 L Ed 2d 86, 109 S Ct 1661 (1989). See also, Hanover Shoe, Inc. v United Shoe Machinery Corp. 392 US 481, 494, 20 L Ed 2d 1231, 88 S Ct 2224 (1968).

The issue in this case is whether Illinois Brick bars a suit by retail customers to whom the utilities have passed on the entire cost of the gas sold to them, including any illegal overcharge. Before the District Court, the utilities moved to dismiss the States as parens patriae, arguing that the States lacked standing because they represented indirect purchasers.

In response, the States contended that the indirect purchasers were proper plaintiffs because the utilities had passed through the entire overcharge to their residential customers. The District Court found it unnecessary "to wait upon evidence establishing the degree to which the utilities passed on the overcharge," In re Wyoming Tight Sands Antitrust Cases, 695 F Supp 1109, 1116 (Kan 1988), for even accepting the States' position that there had been a total pass-on, decisions of this Court were thought to bar the suit. Likewise, in affirming the District Court, the Court of Appeals presumed a "perfect and provable pass-on of the allegedly illegal overcharge." In re Wyoming Tight Sands Antitrust Cases, 866 F2d 1286, 1293 (CA10 1989). Indeed, the vice president and general counsel of one of the respondent utilities is on record as stating that the utility's customers "pay *all* of any increases in the cost of natural gas [Kansas Power & Light] must purchase to serve them." Affidavit of David S. Black, Vice President and General Counsel of the Kansas Power & Light Company, Record, Doc. No. 485, Exhibit D (emphasis in original). Rather than embarking, as the Court does, on what amounts to a factfinding mission, which the courts below eschewed, about the fact and provability of this pass-on, we should decide this case on the basis that there has been a complete pass-through of the overcharge. On that basis, it is evident that the concerns underlying the decision in Illinois Brick do not support the judgment below. Rather, we should follow the plain intent of § 4 that the victims of anticompetitive conduct be allowed the remedy provided by the section.

Illinois Brick barred indirect purchaser suits chiefly because we feared that permitting the use of pass-on theories under § 4 would transform these treble-damages actions into massive and inconclusive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge—from direct purchasers to middlemen to ultimate consumers. 431 US, at 737, 52 L Ed 2d 707, 97 S Ct 2061. As Judge Posner has

written: "The optimal adjustment by an unregulated firm to the increased cost of the input will always be a price increase smaller than the increase in input cost, and this means that the increased cost will be divided between the two tiers, the direct and indirect purchasers—but in what proportion will often be hard to determine, even by sophisticated techniques of economic analysis. This is a central insight of the Illinois Brick decision." Illinois ex rel. Hartigan v Panhandle Eastern Pipe Line Co. 852 F2d 891, 894 (CA7 1988).

In this case, however, it is regulation rather than market forces that determines the amount of overcharge that the utility passes through to its residential customers. The rates of utilities are determined by law and are set at a level designed to allow a fair return on a rate base that includes the cost of furnishing the service, plainly including in this case the cost of gas purchased from the pipelines and resold to customers. It is fanciful, at least unrealistic, to think that a utility entitled to pass on to its customers the cost of gas that it has purchased will not do so to the maximum extent permitted by law. Furthermore, petitioners assert that in this case the applicable law requires that such cost be passed on to consumers. And, as we have said, the Tenth Circuit opinion reflects the likelihood of a perfect and provable pass-on.

Of course, to recover in a case like this, the plaintiff must prove that the utility paid the pipelines an illegally high price and must demonstrate the amount of the overcharge. That amount is included in the rates charged by the utility and hence is passed through to the consumer. The result is that determining the injury inflicted on consumers involves nothing more than reading their utility bills, which reveal the amount of gas purchased by them at a price which includes the amount of the illegal overcharge passed through to them. Where it is clear that the entire overcharge is passed through, there can be no claim that indirect purchasers cannot

prove the extent of their damage caused by a rate calculated on a rate base inflated by an illegal price paid for gas.

The Court contends that the apportionment problem is not so simple. It maintains that, even where a utility raises its rates to compensate for the overcharge and passes the overcharge through to the indirect purchasers, an apportionment problem still exists because "to show that a direct purchaser has borne no portion of an overcharge, the indirect purchaser would have to prove, among other things, that the direct purchaser could not have raised its rates prior to the overcharge." Ante, at 209, 111 L Ed 2d, at 181. The problem identified by the majority is not peculiar to indirect purchaser suits. In antitrust cases where suppliers increase their prices, courts frequently must separate the price increase attributable to anticompetitive conduct (i. e., the "overcharge") from the price increase attributable to legitimate factors. This type of calculation "has to be done in every case where the plaintiff claims to have lost sales because of the defendant's unlawful conduct and the defendant argues that the loss was due partly or entirely to other factors." Panhandle Eastern, supra, at 897; see Bigelow v RKO Radio Pictures, Inc. 327 US 251, 90 L Ed 652, 66 S Ct 574 (1946). The problem identified in Illinois Brick was entirely different: There, we were concerned that it would unduly complicate litigation to require courts to separate the portion of the overcharge absorbed by the direct purchaser from the portion of the overcharge passed onto the indirect purchaser. As argued above, this difficulty is not a concern in the present case.* It is at least very doubtful that a utility that is

---

* The majority also suggests that "difficult questions of timing might necessitate apportioning overcharges if we allowed indirect suits by utility customers. Even if, at some

[497 US 224]

in position to secure a rate increase on grounds having nothing to do with the price paid for its gas would fail to request a rate increase that included as well the entire amount paid for gas purchased from pipelines and sold to consumers.

Illinois Brick also observed that granting standing to the indirect purchasers in that case would lead to the underenforcement of the antitrust laws. 431 US, at 745-747, 52 L Ed 2d 707, 97 S Ct 2061. In the cases where there is "a perfect and provable pass-through," however, the opposite is true for two reasons. First, because the pass-through of the overcharge is complete and easily demonstrated, the indirect purchasers—and the States in their parens patriae capacity—may readily discover their injury. Second, although the utility could sue to recover lost profits resulting from lost sales due to the illegally high price, its injury is not measured by the amount of the illegal overcharge that it has passed on, and hence the utility would have no incentive to seek such a recovery.

The majority suggests that, even where a utility passes the entire overcharge through to the indirect customers, the utility nonetheless might actively prosecute antitrust claims because the state regulatory commission may allow the utility to keep any damages that the utility recovers. But the utility commissions cannot allow an antitrust recovery forbidden by federal law. Given a pass-through, the customer, not the utility, suffers the antitrust injury, and it is the customer or the State on his behalf that is entitled to recover treble damages. In any event, it seems to me that the majority conjures up a very strange utility commission, the possible existence of which the court fails to document.

A third consideration prompting our decision in Illinois Brick was our belief that permitting indirect purchaser suits might subject antitrust defendants to multiple liability. 431 US, at 730-731, 52 L Ed 2d 707, 97 S Ct 2061. Again however, where there is a "perfect and provable" pass-through, there is no danger that both the utilities and the indirect purchasers will recover damages for the same anticompetitive conduct because the utilities

[497 US 225]

have not suffered any overcharge damage: The petitioners will sue for the amount of the overcharge, while the utilities will sue for damages resulting from their lost sales.

The majority argues that, even "[l]eaving aside the apportionment issue" (i. e., assuming that there is no apportionment difficulty as the Tenth Circuit did in affirming summary judgment), the multiple recovery problem identified in Illinois Brick still exists. Ante, at 212-213, 111 L Ed 2d, at 184. I disagree. Illinois Brick "focused on the risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws." Blue Shield, 457 US, at 474-475, 73

---

point, a utility can pass on 100 percent of its costs to its customers, various factors may delay the passing-on process." Ante, at 210, 111 L Ed 2d, at 182. This suggestion, as indicated by the words "might" and "may," is quite speculative. It is much more realistic to believe that sooner or later, the customer will foot the cost of overpriced gas. If timing was such a problem, the Tenth Circuit would not have assumed a "perfect and provable" pass-through.

L Ed 2d 149, 102 S Ct 2540. The danger of multiple recoveries does not exist aside from the apportionment difficulty; rather, it stems from it. If only defensive use of a pass-through defense were barred, or if it were extremely difficult to ascertain the percentage of an overcharge that the utility passed through, then the supplier of natural gas might potentially have to pay overlapping damages to successive purchasers at different levels in the distribution chain. But where there is no apportionment difficulty, there is no comparable risk.

In sum, I cannot agree with the rigid and expansive holding that in no case, even in the utility context, would it be possible to determine in a reliable way a pass-through to consumers of an illegal overcharge that would measure the extent of their damage. There may be cases, as the Court speculates, where there would be insuperable difficulties. But we are to judge this case on the basis that the pass-through is complete and provable. There have been no findings below that this is not the fact. Instead, the decision we review is that consumers may not sue even where it is clear and provable that an illegal overcharge has been passed on to them and that they, rather than the utility, have to that extent been injured.

None of the concerns that caused us to bar the indirect purchaser's suit in Illinois Brick exist in this case. For that

reason, rather than extending the Illinois Brick exception to § 4's grant of a cause of action to persons injured through anticompetitive conduct, I would hold that the petitioners in this case have standing to sue. This result would promote the twin antitrust goals of ensuring recompense for injured parties and encouraging the diligent prosecution of antitrust claims.

[497 US 227]

ROBERT SAWYER, Petitioner
v
LARRY SMITH, Interim Warden

497 US 227, 111 L Ed 2d 193, 110 S Ct 2822, reh den 497 US 1051, 111 L Ed 2d 830, 111 S Ct 17

[No. 89-5809]

Argued April 25, 1990. Decided June 21, 1990.

Decision: Rule of Caldwell v Mississippi, concerning state prosecutor's argument diminishing jury responsibility for death sentence, held not retroactively available to support federal habeas corpus relief.

SUMMARY

A man accused of beating, scalding, and setting fire to a woman who subsequently died of her injuries was charged with murder and was convicted in a Louisiana trial court. During the penalty phase of the trial, the prosecutor, in closing arguments, repeatedly advised the jurors that their decision as to whether the accused should be sentenced to death would be reviewed by others and was not the final decision. The accused was then sentenced to death, and the Supreme Court of Louisiana affirmed the accused's conviction and sentence. The United States Supreme Court granted certiorari and remanded the case for reconsideration in light of intervening precedent; but, after the Supreme Court of Louisiana reaffirmed the accused's sentence, the United States Supreme Court, in 1984, denied a further petition for certiorari, at which point the accused's conviction and sentence became final. After unsuccessfully seeking state collateral relief, the accused filed a federal habeas corpus petition in the United States District Court for the Eastern District of Louisiana, which petition contended that the prosecutor's closing argument, by diminishing the jury's sense of responsibility for the capital sentencing decision, had violated the Federal Constitution's Eighth Amendment under the rule of Caldwell v Mississippi (1985) 472 US 320, 86 L Ed 2d 231, 105 S Ct 2633. The District Court denied relief on the grounds that (1) the prosecutor's comments in the case at hand were significantly different from those condemned in the Caldwell case, and (2) there was no reasonable probability that the sentence would have been different in the absence of the prosecutor's comments. A

Briefs of Counsel, p 870, infra.

panel of the United States Court of Appeals for the Fifth Circuit affirmed (848 F2d 582). While a rehearing en banc was pending, the United States Supreme Court held in Teague v Lane (1989) 489 US 288, 103 L Ed 2d 334, 109 S Ct 1060, that a rule of constitutional law established after a petitioner's conviction has become final may not be used to attack the conviction on federal habeas corpus, unless the rule falls within one of two narrow exceptions. Subsequently, the Court of Appeals, en banc, affirmed the denial of the accused's petition, as the Court of Appeals determined that (1) the Caldwell decision announced a new rule within the meaning of Teague v Lane, and (2) this rule did not fall within the exception to the Teague doctrine for watershed rules of criminal procedure that guarantee the accuracy of a criminal proceeding (881 F2d 1273).

On certiorari, the United States Supreme Court affirmed. In an opinion by KENNEDY, J., joined by REHNQUIST, Ch. J., and WHITE, O'CONNOR, and SCALIA, JJ., it was held that the accused was not entitled to use Caldwell v Mississippi to challenge his capital sentence in a federal habeas corpus action, because (1) Caldwell v Mississippi announced a new rule within the meaning of Teague v Lane, given that (a) although the Supreme Court had held in a prior case that improper prosecutorial remarks could at some point make a conviction a denial of due process, no such pervasive error had been established in that case, which was not a capital case, and the court in Caldwell v Mississippi, while noting its prior decision, had determined not to rely on the due process clause, (b) examination of the Supreme Court's Eighth Amendment decisions preceding Caldwell v Mississippi showed that that decision was not dictated by precedent existing at the time the conviction of the accused in the present case became final, and (c) although numerous prior decisions from the courts of various states had prohibited prosecutorial statements of the type later condemned in Caldwell, practically all of these decisions rested on state common law prohibiting any mention of appellate review rather than condemning false prosecutorial statements under Caldwell's Eighth Amendment analysis, and to the extent that some of these decisions reflect a recognition that general Eighth Amendment principles point toward the Caldwell rule, or that Caldwell is congruent with pre-existing state law, such decisions cannot serve to show that Caldwell was dictated by Supreme Court precedent; (2) one exception to the principle of Teague v Lane—which exception applies to new rules that place an entire category of primary conduct beyond the reach of the criminal law, or to new rules that prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense—has no application to the accused's case; and (3) the other Teague v Lane exception, which applies to new "watershed" rules of criminal procedure that are necessary to the fundamental fairness of the criminal proceeding, does not apply to Caldwell v Mississippi, as (a) at the time of the accused's trial and appeal, the aforementioned due process decision was in place to protect defendants, (b) Caldwell v Mississippi must therefore be read as providing an additional measure of protection against error in the special context of capital sentencing, (c) it therefore cannot be said that the Caldwell rule is an absolute prerequisite to fundamental fairness of the type that may come within the exception, and (d) subsequent Supreme Court decisions discussing Caldwell v Mississippi in other contexts reflect a rejection of the argument that that decision represents a fundamental rule.

Marshall, J., joined by Brennan, J., joined in part (as to points 1-5 below) by Blackmun, J., and joined in part (as to points 1-4 below) by Stevens, J., dissented, expressing the view that (1) the court's effort to curtail the scope of federal habeas corpus through the principle of Teague v Lane is inconsistent with Congress' intent to provide state prisoners with an opportunity to redress unlawful state deprivations of their liberty interests through a fresh and full review of their claims by a federal court; (2) even under the Teague principle, Caldwell v Mississippi did not create a new rule; (3) even if Caldwell v Mississippi established a new rule, that rule would be available on federal habeas corpus because it falls within the second Teague exception, as a rule without which the likelihood of an accurate verdict is seriously diminished; (4) a state's legitimate interest in the finality of its convictions must give way when the state itself undermines the accuracy of a capital proceeding; (5) the Supreme Court's refusal to allow a federal court to correct the error in the case at hand indicates that the Supreme Court is less concerned with safeguarding constitutional rights than with speeding defendants, deserving or not, to the executioner; and (6) the accused's sentence should be vacated because the death penalty is in all circumstances cruel and unusual punishment.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

20 Am Jur 2d, Courts §§ 233, 236; 21 Am Jur 2d, Criminal Law § 609; 21A Am Jur 2d, Criminal Law §§ 814, 815; 39 Am Jur 2d, Habeas Corpus §§ 17, 50, 73, 174; 75 Am Jur 2d, Trial § 230

9 Federal Procedure, L Ed, Criminal Procedure §§ 22:830, 22:831, 22:925; 16 Federal Procedure, L Ed, Habeas Corpus §§ 41:157, 41:206

7 Am Jur Trials 477, Homicide; 20 Am Jur Trials 1, Federal Habeas Corpus Practice; 39 Am Jur Trials 157, Historical Aspects and Procedural Limitations of Federal Habeas Corpus

USCS, Constitution, Amendments 8, 14

US L Ed Digest, Courts § 777.5; Habeas Corpus §§ 36, 61

Index to Annotations, Arguments of Counsel; Capital Offenses and Punishment; Cruel and Unusual Punishment; Habeas Corpus; Retrospective Operation and Laws

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed or carried out. 90 L Ed 2d 1001.

United States Supreme Court's views as to retroactive effect of its own decisions announcing new rules. 65 L Ed 2d 1219.

Supreme Court's views as to what courtroom statements made by prosecuting attorney during criminal trial violate due process or constitute denial of fair trial. 40 L Ed 2d 886.

Federal constitutional guaranty against cruel and unusual punishment—Supreme Court cases. 33 L Ed 2d 932.

Comment Note.—Retroactive or merely prospective operation of new rule adopted by court in overruling precedent—federal cases. 14 L Ed 2d 992.

Prejudicial effect of statement of prosecutor that if jury makes mistake in convicting it can be corrected by other authorities. 3 ALR3d 1448.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Courts § 777.5; Habeas Corpus §§ 36, 61 — retroactivity of new rule — grounds for federal relief — argument by prosecutor as to jury responsibility for death sentence — Eighth Amendment

1a-1c. A state prisoner whose murder conviction became final before the United States Supreme Court's decision in Caldwell v Mississippi (1985) 472 US 320, 86 L Ed 2d 231, 105 S Ct 2633, is not entitled to use that decision to challenge his capital sentence in a federal habeas corpus action—even though the prosecutor's closing argument to the jury during the sentencing phase of the prisoner's state court trial, which argument repeatedly advised the jurors that their decision as to whether the prisoner should be sentenced to death would be reviewed by others and was not the final decision, allegedly violated the Federal Constitution's Eighth Amendment under the rule of Caldwell v Mississippi by diminishing the jury's sense of responsibility for the capital sentencing decision—because (1) Caldwell v Mississippi announced a new rule for purposes of the principle that a rule of constitutional law established after a petitioner's conviction has become final may not be used to attack the conviction on federal habeas corpus; (2) one exception to this principle—for new rules that place an entire category of primary conduct beyond the reach of the criminal law, or for new rules that prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense—has no application to the prisoner's case; and (3) the new rule of Caldwell v Mississippi does not come within the other exception to the principle, for watershed rules that are fundamental to the integrity of the criminal proceeding. (Marshall, Brennan, Blackmun, and Stevens, JJ., dissented from this holding.)

Courts § 777.5; Habeas Corpus §§ 36, 61 — grounds for relief from death sentence — Eighth Amendment — retroactivity — new rule

2a-2g. The United States Supreme Court's decision in Caldwell v Mississippi (1985) 472 US 320, 86 L Ed 2d 231, 105 S Ct 2633—which held that the Federal Constitution's Eighth Amendment prohibits the imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of a defendant's capital sentence rests elsewhere—is a "new rule" for purposes of the principle that a rule of constitutional law established after a petitioner's conviction has become final may not be used to attack the conviction on federal habeas corpus, because (1) although the Supreme Court had stated in a prior case that improper prosecutorial remarks could at some point make a conviction a denial of due process, (a) no such pervasive error had been established in that case, (b) that case was not a capital case, and (c) the court in Caldwell, while noting the prior decision, had determined to rely not on the due process clause but on more particular guarantees of sentencing reliability based on the Eighth Amendment; (2) examination of the Supreme Court's Eighth Amendment decisions preceding Caldwell shows that that decision was not dictated by precedent existing at the time the conviction of the defendant in the present case became final, as (a) the Eighth Amendment decisions relied on in Caldwell were cited for the general proposition that capital sentencing must have guarantees of reliability and must be carried out by jurors who would view all the relevant characteristics of the crime and would take their task as a serious one, (b) neither the fact that the court's Eighth Amendment precedents lend general support to the conclusion reached in Caldwell, nor the contention that state courts would have found that conclusion to be a predictable development in Eighth Amendment law, is sufficient to show that that conclusion was not a new rule, (c) no case prior to Caldwell had invalidated a prosecutorial argument as impermissible under the Eighth Amendment, (d) Caldwell was not seen as "compelled" by the three dissenting Justices in the case, (e) several of the Supreme Court's pre-Caldwell denials of relief where Eighth Amendment challenges to prosecutorial comments were raised provided indications that the Caldwell rule was not an Eighth Amendment requirement, and (f) some of the Supreme Court's other pre-Caldwell decisions cast doubt on the court's view of the proposition, which became a major premise of Caldwell, that misleading prosecutorial comments might cause a bias in favor of death sentences; and (3) although numerous prior decisions from the courts of various states had prohibited prosecutorial statements of the type later condemned in Caldwell, (a) practically all of the state decisions in question rested on state common law prohibiting any mention of appellate review rather than on the condemnation of false prosecutorial statements under Caldwell's Eighth Amendment analysis, (b) to the extent that some state decisions reflect a recognition that general Eighth Amendment principles point toward the Caldwell rule, or that Caldwell is congruent with pre-existing state law, such decisions cannot serve to show that Caldwell was dictated by Supreme Court precedent, and (c) the Supreme Court will not endorse the skepticism of state courts inhering in the argument that state decisions recognizing principles similar to Caldwell must have been compelled by federal precedents under the Eighth Amendment. (Marshall, Brennan, Blackmun, and Stevens, JJ., dissented from this holding.)

Constitutional Law § 839.5; Courts § 777.5; Criminal Law §§ 82, 83; Habeas Corpus § 61 — grounds for relief from death sentence — improper prosecution argument — due process or Eighth Amendment — retroactivity — watershed rule

3a-3c. Although new "watershed" rules of criminal procedure that are necessary to the fundamental fairness of the criminal proceeding are excepted from the principle that a rule of constitutional law established after a petitioner's conviction has become final may not be used to attack the conviction on federal habeas corpus, the "new rule" announced by the United States Supreme Court's decision in Caldwell v Mississippi (1985) 472 US 320, 86 L Ed 2d 231, 105 S Ct 2633—which held that the Federal Constitution's Eighth Amendment prohibits the imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of a defendant's capital sentence rests elsewhere—does not come within that exception, so as to allow the application of the Caldwell rule to a prosecutor's allegedly improper remarks in the case of a state prisoner who was sentenced to death, where (1) at the time of the trial and appeal of the prisoner, whose conviction and sentence became final in 1984, the rule of Donnelly v De Christoforo (1974) 416 US 637, 40 L Ed 2d 431, 94 S Ct 1868, was in place to protect any defendant who could show that a prosecutor's remarks had in fact made a proceeding fundamentally unfair in violation of the due process clause; (2) the only defendants who need to rely on Caldwell rather than Donnelly are those who must concede that the prosecutorial arguments in their cases were not so harmful as to render their sentencing trials fundamentally unfair; (3) the Supreme Court's concern in Caldwell, rather than focusing on the prejudice to the defendant that must be shown to establish a Donnelly violation, was with the unacceptable risk that misleading remarks could affect the reliability of the sentence, and Caldwell must therefore be read as providing an additional measure of protection against error, beyond that afforded by Donnelly, in the special context of capital sentencing to enhance the accuracy of such sentencing; (4) given that the Caldwell rule was added to an existing guarantee of due process protection against fundamental unfairness, it cannot be said that this systemic rule enhancing reliability is an absolute prerequisite to fundamental fairness of the type that may come within the exception; and (5) subsequent Supreme Court decisions discussing Caldwell in other contexts reflect a rejection of the argument that Caldwell represents a rule fundamental to the criminal proceeding. (Marshall, Brennan, Blackmun, and Stevens, JJ., dissented from this holding.)

Courts § 777.5; Habeas Corpus § 28 — federal relief from state conviction — retroactivity — new constitutional rules

4. The principle that a rule of constitutional law established after a petitioner's conviction has become final may not be used to attack the conviction on federal habeas corpus, unless the rule falls within one of two narrow exceptions, serves to validate reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions, and serves to insure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions that are valid when entered; this is but a recognition that the purpose of federal habeas corpus is to insure that state convictions comply with the federal law in existence at the time the conviction became final, and not to provide a mechanism for the continuing re-examination of final judgments based upon later emerging legal doctrine.

Constitutional Law § 1; States, Territories, and Possessions § 12 — relationship between state law and Federal Constitution

5. The availability of a claim under state law does not of itself establish that a claim was available under the Federal Constitution.

Courts § 777.5; Habeas Corpus § 47 — grounds — retroactivity of new constitutional rules

6. The relevant frame of reference for the inquiry as to whether a deci-

sion announces a "new rule"—for purposes of the principle that a rule of constitutional law established after a petitioner's conviction has become final may not be used to attack the conviction on federal habeas corpus—is not the purpose of the new rule whose benefit the petitioner seeks, but instead the purposes for which a federal writ of habeas corpus is made available.

Courts § 777.5; Habeas Corpus §§ 36, 61 — grounds for federal relief from death sentence — retroactivity of new rule — reliance on state law — Eighth Amendment

7. Although the United States Supreme Court's cases have looked to the decisions of state courts and legislatures to inform the Supreme Court's analysis under the Federal Constitution's Eighth Amendment, this fact cannot be used to show that the Supreme Court's decision in Caldwell v Mississippi (1985) 472 US 320, 86 L Ed 2d 231, 105 S Ct 2633—which held that the Eighth Amendment prohibits the imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of a defendant's capital sentence rests elsewhere—is not a "new rule" for purposes of the principle that a rule of constitutional law established after a petitioner's conviction has become final may not be used to attack the conviction on federal habeas corpus, because, under such a view, state court decisions would both (1) inform the Supreme Court's decisions on the substantive content of the Eighth Amendment, and (2) by simultaneous effect, impose those standards back upon the states themselves with retroactive effect. (Marshall, Brennan, Blackmun, and Stevens, JJ., dissented from this holding.)

Courts § 777.5; Criminal Law §§ 82, 83; Habeas Corpus § 61 — grounds — retroactivity — watershed rules — capital sentencing — Eighth Amendment

8a, 8b. In order to fall within an exception to the principle that a rule of constitutional law established after a petitioner's conviction has become final may not be used to attack the conviction on federal habeas corpus—which exception applies to new "watershed" rules of criminal procedure that are necessary to the fundamental fairness of the criminal proceeding—a capital sentencing rule must not only improve the accuracy of capital sentencing judgments, but also alter the United States Supreme Court's understanding of the bedrock procedural elements essential to the fairness of a proceeding; this exception cannot be read as including all new capital sentencing rules that preserve the fairness and accuracy of capital sentencing judgments, as (1) such a test looks to only half the definition of the exception, and (2) all of the Supreme Court's Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense, so that the practical effect of such a reading would be to render the principle inapplicable to new rules of capital sentencing, and the principle does apply to such rules.

Courts § 777.5; Habeas Corpus § 47 — grounds — retroactivity of new constitutional rules — exceptions

9. With regard to the principle

that a rule of constitutional law established after a petitioner's conviction has become final may not be used, on federal habeas corpus, to attack the petitioner's conviction, the scope of the exceptions to that principle must be consistent with the recognition that application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system.

SYLLABUS BY REPORTER OF DECISIONS

Petitioner Sawyer's conviction and death sentence for a brutal murder became final in 1984. The Federal District Court denied his habeas corpus petition, which was based in relevant part on the argument that the prosecutor's closing argument during the penalty phase of his trial diminished the jury's sense of responsibility for the capital sentencing decision, in violation of this Court's 1985 decision in Caldwell v Mississippi, 472 US 320, 86 L Ed 2d 231, 105 S Ct 2633. While his appeal of the denial of habeas relief was pending, this Court decided Teague v Lane, 489 US 288, 103 L Ed 2d 334, 109 S Ct 1060, under which a new rule of constitutional law established after a petitioner's conviction has become final may not be used to attack the conviction on federal habeas corpus unless the rule (1) places an entire category of primary conduct beyond the reach of criminal law, id., at 311, 103 L Ed 2d 334, 109 S Ct 1060, or prohibits imposition of a certain type of punishment for a class of defendants because of their status or offense, see Penry v Lynaugh, 492 US 302, 330, 106 L Ed 2d 256, 109 S Ct 2934, or (2) applies a new watershed rule of criminal procedure that enhances accuracy and is necessary to the fundamental fairness of the criminal proceeding, 489 US, at 312-313, 103 L Ed 2d 334, 109 S Ct 1060. The Court of Appeals affirmed the denial of relief, holding that Caldwell announced a new rule within the meaning of Teague and did not fall within Teague's second exception.

Held: Petitioner is not entitled to federal habeas relief, because Caldwell announced a new rule, as defined by Teague, that does not come within either of the Teague exceptions.

(a) Caldwell's result was not dictated by Eighth Amendment precedent existing at the time petitioner's conviction became final. No case prior to Caldwell invalidated a prosecutorial argument as impermissible under the Eighth Amendment. The discussion of improper prosecutorial comment in Donnelly v DeChristoforo, 416 US 637, 40 L Ed 2d 431, 94 S Ct 1868, a noncapital murder case, was based on the Due Process Clause's guarantees of fundamental fairness, not the Eighth Amendment's more particular guarantees of sentencing reliability. Eddings v Oklahoma, 455 US 104, 71 L Ed 2d 1, 102 S Ct 869; Lockett v Ohio, 438 US 586, 57 L Ed 2d 973, 98 S Ct 2954; Gardner v Florida, 430 US 349, 51 L Ed 2d 393, 97 S Ct 1197; and Woodson v North Carolina, 428 US 280, 49 L Ed 2d 944, 96 S Ct 2978, earlier Eighth Amendment cases, spoke to the general issue of sentencing reliability but not to the issue decided in Caldwell, and Teague would be meaningless if applied at such a level of generality. In 1984, from a state court's point of view, there were indications that Caldwell was not an Eighth Amendment requirement, see California v Ramos, 463 US 992, 77 L Ed 2d 1171, 103 S Ct 3446; Maggio v Williams, 464 US 46, 78 L Ed 2d 43, 104 S Ct 311, and there was some doubt as to this Court's view concerning a major premise of Caldwell, that misleading prosecutorial comment might cause a bias in favor of death sentences, see Dobbert v Florida, 432 US 282, 294, and n 7, 53 L Ed 2d 344, 97 S Ct 2290. It cannot be said that state cases were anticipating the Caldwell rule when they prohibited similar prosecutorial statements, because their decisions were based on state law and did not purport to construe the Eighth Amendment. Reliance on these cases misapprehends the function of federal habeas relief, which serves to ensure that state convictions comport with established *federal* law at the time a petitioner's conviction becomes final. To the extent that post-Caldwell Louisiana cases reflect state-court recognition that general Eighth Amendment principles pointed toward adoption of a Caldwell rule, or that Caldwell is congruent with preexisting state law, they cannot serve to show that Caldwell was dictated by this Court's Eighth Amendment precedents, since courts can be expected to apply principles announced in prior Eighth Amendment decisions that are susceptible to debate among reasonable minds. Petitioner's argument that state courts would not have provided protection against misleading prosecutorial comment unless they had been compelled to do so by federal precedent and the threat of federal habeas review is premised on a skepticism of state courts that this Court declines to endorse.

(b) Caldwell does not come within either of the Teague exceptions. The first exception has no applicability here. Petitioner's argument that the second exception should be read to include new rules of capital sentencing that preserve the accuracy and fairness of judgments looks only to the first half of the exception's definition. To qualify under Teague, a rule must not only improve the accuracy of trial; it must also be essential to the fairness of the proceeding. There would be no limit to the second exception if it were to be recast as suggested by petitioner, since almost all Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability or accuracy in some sense. Caldwell is a systemic rule designed as an enhancement of the accuracy of capital sentencing. However, this measure of protection against error in the context of capital sentencing was added to the already existing due process guarantee of fundamental fairness afforded by Donnelly, supra. "[T]he only defendants who need to rely on Caldwell rather than Donnelly are those who must concede that the prosecutorial argument in their case was not so harmful as to render their sentencing trial 'fundamentally unfair.' " 881 F2d 1273, 1293. Thus, it cannot be said that Caldwell is the type of absolute prerequisite to fundamental fairness that may come within Teague's second exception. Cf., e. g., Dugger v Adams, 489 US 401, 103 L Ed 2d 435, 109 S Ct 1211.

881 F2d 1273, affirmed.

Kennedy, J., delivered the opinion of the Court, in which Rehnquist, C. J., and White, O'Connor, and Scalia, JJ., joined. Marshall, J., filed a dissenting opinion, in which Brennan, J., joined, in which Blackmun, J., joined as to Parts I, II, III, and IV, and in which Stevens, J., joined as to Parts I, II, and III.

APPEARANCES OF COUNSEL

Catherine Hancock argued the cause for petitioner.
Dorothy A. Pendergast argued the cause for respondent.
Briefs of Counsel, p 870, infra.

OPINION OF THE COURT

Justice **Kennedy** delivered the opinion of the Court.

[1a, 2a, 3a] We must decide in this case whether a prisoner whose murder conviction became final before our decision in Caldwell v Mississippi, 472 US 320, 86 L Ed 2d 231, 105 S Ct 2633 (1985), is entitled to use that decision to challenge his capital sentence in a federal habeas corpus action. We hold that he cannot, for Caldwell announced a new rule as defined by Teague v Lane, 489 US 288, 103 L Ed 2d 334, 109 S Ct 1060 (1989), and the new rule does not come within Teague's exception for watershed rules fundamental to the integrity of the criminal proceeding.

I

Over 10 years ago, petitioner Robert Sawyer murdered Frances Arwood, a visitor in the New Orleans, Louisiana, residence petitioner shared with his girlfriend, Cynthia [497 US 230] Shano. On September 29, 1979, petitioner and his accomplice Charles Lane arrived at the residence after a night of drinking. They argued with Arwood and accused her of giving drugs to Shano's children. For reasons that are not clear, petitioner and Lane struck Arwood repeatedly with their fists and dragged her by the hair into the bathroom. There they stripped the victim naked, literally kicked her into the bathtub, and subjected her to scalding, dunkings, and additional beatings. Petitioner left Lane to guard the victim, and apparently to rape her, while petitioner went to the kitchen to boil water to scald her. Petitioner kicked Arwood in the chest, causing her head to strike the tub or a windowsill and rendering her unconscious. The pair then dragged Arwood into the living room, where they continued to beat and kick her. Petitioner poured lighter fluid on the unconscious victim, particularly her torso and genital area, and set the lighter fluid afire. He told Lane that he had done this to show "just how cruel he could be." There were further brutalities we do not recount. Arwood later died of her injuries.

Petitioner was convicted and sentenced to death for the crime by a Louisiana jury in September 1980. At issue in this case are remarks made by the prosecutor in his closing argument during the sentencing phase of the trial. The prosecutor first stated, after discussing the proof of aggravating circumstances under Louisiana law:

> "The law provides that if you find one of those circumstances then what you are doing as a juror, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the

> United States, that you the people as a fact finding body from all the facts and evidence you have heard in relationship to this man's conduct are of the opinion that there are aggravating circumstances as defined by the statute, by
>
>
>
> the State Legislature that this is a type of crime that deserves that penalty. It is merely a recommendation so try as he may, if Mr. Weidner tells you that each and every one of you I hope can live with your conscience and try and play upon your emotions, you cannot deny, it is a difficult decision. No one likes to make those type of decisions but you have to realize if but for this man's actions, but for the type of life that he has decided to live, if of his own free choosing, I wouldn't be here presenting evidence and making argument to you. You wouldn't have to make the decision." Tr 982.

After emphasizing the brutal nature of the crime for which they had convicted petitioner, the prosecutor told the jury:

> "There is really not a whole lot that can be said at this point in time that hasn't already been said and done. The decision is in your hands. You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day, is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and the impact, the full authority and impact of the law of Louisiana. All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less." Id., at 984.

Finally, the prosecutor emphasized again that the jury's decision would be reviewed by later decisionmakers:

> "It's all [you're] doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and if you are wrong in your decision believe me, believe me there will be others who will be behind
>
>
>
> you to either agree with you or to say you are wrong so I ask that you do have the courage of your convictions." Id., at 985.

The Louisiana Supreme Court affirmed petitioner's conviction and sentence. State v Sawyer, 422 So 2d 95 (1982). This Court granted certiorari and remanded the case with instructions to the Louisiana Supreme Court to reconsider its decision in light of Zant v Stephens, 462 US 862, 77 L Ed 2d 235, 103 S Ct 2733 (1983). Sawyer v Louisiana, 463 US 1223, 77 L Ed 2d 1407, 103 S Ct 3567 (1983). The Louisiana Supreme Court reaffirmed the capital sentence on remand, Sawyer v Louisiana, 442 So 2d 1136 (1983). His conviction and sentence became final on April 2, 1984, when we denied certiorari, Sawyer v Louisiana, 466 US 931, 80 L Ed 2d 191, 104 S Ct 1719. Petitioner sought state collateral relief, which was denied. Sawyer v Maggio, 479 So 2d 360 (La 1985); Sawyer v Maggio, 480 So 2d 313 (La 1985).

Petitioner then filed the federal habeas corpus petition now before us, raising a host of constitutional claims. Relevant here is petitioner's claim that the prosecutor's closing argument violated the Eighth Amendment of the United States Constitution by diminishing the jury's sense of responsibility for the capital sentencing decision, in violation of our decision in Caldwell v Mississippi, 472 US 320, 86 L Ed 2d 231, 105 S Ct 2633 (1985). Caldwell was decided over one year after petitioner's conviction became final.

The District Court denied relief, concluding that the prosecutor's remarks were of a different character from those in Caldwell, and that there was no reasonable probability that the sentence would have been different in the absence of the comments. A divided panel of the Court of Appeals for the Fifth Circuit affirmed. 848 F2d 582 (1988). The panel held that the facts in this case were "a far cry from those in Caldwell," in large part due to the absence of any judicial approval of the prosecutor's comments. Id., at 596. Following the panel decision, the Fifth Circuit granted rehearing en banc. Id., at 606.

[497 US 233]

After the en banc court heard oral argument, but while the case was pending, a plurality held in Teague v Lane, 489 US 288, 103 L Ed 2d 334, 109 S Ct 1060 (1989), that a rule of constitutional law established after a petitioner's conviction has become final may not be used to attack the conviction on federal habeas corpus unless the rule falls within one of two narrow exceptions. The Fifth Circuit requested supplemental briefing from the parties on the question whether Teague barred petitioner's claim for relief under Caldwell. The en banc court held that Caldwell announced a new rule within the meaning of Teague, a rule not within Teague's second exception for watershed rules of criminal procedure that guarantee the accuracy of a criminal proceeding. Accordingly, the Court of Appeals affirmed the denial of habeas corpus relief. 881 F2d 1273 (1989).

We granted certiorari, 493 US 1042, 107 L Ed 2d 830, 110 S Ct 835 (1990), to resolve a conflict among the Courts of Appeals, see Hopkinson v Shillinger, 888 F2d 1286 (CA10 1989), and now affirm.

II

[2b] We must address first whether, in relying on Caldwell, petitioner claims the benefit of a new rule, as defined by our decision in Teague. In Caldwell, we held that the Eighth Amendment prohibits the imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests elsewhere. See 472 US, at 328-329, 86 L Ed 2d 231, 105 S Ct 2633; id., at 342, 86 L Ed 2d 231, 105 S Ct 2633 (opinion of O'Connor, J.). We determined that false information of this type might produce "substantial unreliability as well as bias in favor of death sentences." Id., at 330, 86 L Ed 2d 231, 105 S Ct 2633.

At the outset we note that the parties dispute whether Caldwell, even if its rule applies, could support any claim for relief in petitioner's case. The State emphasizes that the judge in this case, unlike Caldwell, see id., at 339, 86 L Ed 2d 231, 105 S Ct 2633, did not approve the prosecutor's argument, and that the remarks

[497 US 234]

in this case were less likely to mislead. Petitioner, on the other hand, contends that the prosecutor's remarks were similar to those in Caldwell, and were not cured by the judge's instructions to the jury. We need not address the significant questions concerning the merits of petitioner's Caldwell claim on these facts, or the question whether application of Caldwell to the facts presented here would itself involve a new rule of law. Rather, we address only whether Caldwell is available to petitioner as a ground upon which he may seek relief. Cf. Dugger v Adams, 489 US 401, 408, n 4, 103 L Ed 2d 435, 109 S Ct 1211 (1989) (merit of Caldwell claim immaterial to disposition of case on procedural bar grounds).

[2c, 4] Our review of the relevant prcedents that preceded Caldwell convinces us that it is a new rule for purposes of Teague. On this point we are in accord with the Court of Appeals, as well as the other two Courts of Appeals that have addressed the question. See Clark v Dugger, 901 F2d 908 (CA11 May 3, 1990); Hopkinson v Shillinger, supra. The rule of Teague serves to "validat[e] reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." Butler v McKellar, 494 US 407, 414, 108 L Ed 2d 347, 110 S Ct 1212 (1990). Thus, we have defined new rules as those that were not "*dictated* by precedent existing at the time the defendant's conviction became final." Teague, supra, at 301, 103 L Ed 2d 334, 109 S Ct 1060 (plurality opinion). The principle announced in Teague serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered. This is but a recognition that the purpose of federal habeas corpus is to ensure that state convictions comply with the federal law in existence at the time the conviction became final, and not to provide a mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine.

[2d] Caldwell, of course, was not decided upon a clean slate. As the Court in Caldwell recognized, we had earlier addressed

the question of improper prosecutorial comment in Donnelly v DeChristoforo, 416 US 637, 40 L Ed 2d 431, 94 S Ct 1868 (1974). We stated in Donnelly that improper remarks by a prosecutor could at some point "so infec[t] the trial with unfairness as to make the resulting conviction a denial of due process." Id., at 643, 40 L Ed 2d 431, 94 S Ct 1868. No such pervasive error was established in that case, and we took the occasion to warn against "holding every improper and unfair argument of a state prosecutor to be a federal due process violation." Caldwell, supra, at 338, 86 L Ed 2d 231, 105 S Ct 2633. Caldwell, unlike Donnelly, was a capital case; and while noting the principle set forth in Donnelly, the Court in Caldwell determined to rely not on the Due Process Clause but on more particular guarantees of sentencing reliability based on the Eighth Amendment. In Donnelly we had reversed a court of appeals opinion vacating a conviction because prosecutorial comments were "potentially" misleading, 416 US, at 641, 40 L Ed 2d 431, 94 S Ct 1868, but in Caldwell we found that the need for reliable sentencing in capital cases required a new sentencing proceeding because false prosecutorial comment created an "unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously,'" 472 US, at 343, 86 L Ed 2d 231, 105 S Ct 2633 (opinion of O'Connor, J.).

Examination of our Eighth Amendment authorities that preceded Caldwell shows that it was not dictated by prior precedent existing at the time the defendant's conviction became final. In Caldwell itself we relied on Eddings v Oklahoma, 455 US 104, 71 L Ed 2d 1, 102 S Ct 869 (1982); Lockett v Ohio, 438 US 586, 57 L Ed 2d 973, 98 S Ct 2954 (1978) (plurality opinion); Gardner v Florida, 430 US 349, 51 L Ed 2d 393, 97 S Ct 1197 (1977) (plurality opinion); and Woodson v North Carolina, 428 US 280, 49 L Ed 2d 944, 96 S Ct 2978 (1976) (plurality opinion), in support of the result. We cited these decisions for the general proposition that capital sentencing must have guarantees of reliability, and must be carried out by jurors who would view all of the relevant characteristics of the crime and the criminal, and take their task as a serious one. Petitioner, too, cites these and other cases in support of the argument that Caldwell was

[497 US 236]

"rooted" in the Eighth Amendment command of reliable sentencing, and that application of these cases to misleading prosecutorial comment "[b]y analogy" would lead to the predictable Caldwell result. Brief for Petitioner 16.

We do not doubt that our earlier Eighth Amendment cases lent general support to the conclusion reached in Caldwell. But neither this fact, nor petitioner's contention that state courts "would have found Caldwell to be a predictable development in Eighth Amendment law," Brief for Petitioner 8, suffices to show that Caldwell was not a new rule. In petitioner's view, Caldwell was dictated by the principle of reliability in capital sentencing. But the test would be meaningless if applied at this level of generality. Cf. Anderson v Creighton, 483 US 635, 639, 97 L Ed 2d 523, 107 S Ct 3034 (1987) ("[I]f the test of 'clearly established law' were to be applied at this level of generality, . . . [p]laintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights").

It is beyond question that no case prior to Caldwell invalidated a prosecutorial argument as impermissible under the Eighth Amendment. Eddings and Lockett invalidated statutory schemes that imposed an absolute prohibition against consideration of certain mitigating evidence by the sentencer. Woodson invalidated a capital sentencing statute providing for mandatory capital sentencing. Gardner invalidated a capital sentence based on information of which the defendant had no notice or opportunity to respond. These cases do not speak to the issue we decided in Caldwell. What we said in Saffle v Parks, 494 US 484, 491, 108 L Ed 2d 415, 110 S Ct 1257 (1990), applies here: "Even were we to agree with [petitioner's] assertion that our decisions in Lockett and Eddings inform, or even control or govern, the analysis of his claim, it does not follow that they compel the rule that [petitioner] seeks." Certainly Caldwell was not seen as compelled by the three Justices of this Court who found a "lack of authority" in our

[497 US 237]

Eighth Amendment precedents for the approach taken there.

See 472 US, at 350, 86 L Ed 2d 231, 105 S Ct 2633 (Rehnquist, J., dissenting).

From the point of view of a state court considering petitioner's claim at the time his conviction became final, Saffle, supra, at 488, 108 L Ed 2d 415, 110 S Ct 1257, there were in fact indications in our decisions that the Caldwell rule was *not* a requirement of the Eighth Amendment. In a previous case raising an Eighth Amendment challenge to prosecutorial comment, we had rejected the petitioner's claim. California v Ramos, 463 US 992, 77 L Ed 2d 1171, 103 S Ct 3446 (1983). Indeed, the Mississippi Supreme Court had held without dissent in Caldwell that Ramos stood for the proposition that "states may decide whether it is error to mention to jurors the matter of appellate review." See Caldwell v State, 443 So 2d 806, 813 (1983). The Mississippi Court's characterization of Ramos, of course, later proved to be incorrect. But this nonetheless suggests that prior to Caldwell our cases did not put other courts on notice that the Eighth Amendment compelled the Caldwell result.

Our opinion in Maggio v Williams, 464 US 46, 78 L Ed 2d 43, 104 S Ct 311 (1983), provides more direct evidence that the rule of Caldwell cannot be described as dictated by existing law at the time petitioner's claim became final. In Williams we vacated a stay of execution in a case presenting a claim very similar to that in Caldwell. Justice Stevens' opinion concurring in the judgment described at length the prosecutor's argument in that case, 464 US, at 53-54, 78 L Ed 2d 43, 104 S Ct 311, one similar to the argument made in Caldwell. The Court, however, found that the prisoner's challenge to the prosecutor's statements "warrant[ed] little discussion." 464 US, at 49, 78 L Ed 2d 43, 104 S Ct 311. Although we stated that the failure to raise the claim of improper prosecutorial argument in an earlier habeas petition was "inexcusable," we noted that the District Court in the second petition had given the claim "full consideration" under the "standard established in Donnelly v DeChristoforo, 416 US 637, [40 L Ed 2d 431, 94 S Ct 1868] (1974)," and had found that the prosecutor's closing argument "did not render Williams' trial fundamentally unfair." Id., at 49-50, 78 L Ed 2d 43, 104 S Ct 311. Our

opinion concluded by describing this and other claims raised by Williams as "insubstantial." Id., at 52, 78 L Ed 2d 43, 104 S Ct 311. Williams, of course, did not represent a rejection on the merits of the rule announced in Caldwell. But given our statements concerning so similar a claim in Williams, we do not think a state court viewing petitioner's case at the time his conviction became final could have concluded that our Eighth Amendment precedents compelled such a rule.

We note also that, when petitioner's conviction became final, there was some reason for doubt as to this Court's view concerning what became a major premise of Caldwell, that misleading prosecutorial comment might cause a "bias in favor of death sentences." 472 US, at 330, 86 L Ed 2d 231, 105 S Ct 2633. At the time of petitioner's trial and appeal there was at least "some suggestion," see Dugger v Adams, 489 US, at 409, 103 L Ed 2d 435, 109 S Ct 1211, that comments tending to diminish the jury's sense of sentencing responsibility would skew the result toward leniency rather than a death sentence. See Dobbert v Florida, 432 US 282, 294, and n 7, 53 L Ed 2d 344, 97 S Ct 2290 (1977) (Florida's change to a system in which jury's verdict was advisory might benefit defendants, as the jury "may have chosen leniency when they knew [the sentencing] decision rested ultimately on the shoulders of the trial judge, but might not have followed the same course if their vote were final").

Petitioner places primary reliance on numerous state cases, decided prior to the finality of his conviction, that prohibited prosecutorial statements of the type later held to violate the Eighth Amendment in Caldwell. See, e.g., Ward v Commonwealth, 695 SW2d 404, 408 (Ky 1985); Ice v Commonwealth, 667 SW2d 671, 676 (Ky), cert denied, 469 US 860, 83 L Ed 2d 125, 105 S Ct 192 (1984); Wiley v State, 449 So 2d 756, 762 (Miss 1984), cert denied, 479 US 906, 93 L Ed 2d 278, 107 S Ct 304 (1986); Williams v State, 445 So 2d 798, 811-812 (Miss 1984), cert denied, 469 US 1117, 83 L Ed 2d 795, 105 S Ct 803 (1985); State v Robinson, 421 So 2d 299, 233-234 (La 1982); State v Willie, 410 So 2d 1019, 1033-1035 (La 1982), cert denied, 465 US 1051, 79 L Ed 2d 723, 104 S Ct 1327 (1984); State v Jones, 296

[497 US 239]

NC 495, 501-502, 251 SE2d 425, 427-429 (1979); State v Gilbert, 273 SC 690, 696-698, 258 SE2d 890, 894 (1979); State v Tyner, 273 SC 646, 659-660, 258 SE2d 559, 566 (1979); Hawes v State, 240 Ga 327, 334-335, 240 SE2d 833, 839 (1977); Fleming v State, 240 Ga 142, 145-146, 240 SE2d 37, 40 (1977), cert denied, 444 US 885, 62 L Ed 2d 115, 100 S Ct 177 (1979); State v White, 286 NC 395, 403-404, 211 SE2d 445, 450 (1975); Prevatte v State, 233 Ga 929, 932-933, 214 SE2d 365, 367-368 (1975); State v Hines, 286 NC 377, 381-386, 211 SE2d 201, 204-207 (1975). Petitioner argues that these authorities show that state courts anticipated the rule of Caldwell, and that no state reliance interest could be upset by retroactive application of the federal rule to overturn a state conviction that became final before Caldwell was decided.

[2e, 5, 6] The flaw in this argument is that "the availability of a claim under state law does not of itself establish that a claim was available under the United States Constitution." Dugger v Adams, supra, at 409, 103 L Ed 2d 435, 109 S Ct 1211. All of the cases cited by respondent, with one arguable exception, are decisions of *state* law, and do not purport to construe the Eighth Amendment. These cases, moreover, apply state common-law rules prohibiting *any* mention of appellate review; they do not condemn false prosecutorial statements under the Eighth Amendment analysis employed in Caldwell. Reliance on state-law cases for the proposition that the rule adopted in Caldwell was an old one misapprehends the function of federal habeas corpus. As we have said, the "'relevant frame of reference'" for the new rule inquiry "'is not the purpose of the new rule whose benefit the [defendant] seeks, but instead the purposes for which the writ of habeas corpus is made available.'" Teague, 489 US, at 306, 103 L Ed 2d 334, 109 S Ct 1060 (plurality opinion) (quoting Mackey v United States, 401 US 667, 682, 28 L Ed 2d 404, 91 S Ct 1160 (1971)). Federal habeas corpus serves to ensure that state convictions comport with the *federal* law that was established at the time the petitioner's conviction became final.

[497 US 240]

[2f, 7] Petitioner points out, to support his argument that Caldwell applied an old rule, that our opinion there was based in part on the adoption by many state courts of rules that prohibited prosecutorial comments that could diminish the jury's sense of sentencing responsibility. Brief for Petitioner 11; see 472 US, at 333-334, and n 4, 86 L Ed 2d 231, 105 S Ct 2633. It is true that our cases have looked to the decisions of state courts and legislatures to inform Eighth Amendment analysis. But petitioner's attempt to use this fact to show that Caldwell is an old rule is untenable. Under this view, state-court decisions would both inform this Court's decisions on the substantive content of the Eighth Amendment and, by simultaneous effect, impose those standards back upon the States themselves with retroactive effect. This view is also inconsistent with our citation in Penry v Lynaugh, 492 US 302, 329-330, 106 L Ed 2d 256, 109 S Ct 2934 (1989), of Ford v Wainwright, 477 US 399, 91 L Ed 2d 335, 106 S Ct 2595 (1986), which relied for its Eighth Amendment analysis on the statutory or common law of a majority of the States, see id., at 408-409, 91 L Ed 2d 335, 106 S Ct 2595, as an example of a new rule.

[2g] One Louisiana case cited by petitioner disapproving prosecutorial comment on appellate review does discuss Eighth Amendment principles rather than relying solely on state law. Even in this case, however, the court cited Eighth Amendment cases only in its discussion of prosecutorial reference to the possibility of *pardon*. Its discussion of prosecutorial comment on appellate review, the issue before us here, referred to state-law rules. See State v Willie, supra, at 1033 (La 1982), cert denied, 465 US 1051, 79 L Ed 2d 723, 104 S Ct 1327. Petitioner also cites post-Caldwell Louisiana cases, which cite Caldwell and state cases interchangeably, and state that Caldwell did not change prior law in the State. See State v Smith, 554 So 2d 676, 685 (La 1989); State v Clark, 492 So 2d 862, 870-871 (La 1986); State ex rel. Busby v Butler, 538 So 2d 164, 173 (La 1988). To the extent these cases reflect state-court recognition that general Eighth Amendment principles pointed toward adoption of a Caldwell rule, or that Caldwell

[497 US 241]

is congruent with pre-existing state law, they cannot serve to show that Caldwell was dictated by our Eighth Amendment precedent. State courts as well as federal can be expected to engage in application of the principles announced in prior Eighth Amendment decisions that are "susceptible to debate among reasonable minds." Butler, 494 US, at 415, 108 L Ed 2d 347, 110 S Ct 1212.

Petitioner appears to contend that state courts will recognize federal constitutional protections only if they are compelled to do so by federal precedent and the threat of federal habeas review. Since some state courts had recognized a principle similar to Caldwell's, this argument goes, the result in Caldwell must have been compelled by Eighth Amendment precedent. This argument is premised on a skepticism of state courts that we decline to endorse. State courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution. It is not surprising that state courts, whether applying federal constitutional protections or seeking fair administration of their own state capital punishment law, would have taken care to exclude misleading prosecutorial comment. But this conscientious exercise of their powers of supervision and review could not dictate Caldwell as a principle of federal law under the Eighth Amendment.

III

[1b, 3b] Under Teague, new rules may be applied in habeas corpus proceedings only if they come within "one of two narrow exceptions." Saffle, 494 US, at 486, 108 L Ed 2d 415, 110 S Ct 1257. The first of these applies to new rules that place an entire category of primary conduct beyond the reach of the criminal law, Teague, supra, at 311, 108 L Ed 2d 415, 110 S Ct 1257 (plurality opinion), or new rules that prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense, Penry, supra, at 330, 106 L Ed 2d 256, 109 S Ct 2934. This exception has no application here. The second Teague exception applies to new "watershed rules of criminal procedure" that are necessary to the fundamental fairness of the

[497 US 242]

criminal proceeding. Saffle, supra, at 495, 108 L Ed 2d 415, 110 S Ct 1257; Teague, supra, at 311-313, 103 L Ed 2d 334, 109 S Ct 1060 (plurality opinion). Petitioner here challenges the Court of Appeals' conclusion that Caldwell does not come within this exception.

[8a] Petitioner contends that the second Teague exception should be read to include new rules of capital sentencing that "preserve the accuracy and fairness of capital sentencing judgments." Brief for Petitioner 30. But this test looks only to half of our definition of the second exception. Acceptance of petitioner's argument would return the second exception to the broad definition that Justice Harlan first proposed in Desist, but later abandoned in Mackey, under which new rules that "significantly improve the pre-existing factfinding procedures are to be retroactively applied on habeas." Desist v United States, 394 US 244, 262, 22 L Ed 2d 248, 89 S Ct 1030 (1969). In Teague, we modified Justice Harlan's test to combine the accuracy element of the Desist test with the Mackey limitation of the exception to watershed rules of fundamental fairness. It is thus not enough under Teague to say that a new rule is aimed at improving the accuracy of trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also " 'alter our understanding of the *bedrock procedural elements*' " essential to the fairness of a proceeding. Teague, 489 US, at 311, 103 L Ed 2d 334, 109 S Ct 1060 (plurality opinion) (quoting Mackey, 401 US, at 693, 28 L Ed 2d 404, 91 S Ct 1160).

[9] The scope of the Teague exceptions must be consistent with the recognition that "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." Teague, supra, at 309, 103 L Ed 2d 334, 109 S Ct 1060 (plurality opinion) (citing Friendly, Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments, 38 U Chi L Rev 142, 150 (1970)). The "costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus thus generally far outweigh the benefits of this application." Solem v

[497 US 243]

Stumes, 465 US 638, 654, 79 L Ed 579,

104 S Ct 1338 (1984) (opinion of Powell, J.). As we stated in Teague, because the second exception is directed only at new rules essential to the accuracy and fairness of the criminal process, it is "unlikely that many such components of basic due process have yet to emerge." 489 US, at 313, 103 L Ed 2d 334, 109 S Ct 1060 (plurality opinion).

[8b] It is difficult to see any limit to the definition of the second exception if cast as proposed by petitioner. All of our Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense. Indeed, petitioner has not suggested any Eighth Amendment rule that would not be sufficiently "fundamental" to qualify for the proposed definition of the exception, and at oral argument in this case counsel was unable to provide a single example. Tr of Oral Arg 17. In practical effect, petitioner asks us to overrule our decision in Penry that Teague applies to new rules of capital sentencing. This we decline to do.

[3c] At the time of petitioner's trial and appeal, the rule of Donnelly was in place to protect any defendant who could show that a prosecutor's remarks had in fact made a proceeding fundamentally unfair. It was always open to this petitioner to challenge the prosecutor's remarks at his sentencing proceeding, by making the showing required by Donnelly. See Dugger v Adams, 489 US, at 410, 103 L Ed 2d 435, 109 S Ct 1211 (defendant whose trial and appeal occurred prior to Caldwell "could have challenged the improper remarks by the trial judge at the time of his trial as a violation of due process. See Donnelly v DeChristoforo, 416 US 637 [40 L Ed 2d 431, 94 S Ct 1868] (1974)"); Maggio v Williams, 464 US, at 49-50, 78 L Ed 2d 43, 104 S Ct 311 (discussing application of Donnelly to improper remarks at sentencing). Petitioner has not contested the Court of Appeals' finding that he has no claim for relief under the Donnelly standard. And as the Court of Appeals stated: "[T]he only defendants who need to rely on Caldwell rather than Donnelly are those who must concede that the prosecutorial argument in their case was not so harmful as

to render their sentencing trial 'fundamentally unfair.'" 881 F2d, at 1293.

Rather than focusing on the prejudice to the defendant that must be shown to establish a Donnelly violation, our concern in Caldwell was with the "unacceptable risk" that misleading remarks could affect the reliability of the sentence. See 472 US, at 343, 86 L Ed 2d 231, 105 S Ct 2633 (opinion of O'Connor, J.). Caldwell must therefore be read as providing an additional measure of protection against error, beyond that afforded by Donnelly, in the special context of capital sentencing. See Darden v Wainwright, 477 US 168, 183-184, n 14, 91 L Ed 2d 144, 106 S Ct 2464 (1986). The Caldwell rule was designed as an enhancement of the accuracy of capital sentencing, a protection of systemic value for state and federal courts charged with reviewing capital proceedings. But given that it was added to an existing guarantee of due process protection against fundamental unfairness, we cannot say this systemic rule enhancing reliability is an "absolute prerequisite to fundamental fairness," 489 US, at 314, 103 L Ed 2d

334, 109 S Ct 1060, of the type that may come within Teague's second exception.

Discussions of the nature of Caldwell error from other contexts also support our conclusion. In Dugger v Adams, supra, we held that failure to consider a Caldwell claim would not come within a "fundamental miscarriage of justice" exception to the doctrine of procedural default. 489 US, at 412, n 6, 103 L Ed 2d 435, 109 S Ct 1211; see Murray v Carrier, 477 US 478, 91 L Ed 2d 397, 106 S Ct 2639 (1986). We rejected the dissent's contention that a fundamental miscarriage of justice had been shown in that "the very essence of a Caldwell claim is that the accuracy of the sentencing determination has been unconstitutionally undermined." Dugger, supra, at 412, n 6, 103 L Ed 2d 435, 109 S Ct 1211. Similarly, in Williams, supra, Justice Stevens concluded his discussion of a Caldwell-type claim by stating, "I question whether it can be said that this trial was fundamentally unfair. See Rose v Lundy, [455 US 509,] 543, and n 8 [71 L Ed 2d 379, 102 S Ct 1198 (1982)], (Stevens, J., dissenting)." 464 US, at 56, 78 L Ed 2d 43, 104 S Ct 311. These cases, of course, involved different

[497 US 245]

rules and contexts. Yet we think their rationale reflects a rejection of the argument that Caldwell represents a rule fundamental to the criminal proceeding.

[1c] Because petitioner seeks the benefit of a new rule that does not come within either of the Teague exceptions, his claim for habeas corpus relief is without merit. The judgment of the Court of Appeals is therefore affirmed.

SEPARATE OPINION

Justice **Marshall,** with whom Justice **Brennan** joins, Justice **Blackmun,** joins as to Parts I-IV, and Justice **Stevens** joins as to Parts I-III, dissenting.

In his closing argument in the sentencing phase of Robert Sawyer's trial, the prosecutor emphatically argued to the jury that a sentence of death would be "merely a recommendation" and that "others" would be able to correct the decision if it turned out to be "wrong." This argument misrepresented the scope of appellate review of capital sentences under Louisiana law. La Code Crim Proc Ann, Art 905.9 (West 1984) (review by State Supreme Court is limited to question whether sentence of death is "excessive"). The prosecutor's effort to minimize the jury's sense of responsibility is precisely the type of misleading argument that we condemned in Caldwell v Mississippi, 472 US 320, 86 L Ed 2d 231, 105 S Ct 2633 (1985), and is therefore "fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment.'" Id., at 340, 86 L Ed 2d 231, 105 S Ct 2633 (quoting Woodson v North Carolina, 428 US 280, 305, 49 L Ed 2d 944, 96 S Ct 2978 (1976) (plurality opinion)).

The Court refuses to address Sawyer's Caldwell claim on the merits. Instead, it holds that Caldwell created a "new" rule within the meaning of Teague v Lane, 489 US 288, 103 L Ed 2d 334, 109 S Ct 1060 (1989), ante, at 234, 111 L Ed 2d, at 206, and that Caldwell's protection against misleading prosecutorial argument is not a " 'watershed rul[e] of criminal procedure' " essential to the fundamental fairness of a capital proceeding, ante, at 241, 111 L Ed 2d, at 211 (quoting Saffle v Parks, 494 US 484, 495, 108 L Ed 2d 415, 110 S Ct 1257 (1990)). To reach this result, the majority

misrepresents the source and function of Caldwell's prohibitions, thereby applying its newly crafted retroactivity bar to a case in which the State has no legitimate interest in the finality of the death sentence it obtained through intentional misconduct. I dissent.

I

In Teague, the plurality declared that a case announces a new rule "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." 489 US, at 301, 103 L Ed 2d 334, 109 S Ct 1060. This Term, the Court held that the " 'new rule' principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." Butler v McKellar, 494 US 407, 414, 108 L Ed 2d 347, 110 S Ct 1212 (1990). Accord, Parks, supra, at 488, 108 L Ed 2d 415, 110 S Ct 1257 (quoting Butler, supra, at 414, 108 L Ed 2d 347, 110 S Ct 1212). I continue to regard the Court's effort to curtail the scope of federal habeas as inconsistent with Congress's intent to provide state prisoners with an opportunity to redress "unlawful state deprivations of their liberty interests through a fresh and full review of their claims by an Article III court." Butler, supra, at 427, 108 L Ed 2d 347, 110 S Ct 1212 (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting). Even under the majority's standard, though, if the answer to a legal question is not "susceptible to debate among reasonable minds," Butler, supra, at 415, 108 L Ed 2d 347, 110 S Ct 1212, or if existing precedent would have "compelled" state courts to provide relief at the time the defendant's conviction became final, Parks, supra, at 488, 108 L Ed 2d 415, 110 S Ct 1257, then the decision does not announce a "new" legal rule within the meaning of Teague. In such circumstances, a defendant is entitled to the retroactive benefit of the decision he seeks to invoke.

A

The "new rule" inquiry spelled out in Teague, Butler, and Parks confirms that Caldwell did not create a new rule. The roots of the Caldwell rule can be traced directly to this Court's Eighth Amendment decisions demanding heightened

reliability in capital sentencing. Woodson v North Carolina, supra (plurality opinion); Lockett v Ohio, 438 US 586, 57 L Ed 2d 973, 98 S Ct 2954 (1978) (plurality opinion); Eddings v Oklahoma, 455 US 104, 118-119, 71 L Ed 2d 1, 102 S Ct 869 (1982) (O'Connor, J., concurring). In Woodson, Lockett, and Eddings, the Court considered and rejected States' efforts after Furman v Georgia, 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726 (1972), to eliminate arbitrariness in the administration of the death penalty by limiting or withdrawing the sentencer's discretion. These decisions, as well as the post-Furman decisions in which the Court upheld capital sentencing schemes, see, e.g., Gregg v Georgia, 428 US 153, 49 L Ed 2d 859, 96 S Ct 2909 (1976); Proffitt v Florida, 472 US 242, 49 L Ed 2d 913, 96 S Ct 2960 (1976); Jurek v Texas, 428 US

262, 49 L Ed 2d 929, 96 S Ct 2950 (1976), emphasized that sentencers must confront their "truly awesome responsibility of decreeing death for a fellow human . . . with due regard for the consequences of their decision." Lockett, supra, at 598, 57 L Ed 2d 973, 98 S Ct 2954 (plurality opinion) (internal quotation marks and citation omitted). By the time of Caldwell, "this Court's Eighth Amendment jurisprudence ha[d] taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State." 472 US, at 329, 86 L Ed 2d 231, 105 S Ct 2633.

The majority nonetheless insists that the "principle of reliability in capital sentencing" is framed at such a high "level of generality" that treating it as the relevant principle for determining whether Caldwell is new law would render Teague "meaningless." Ante, at 236, 111 L Ed 2d, at 207. This argument ignores the centrality of the Caldwell rule to reliability in capital sentencing. Caldwell error affects not just the consideration of some relevant sentencing factors, but the entire decisionmaking process itself. When a prosecutor misleadingly tells the jury that its verdict may be corrected on appeal, the prosecutor invites the jury to shirk its sentencing responsibility. The prosecutor essentially informs the jury that its verdict is less important because no execution will occur without the independent approval of higher authorities. To the extent

the prosecutor's comments are "focused, unambiguous, and strong," Caldwell, supra, at 340, 86 L Ed 2d 231, 105 S Ct 2633, such misconduct casts irredeemable doubt on the resulting verdict.

Some rules in capital proceedings do not contribute fundamentally to reliability; as to such rules, the majority's rejection of the reliability principle as too general may be apt. For example, the rule of Batson v Kentucky, 476 US 79, 90 L Ed 2d 69, 106 S Ct 1712 (1986), prohibiting the state from exercising peremptory challenges in a racially discriminatory manner does not have a fundamental impact on the accuracy—as opposed to the integrity—of the criminal process. See Allen v Hardy, 478 US 255, 259, 92 L Ed 2d 199, 106 S Ct 2878 (1986). The Caldwell rule, though, is a prerequisite to reliability in capital sentencing. Not unlike the right to counsel, the right to a jury that understands the gravity of its task is essential to the vindication of the other sentencing guarantees. Meticulous presentation of evidence and careful instruction on the law are of minimal value to a defendant whose jury has been led to believe that its verdict is of little or no consequence. The majority's observation that Caldwell's prohibition against misleading prosecutorial argument is specific thus does not undermine Sawyer's assertion that it was dictated by the Eighth Amendment's general insistence on reliability in capital sentencing.

B

The majority's assertion that "there were in fact indications in our decisions that the Caldwell rule was *not* a requirement of the Eighth Amendment," ante, at 237, 111 L Ed 2d, at 208 is unsupported by the cases on which the majority relies. In California v Ramos, 463 US 992, 77 L Ed 2d 1171, 103 S Ct 3446 (1983), the defendant had challenged California's requirement that trial courts instruct capital juries about the Governor's power to commute life sentences. In rejecting the Eighth Amendment challenge, the Court emphasized that the challenged instruction was accurate. The Court distinguished Gardner v Florida, 430 US 349, 51 L Ed 2d 393, 97 S Ct 1197 (1977), in which the Court had struck down a death

sentence based in part on information contained in a presentence report that had not been disclosed to defense counsel. Unlike Gardner, where there was a "risk that some of the information [relied on in sentencing] . . . may [have] be[en] erroneous," Id., at 359, 51 L Ed 2d 393, 97 S Ct 1197 (plurality opinion), the sentencing decision in Ramos did not rest "in part on erroneous or inaccurate information." 463 US, at 1004, 77 L Ed 2d 1171, 103 S Ct 3446. See also ibid. (the "need for reliability in capital sentencing" did not require reversal because the challenged instruction gave the jury "accurate information"). Cf. Caldwell, 472 US, at 342, 86 L Ed 2d 231, 105 S Ct 2633 (O'Connor, J., concurring in part and concurring in judgment) ("In my view, the prosecutor's remarks were impermissible because they were inaccurate and misleading in a manner that diminished the jury's sense of responsibility. I agree that there can be no 'valid state penological interest' in imparting inaccurate or misleading information that minimizes the importance of the jury's deliberations in a capital sentencing case") (quoting id., at 336, 86 L Ed 2d 231, 105 S Ct 2633 (majority opinion)). The Ramos Court's approval of California's decision to provide capital juries with accurate information respecting commutation cannot reasonably be read as an approval of misleading or inaccurate prosecutorial argument concerning the scope of appellate review.

That the Mississippi Supreme Court in Caldwell erroneously read Ramos so broadly does not, as the majority argues, "sugges[t] that prior to Caldwell our cases did not put other courts on notice that the Eighth Amendment compelled the Caldwell result." Ante, at 237, 111 L Ed 2d, at 208. Some courts will misconstrue our precedents notwithstanding their clarity, see, e.g., McKoy v North Carolina, 494 US 433, 439-441, 108 L Ed 2d 369, 110 S Ct 1227 (1990) (state court failed to adhere to clear direction of Mills v Maryland, 486 US 367, 100 L Ed 2d 384, 108 S Ct 1860 (1988)), and the mere fact that a single court adopts a position contrary to the one dictated by our precedents does not confirm that the case law was unclear. Indeed, if that were the standard, almost every Supreme Court decision would announce a new rule, as we

seldom take cases to resolve issues as to which the lower courts are in universal agreement. Moreover, under the majority's view, state-court decisions, by misconstruing the scope of this Court's Eighth Amendment decisions, would simultaneously limit the reach of those decisions as a matter of federal law. Cf. ante, at 240, 111 L Ed 2d, at 210.

Ironically, the majority regards one errant decision by the Mississippi Supreme Court as evidence of uncertainty and yet dismisses as irrelevant to its "new rule" inquiry the States' near-unanimous rejection of Caldwell-type prosecutorial arguments prior to Caldwell, supra, at 333-334, and n 4, 86 L Ed 2d 231, 105 S Ct 2633 (collecting cases). Even the Mississippi Supreme Court declared that "[a]ny argument by the state which distorts or minimizes the solemn obligation and responsibility of the jury is serious error." Hill v State, 432 So 2d 427, 439 (1983) (refusing to rule on defendant's Caldwell-type claim, however, because of the absence of a contemporaneous objection). State decisions, even if they are not premised on federal law, play a part in determining the status of constitutional protections under the Eighth Amendment. That Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society," Trop v Dulles, 356 US 86, 101, 2 L Ed 2d 630, 78 S Ct 590 (1958) (plurality opinion), and this Court has often looked to the laws of the States as a barometer of contemporary values, see, e.g., Penry v Lynaugh, 492 US 302, 330-331, 106 L Ed 2d 256, 109 S Ct 2934 (1989); Ford v Wainwright, 477 US 399, 408-409, 91 L Ed 2d 335, 106 S Ct 2595 (1986). Of course, the recognition of a right under state law does not translate automatically into the existence of federal constitutional protection. But a consensus among States regarding an essential ingredient to "a *fair trial* in the sentencing phase," State v Berry, 391 So 2d 406, 418 (La 1980) (opinion on rehearing), is evidence that the right is cognizable under the Federal Constitution. The States' strong pre-Caldwell condemnation of misleading prosecutorial arguments regarding the scope of appellate review

is thus additional evidence that our Eighth Amendment decisions compelled the result in Caldwell.

Moreover, the majority's contention that the state courts based their decisions solely on "state common law," ante, at 239, 111 L Ed 2d, at 209, assumes that States' capital punishment jurisprudence has evolved independently of our Eighth Amendment decisions. But state decisions regarding capital sentencing procedures—even those that do not explicitly mention federal law—are surely informed by federal principles and should thus be accorded some weight in discerning the scope of federal protections. Only an especially condescending federalism would protect States from retroactive application of federal law by dismissing state decisions concerning capital sentencing as irrelevant to the lineage of the federal law.[1]

C

This Court's approach to improper prosecutorial comments in Donnelly v DeChristoforo, 416 US 637, 40 L Ed 2d 431, 94 S Ct 1868 (1974), also supports a finding that Caldwell did not establish a new rule. In Donnelly, the prosecutor hinted that the defendant might have been willing to accept a lesser penalty for his crime, implicitly suggesting that the defendant had acknowledged his guilt. The Court held that this comment did not violate the Due Process Clause because it was ambiguous, corrected by the trial court, and too fleeting to have influenced the jury. Id., at 643-645, 40 L Ed 2d 431, 94 S Ct 1868. The Donnelly Court specifically

---

[1] That Penry v Lynaugh, 492 US 302, 329, 106 L Ed 2d 256, 109 S Ct 2934 (1989), and Teague v Lane, 489 US 288, 301, 103 L Ed 2d 334, 109 S Ct 1060 (1989), cite Ford v Wainwright, 477 US 399, 91 L Ed 2d 335, 106 S Ct 2595 (1986), as crafting a "new" rule does not establish that state decisions are irrelevant in assessing the status of a right under the Federal Constitution. Cf. ante, at 240, 111 L Ed 2d, at 210. Neither of these opinions discussed the citation to Ford, and the force of their conclusions is undermined by this Court's subsequent reliance on state decisions in Saffle v Parks, 494 US 484, 108 L Ed 2d 415, 110 S Ct 1257 (1990), to determine whether the rule invoked in that case was compelled by our Eighth Amendment decisions, see id., at 490-491, 108 L Ed 2d 415, 110 S Ct 1257 (citing state decisions). State decisions cannot be deemed relevant to the Teague inquiry only to the extent that they *disprove* the rootedness of a constitutional right.

confined its decision to prosecutorial comments that did not implicate "specific guarantees of the Bill of Rights." Id., at 643, 40 L Ed 2d 431, 94 S Ct 1868. Had the claim implicated such rights, the Court acknowledged that "special care" would be required "to assure that prosecutorial conduct in no way impermissibly infringe[d] them." Ibid.

Donnelly was decided prior to the Court's explicit recognition in the cases following Gregg that the Eighth Amendment affords special protections to defendants facing the death penalty. The Court's decisions in the decade after Donnelly but before Caldwell made unmistakably clear that the death penalty's qualitatively different character from all other punishments necessitates "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson, 428 US, at 305, 49 L Ed 2d 944, 96 S Ct 2978 (plurality opinion). See also Beck v Alabama, 447 US 625, 637-638, 65 L Ed 2d 392, 100 S Ct 2382 (1980) (quoting Gardner, 430 US, at 357-358, 51 L Ed 2d 393, 97 S Ct 1197 (plurality opinion)). Moreover, our jurisprudence by the time of Caldwell indicated unambiguously that the Eighth Amendment protects against the *risk* that the death penalty would be imposed in an arbitrary or capricious manner. Gregg, 428 US, at 188, 49 L Ed 2d 859, 96 S Ct 2909 (joint opinion of Stewart, Powell, and Stevens, JJ.); see also Lockett, 438 US, at 605, 57 L Ed 2d 973, 98 S Ct 2954 (plurality opinion). In light of the Court's repeated emphasis on indispensible safeguards guaranteed in capital sentencing by a provision of the Bill of Rights, a court faced with misleading prosecutorial comments about the jury's sentencing role just prior to Caldwell could not reasonably have concluded on the basis of Donnelly that such comments would survive this Court's scrutiny.

The majority's contrary conclusion rests on a misunderstanding of the relationship between Caldwell and Donnelly. The majority endorses the Fifth Circuit's view that " '[t]he only defendants who need to rely on Caldwell rather than Donnelly are those who must concede that the prosecutorial argument in their case was not so harmful as to render their

sentencing trial "fundamentally unfair." ' " Ante, at 243-244, 111 L Ed 2d, at 212 (quoting 881 F2d 1273, 1293 (1989)). But Caldwell is not, as the majority argues, "an additional measure of protection against error, beyond that afforded by Donnelly, in the special context of capital sentencing." Ante, at 244, 111 L Ed 2d, at 212. This analysis erroneously presumes precisely what Caldwell denies, that "focused, unambiguous, and strong," prosecutorial arguments that mislead a jury about its sentencing role in the capital context can ever be deemed harmless. Caldwell rests on the view that *any* strong, uncorrected, and unequivocal prosecutorial argument minimizing the jury's sense of responsibility for its capital sentencing decision "presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." 472 US, at 333, 86 L Ed 2d 231, 105 S Ct 2633. Caldwell thus tells us that a capital trial in which the jury has been misled about its sentencing role *is* fundamentally unfair and therefore violates Donnelly as well.

The majority's claim that Maggio v Williams, 464 US 46, 78 L Ed 2d 43, 104 S Ct 311 (1983), provides more "direct evidence" that the rule of Caldwell was not clear at the time petitioner's conviction became final, ante, at 237, 111 L Ed 2d, at 208, is likewise unconvincing. In Williams, the Court vacated the Fifth Circuit's entry of a stay in a capital case because Williams' contentions were "insubstantial." 464 US, at 52, 78 L Ed 2d 43, 104 S Ct 311. Williams alleged, inter alia, that the prosecutor's closing argument had "elicited a decision based on passion rather than reason." Id., at 49, 78 L Ed 2d 43, 104 S Ct 311. Some, but not all, of the prosecutor's argument referred to the scope of appellate review. See id., at 53-54, 78 L Ed 2d 43, 104 S Ct 311 (Stevens, J., concurring in judgment). When the motion to vacate the stay came to this Court, the sole issue was whether there was "a reasonable probability" that four Members of the Court would vote to grant certiorari. Id., at 48, 78 L Ed 2d 43, 104 S Ct 311 (internal quotation marks omitted). In view of Williams' prior unsuccessful efforts to secure relief on similar claims, the Court applied "a strict standard of review" to Williams' application. Id., at 55, 78 L Ed 2d 43, 104 S Ct 311 (Stevens, J., concurring in judgment). The Court did not discuss the

merits of Williams' claim regarding the prosecutorial argument other than to note that the District Court had given it "full consideration," id., at 49, 78 L Ed 2d 43, 104 S Ct 311, and had found "that it did not render Williams' trial fundamentally unfair," id., at 50, 78 L Ed 2d 43, 104 S Ct 311. The Court's vacation of the stay in these circumstances thus reflects only the Court's view that Williams' claims, in such a posture, did not "warrant certiorari and plenary consideration." Id., at 48, 78 L Ed 2d 43, 104 S Ct 311.[2] In sum, because the cases that dictated the result in Caldwell were decided before Sawyer's conviction became final in 1984, he is entitled to careful review of the merits of his Caldwell claim.

II

Even if Caldwell established a "new rule," that rule nonetheless is available on federal habeas because it is a rule "without which the likelihood of an accurate [verdict] is seriously diminished," Teague, 489 US, at 313, 103 L Ed 2d 334, 109 S Ct 1060 (plurality opinion). The devastating impact of prosecutorial argument that diminishes jurors' sense of responsibility is revealed in the such argument.

---

[2] The majority nonetheless views Williams as casting some doubt on the ultimate disposition of Caldwell v Mississippi, 472 US 320, 86 L Ed 2d 231, 105 S Ct 2633 (1985) because the prosecutor's argument in Williams was "very similar to [the argument] in Caldwell." Ante, at 237, 111 L Ed 2d, at 208. That position, though, is overbroad. The District Court's finding that Williams' trial was not fundamentally unfair under Donnelly v DeChristoforo, 416 US 637, 40 L Ed 2d 431, 94 S Ct 1868 (1974), was tantamount to a finding that Williams' jury was not misled about its sentencing role. See Williams v King, 573 F Supp 525, 530-531 (MD La 1983).

See, e.g., Fleming v State, 240 Ga 142, 146, 240 SE2d 37, 40 (1977) (holding that "this type of remark has an unusual potential for corrupting the death sentencing process"); State v Berry, 391 So 2d, at 418 ("If the reference conveys the message that the jurors' awesome responsibility is lessened by the fact that their decision is not the final one, or if the reference contains inaccurate or misleading information, then the defendant has not had a *fair trial* in the sentencing phase, and the penalty should be vacated"); Ward v Commonwealth, 695 SW2d

404, 408 (Ky 1985) (holding that "the prosecutor clearly sought to divert from the minds of the jurors their true responsibility in this case by implying that the ultimate responsibility would fall to the trial judge, this court, [or] other appellate courts . . . . This is clearly an error of reversible magnitude"); Hill v State, 432 So 2d, at 439 ("Any argument by the state which distorts or minimizes this solemn obligation and responsibility of the jury is serious error. . . . [I]n a death penalty case a jury should never be given false comfort that any decision they make will, or can be, corrected"); Wiley v State, 449 So 2d 756, 762 (Miss 1984) ("While a jury is not literally 'the hangman,' only they [sic] may supply the hangman's victims. All notions of justice require that the jurors as individuals, and as a body, recognize and appreciate the gravity of their role").

The majority's underestimation of Caldwell's importance rests on the defect discussed above, supra, at 252-253, 111 L Ed 2d, at 218-219, namely, the view that a Caldwell error will not render a trial fundamentally unfair.[3] The majority's vague suggestion that Caldwell serves as "a protection of systemic value for state and federal courts charged with reviewing capital proceedings," ante, at 244, 111 L Ed 2d, at 212, does not disguise its inability to identify, in concrete terms, a situation in which Caldwell error occurs and yet the capital proceeding can be described as fundamentally

fair. See Caldwell, 472 US, at 341, 86 L Ed 2d 231, 105 S Ct 2633 (holding that if improper prosecutorial comment occurs the sentencing decision "does not meet the standard of reliability that the Eighth Amendment requires").

Nor does Dugger v Adams, 489 US 401, 103 L Ed 2d 435, 109 S Ct 1211 (1989), undermine Caldwell's status as a fundamental rule. The issue there was whether a particular defendant who had failed to object to misleading prosecutorial argument at sentencing had suffered sufficient prejudice to justify overlooking a state procedural bar. 489 US, at 406, 103 L Ed 2d 435, 109 S Ct 1211. The Court's denial of relief rested largely on the importance of the State's "interest in having the defendant challenge a faulty instruction in a timely manner so that it can correct the misstatement." Id., at 409, 103 L Ed 2d 435, 109 S Ct 1211; see also Wainwright v Sykes, 433 US 72, 87, 53 L Ed 2d 594, 97 S Ct 2497 (1977). The stringent standard for excusing procedural defaults against a particular defendant is premised on "the dual notion that, absent exceptional circumstances, a defendant is bound by the tactical decisions of competent counsel, and that defense counsel may not flout state procedures and then turn around and seek refuge in federal court from the consequences of such conduct." Reed v Ross, 468 US 1, 13, 82 L Ed 2d 1, 104 S Ct 2901 (1984) (citations omitted).

---

[3] The majority's rejection of the States' view that Caldwell's prohibitions are vital to the fairness of a capital proceeding reveals a tension in the Court's retroactivity doctrine. At the same time that the majority insists that Caldwell was not dictated by our Eighth Amendment decisions, the majority also argues that Caldwell is not a fundamental rule because it affected only an incremental change in capital sentencing. See ante, at 244, 111 L Ed 2d, at 212 (stating that Caldwell provides merely an "additional measure of protection against error, beyond that afforded by Donnelly"). A rule may be "new" even if it is designed to serve interests substantially similar to an "old" rule. The majority's extensive effort in its "new rule" analysis to demonstrate that Caldwell's "additional" protections marked a departure in our Eighth Amendment jurisprudence, however, seems disingenuous in light of its conclusion that the departure did not amount to much.

No such concern with enforcing state procedural rules against a particular defendant is at stake when we decide whether to apply new constitutional principles retroactively to all federal habeas cases. Our inquiry instead focuses on the importance of the new principle generally to the fairness and accuracy of the proceedings in which that principle went unobserved. Whereas the Dugger inquiry focuses on the general necessity of a rule to ensure an accurate verdict in all cases, the Court will overlook a clear procedural default only if the error has "probably resulted in the conviction of one who is actually innocent," 489 US, at 412, n 6, 103 L Ed 2d 435, 109 S Ct 1211 (internal quotation marks omitted). The strict procedural default rule is designed in part to protect the State's interest—unique in

the context of procedural default—in correcting error in the first instance. Sykes, supra, at 88-90, 53 L Ed 2d 594, 97 S Ct 2497.

Finally, the fundamental importance of Caldwell cannot be denied on the ground that "it is 'unlikely that many [new rules] of basic due process [essential to accuracy and fairness] have yet to emerge.' " Ante, at 243, 111 L Ed 2d, at 212 (quoting Teague, 489 US, at 313, 103 L Ed 2d 334, 109 S Ct 1060 (plurality opinion)). The majority cannot bind the future to present constitutional understandings of what is essential for due process. See, e.g., Hurtado v California, 110 US 516, 530-531, 28 L Ed 232, 4 S Ct 111 (1884). We would rightly regard such a statement as an expression of hubris were we to discover it in a volume of the United States Reports from 100, 50, or even 20 years ago, at which time, incidentally, this Court, "[i]n light of history, experience, and the present limitations of human knowledge," rejected the argument "that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution." McGautha v California, 402 US 183, 207, 28 L Ed 2d 711, 91 S Ct 1454 (1971) (footnote omitted); cf. Gregg, 428 US, at 189, 49 L Ed 2d 859, 96 S Ct 2909 (joint opinion of Stewart, Powell, and Stevens, JJ.) ("Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action"). Moreover, the notion that we have already discovered all those procedures central to fundamental fairness is squarely inconsistent with our Eighth Amendment methodology, under which "bedrock" Eighth Amendment principles emerge in light of new societal understandings and experience. See, e.g., Coker v Georgia, 433 US 584, 593-597, 53 L Ed 2d 982, 97 S Ct 2861 (1977) (plurality opinion).

III

The Court's refusal to allow Sawyer the benefit of Caldwell reveals the extent to which Teague and its progeny unjustifiably

[497 US 258]

limit the retroactive application of accuracy-enhancing criminal rules. Prior to Teague, our retroactivity jurisprudence always recognized a difference between rules aimed primarily at deterring police conduct and those designed to promote the accuracy of criminal proceedings. Although the former generally were not applied retroactively, see, e.g., Linkletter v Walker, 381 US 618, 636-637, 14 L Ed 2d 601, 85 S Ct 1731 (1965), the Court routinely afforded defendants the benefit of "new constitutional doctrine [whose purpose] is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials." Williams v United States, 401 US 646, 653, 28 L Ed 2d 388, 91 S Ct 1148 (1971) (plurality opinion). We departed from the general rule favoring retroactive application of accuracy-enhancing rules only in special cases in which retroactivity would have undermined substantial reliance interests of law enforcement officials and prosecutors who acted in good faith prior to the change in the law. See, e.g., Stovall v Denno, 388 US 293, 18 L Ed 2d 1199, 87 S Ct 1967 (1967).

The state prosecutor in this case surely could not claim a good-faith belief in the legitimacy of the conduct proscribed in Caldwell—misleading and inaccurate argument designed to minimize the jury's sentencing responsibility. Indeed, respondent seems to concede as much, framing the State's reliance interest, beyond its general interest in the finality of its convictions, as the right to have "misleading prosecutorial remarks . . . reviewed under the fundamental fairness standard of due process" rather than the Eighth Amendment. Brief for Respondent 16. This purported reliance interest depends on the erroneous view that Caldwell error could survive review under the Due Process Clause. See, supra, at 257, 111 L Ed 2d, at 221. But even granting a distinction in the degree of scrutiny applied by Donnelly and Caldwell, the State's claimed interest in having its intentional misconduct reviewed under a less demanding standard is hardly worth crediting.

[497 US 259]

The State is thus left to rely solely on its general interest in the finality in its criminal proceedings. Before today, such an interest was never alone sufficient to preclude vindication of constitutional rights on federal habeas. See Reed v Ross, 468 US, at 15, 82 L Ed 2d 1, 104 S Ct 2901. Teague itself, of course, stated that it was departing from our traditional approach. But that case, as well as Butler and Parks, involved rules that the Court did not recognize as contributing meaningfully to the accuracy of criminal proceedings. See Teague, 489 US, at 315, 103 L Ed 2d 334, 109 S Ct 1060 (plurality opinion) (failure to apply rule does not "seriously diminish the likelihood of obtaining an accurate conviction"); Butler, 494 US, at 416, 108 L Ed 2d 347, 110 S Ct 1212 (failure to apply rule "would not seriously diminish the likelihood of obtaining an accurate determination—indeed, it may increase that likelihood"); Parks, 494 US, at 495, 108 L Ed 2d 415, 110 S Ct 1257 ("The objectives of fairness and accuracy are more likely to be threatened than promoted" by the rule); cf. ante, at 244, 111 L Ed 2d, at 212 (acknowledging that Caldwell's central purpose is to enhance "the accuracy of capital sentencing"). Those cases thus could have been decided in the same way under our prior retroactivity doctrine, which weighed the State's finality and reliance interests against the defendant's interests protected by the new rule.

No such balancing of the competing concerns occurs today. The Court instead simply elevates its preference for finality in state proceedings over Congress' commitment "to provide a federal forum for state prisoners . . . by extending the habeas corpus powers of the federal courts to their constitutional maximum," Fay v Noia, 372 US 391, 426, 9 L Ed 2d 837, 83 S Ct 822 (1963). This raw preference for finality is unjustified. Although a State undoubtedly possesses a legitimate interest in the finality of its convictions, when the State itself undermines the accuracy of a capital proceeding, that general interest must give way to the demands of justice.

IV

The jury that sentenced Sawyer to death was deliberately misled about the significance of its verdict. That Sawyer

was thus denied a fundamentally fair trial was as apparent when Sawyer's conviction became final as it is today. The Court's refusal to allow a federal habeas court to correct this error is yet another indication that the Court is less concerned with safeguarding constitutional rights than with speeding defendants, deserving or not, to the executioner. I dissent.

V

Even if I did not believe that Sawyer was entitled to federal habeas review of his Caldwell claim, I would nonetheless vacate his death sentence. I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment. Gregg v Georgia, 428 US, at 231, 49 L Ed 2d 859, 96 S Ct 2909 (Marshall, J., dissenting).

[497 US 261]

NANCY BETH CRUZAN, by her Parents and Co-Guardians, LESTER L. CRUZAN, et ux., Petitioners

v

DIRECTOR, MISSOURI DEPARTMENT OF HEALTH, et al.

497 US 261, 111 L Ed 2d 224, 110 S Ct 2841

[No. 88-1503]

Argued December 6, 1989. Decided June 25, 1990.

Decision: Missouri requirement that incompetent's wishes as to withdrawal of life-sustaining treatment be proved by clear and convincing evidence held not violative of due process.

SUMMARY

In January 1983, a woman lost control of her car as she traveled down a Missouri road. The car overturned, and a state trooper discovered the woman, lying face down in a ditch, without detectable respiratory or cardiac function. Paramedics who arrived at the accident scene were able to restore the woman's breathing and heartbeat, and the woman was then transported to a hospital in an unconscious state. An attending neurosurgeon diagnosed the woman as having sustained probable cerebral contusions compounded by significant oxygen deprivation, or anoxia. The estimated length of the period of her anoxia was 12 to 14 minutes; permanent brain damage generally results, the trial court later found, after 6 minutes in an anoxic state. The woman remained in a coma for approximately 3 weeks, and then progressed to an unconscious state in which she was able to orally ingest some nutrition. In order to ease feeding and further the woman's recovery, surgeons implanted a gastrostomy feeding and hydration tube with the consent of her then husband. In October 1983, the woman was admitted to a state hospital. Subsequent rehabilitative efforts proved unavailing. After it became apparent that the woman had virtually no chance of regaining her mental faculties, her parents—who had been appointed as her coguardians—asked employees of the state hospital to terminate the artificial nutrition and hydration procedures. The employees refused to honor the request without court approval. The parents then filed a declaratory judgment action in a Missouri trial court, in which they sought judicial authorization

Briefs of Counsel, p 871, infra.

of their request. A guardian ad litem was appointed for the woman. The trial court, following a hearing, entered an order directing the employees to cause the parents' request to be carried out, based upon its findings that (1) the woman (a) had unassisted respiration and circulation function within the normal limits of a 30-year-old female, (b) was oblivious to her environment except for reflexive responses to sound and perhaps to painful stimuli, (c) suffered anoxia of the brain resulting in a massive enlargement of the ventricles filling with cerebrospinal fluid where the brain had degenerated, and cerebral cortical atrophy which was irreversible, permanent, progressive, and ongoing, (d) exhibited her highest cognitive brain function by grimacing, perhaps in recognition of ordinarily painful stimuli, which indicated the experience of pain and apparent response to sound, (e) was a spastic quadriplegic, (f) suffered contracture of her four extremities, with irreversible muscle and tendon damage, and (g) had no cognitive or reflex ability to swallow food or water to maintain her daily essential needs, and would never recover such ability; (2) a person in the woman's condition had a fundamental right under the Missouri and Federal Constitutions to refuse or direct the withdrawal of "death prolonging procedures"; and (3) the woman's expressed thoughts at age 25, in somewhat serious conversation with her housemate, that if sick or injured, she would not wish to continue her life unless she could live at least halfway normally, suggested that the woman would not wish to continue on with her nutrition and hydration given her present condition. Both the state and the guardian ad litem appealed. The Supreme Court of Missouri, reversing, expressed the view that (1) although the woman was in a "persistent vegetative state," she was neither dead within the meaning of Missouri's statutory definition of death nor terminally ill; (2) the woman's right to refuse treatment—whether such right proceeded from a constitutional right of privacy or a common-law right to refuse treatment—did not outweigh Missouri's strong policy favoring the preservation of life, as embodied in the Missouri living will statute; (3) the woman's conversation with her housemate was unreliable for the purpose of determining her intent, and thus insufficient to support the parents' claim to exercise substituted judgment on the woman's behalf; and (4) no person could assume the choice of terminating medical treatment for an incompetent person in the absence of either the formalities required under the living will statute or "clear and convincing, inherently reliable evidence," which was absent in the case at hand (760 SW2d 408).

On certiorari, the United States Supreme Court affirmed. In an opinion by Rehnquist, Ch. J., joined by White, O'Connor, Scalia, and Kennedy, JJ., it was held that (1) the due process clause of the Federal Constitution's Fourteenth Amendment did not forbid a state from requiring that evidence of an incompetent individual's wishes as to the withdrawal of life-sustaining treatment be proved by clear and convincing evidence, and thus a state could apply such standard in proceedings where a guardian sought to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state, because (a) a state could legitimately seek to safeguard the personal element of the choice between life and death of an incompetent individual through the imposition of heightened evidentiary requirements, since a state was entitled (i) to guard against potential abuses in situations such as where family members either were unavailable to serve as surrogate decisionmakers or would not act to protect a patient, (ii) to consider that a judicial proceeding to make a determination regarding an incompetent's wishes might very well not be an adversarial one, and (iii) to assert an unqualified interest in the preservation of human life, which interest would be weighed against the constitutionally protected interests of the individual, and (b) a state could place an increased risk of an erroneous decision on those seeking to terminate an incompetent individual's life-sustaining treatment, since (i) the interests at stake were more substantial, on both the individual and societal level, than those involved in a run-of-the-mine civil dispute, and (ii) an erroneous decision not to terminate would result in a maintenance of the status quo, while an erroneous decision to withdraw life-sustaining treatment was not susceptible of correction; (2) the Missouri Supreme Court did not commit constitutional error in deciding that the woman's desire to have hydration and nutrition withdrawn was not proved at trial pursuant to the standard of clear and convincing evidence enunciated by that court in its decision, where the testimony adduced at trial consisted primarily of (a) the woman's statement to her housemate, and (b) other observations to the same effect, which observations did not deal in terms with withdrawal of medical treatment or of hydration and nutrition; and (3) since the due process clause did not require a state to repose the right to judge whether an incompetent patient wishes to have life-sustaining medical treatment withdrawn with anyone but the patient herself, a state was not required to repose a right of substituted judgment as to such decision with close family members of the patient, and it could choose to defer to only the patient's wishes.

O'Connor, J., concurring, joined the court's opinion, and also expressed the view that (1) the liberty guaranteed by the due process clause protected an individual's personal decision to refuse medical treatment, including the artificial delivery of food and water, and (2) nothing in the court's decision (a) precluded a future determination by the United States Supreme Court that the Federal Constitution required the states to implement the decisions of incompetent individuals' duly appointed surrogates, or (b) prevented the states from developing other approaches for protecting such individuals' liberty interest in refusing medical treatment.

Scalia, J., concurring, joined the court's opinion, and also expressed the view that (1) it would have been preferable for the United States Supreme Court to announce that the federal courts have no business in the field of preserving life, insofar as (a) American law had always accorded states the power to prevent suicide—including suicide by refusing to take appropriate measures necessary to preserve one's life—by force if necessary, and (b) the Federal Constitution had nothing to say about the subject; (2) what was sought in the woman's case was indistinguishable from ordinary suicide; and (3) even when it was demonstrated by clear and convincing evidence that a patient no longer wished certain measures to be taken to preserve her life, it was up to the citizens of Missouri to decide, through their elected representatives, whether such wish would be honored.

Brennan, J., joined by Marshall and Blackmun, JJ., dissenting, expressed the view that (1) the woman had a fundamental right, under the due process clause, to be free of unwanted artificial nutrition and hydration; (2) such right was not outweighed by Missouri's asserted interest in the preservation of life, since (a) a general interest in someone's life which was completely abstracted from the interest of the person living that life could not outweigh the person's choice to avoid medical treatment, (b) an inability to withdraw life-sustaining treatment absent clear and convincing evidence might discourage starting such treatment, which would impair rather than serve the state's interest, and (c) in any event, such interest was not even well supported by Missouri's own enactments; (3) the evidentiary standard imposed by the Missouri Supreme Court impermissibly burdened the woman's right to avoid further medical treatment, since such standard neither enhanced the accuracy of a determination of the woman's wishes nor was consistent with an accurate determination; (4) in concluding that no clear and convincing, inherently reliable evidence had been presented to show that the woman would want to avoid further treatment, the Missouri Supreme Court failed to consider (a) the woman's statements to her housemate and to family members, (b) testimony from the woman's mother and sister that they were certain that the woman would want to discontinue artificial nutrition and hydration, and (c) the conclusion of the guardian ad litem that there was clear and convincing evidence that the woman would want to discontinue medical treatment and that such discontinuance was in the woman's best interests; and (5) the due process clause—while it permitted a state to insure that a person making the decision to refuse medical treatment on behalf of an incompetent patient be one whom the patient would have selected to do so, and to exclude from consideration anyone having improper motives—generally required that the state either repose the choice with the person whom the patient would most likely have chosen as proxy or leave the decision to the patient's family.

Stevens, J., dissenting, expressed the view that (1) the Federal Constitution required Missouri to care for the woman's life in a way that gave appropriate respect to the woman's own best interests; (2) focusing the entire inquiry as to whether an incompetent person would refuse medical treatment on the person's prior unambiguous expressions of intent while competent afforded no protection to children, young people who were victims of unexpected accidents or illnesses, or elderly persons who either failed to decide or failed to explain how they would want to be treated; (3) there was no reasonable ground for believing that the woman had any personal interest in the perpetuation of what the state had decided was her life; (4) the failure of Missouri's policy to heed the woman's interests with respect to private matters was ample evidence of the policy's illegitimacy; and (5) the court's deference to such policy was patently unconstitutional, insofar as it seemed to derive from the premise that chronically incompetent persons had no constitutionally cognizable interests at all, and so were not persons within the meaning of the Constitution.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Constitutional Law §§ 514, 830.7 — due process — intent of incompetent person — withdrawal of life-sustaining treatment — clear and convincing evidence

1a-1f. The due process clause of the Federal Constitution's Fourteenth Amendment does not forbid a state from requiring that evidence of an incompetent individual's wishes as to the withdrawal of life-sustaining treatment be proved by clear and convincing evidence, and thus a state may apply such standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state; consistent with the due process clause—which protects an interest in life, as well as an interest in refusing life-sustaining medical treatment—a state may legitimately seek to safeguard the personal element of the choice between life and death of an incompetent individual through the imposition of heightened evidentiary requirements, because a state is entitled (1) to guard against potential

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

22A Am Jur 2d, Death §§ 632, 633, 635, 636, 650, 655; 30 Am Jur 2d, Evidence § 1167

USCS, Constitution, Amendment 14

US L Ed Digest, Constitutional Law § 830.7; Evidence § 918

Index to Annotations, Euthanasia and Right to Die; Incompetent and Insane Persons; Medical Care and Treatment; Presumptions and Burden of Proof; States

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Supreme Court's views as to concept of "liberty" under due process clauses of Fifth and Fourteenth Amendments. 47 L Ed 2d 975.

Tortious maintenance or removal of life supports. 58 ALR4th 222.

Judicial power to order discontinuance of life-sustaining treatment. 48 ALR4th 67.

Homicide: physician's withdrawal of life supports from comatose patient. 47 ALR4th 18.

Patient's right to refuse treatment allegedly necessary to sustain life. 93 ALR3d 67.

Power of courts or other public agencies, in the absence of statutory authority, to order compulsory medical care for adult. 9 ALR3d 1391.

abuses in situations such as where family members either (a) are unavailable to serve as surrogate decisionmakers, or (b) will not act to protect a patient, (2) to consider that a judicial proceeding to make a determination regarding an incompetent's wishes may very well not be an adversarial one, and thus that such proceeding lacks the added guarantee of accurate factfinding that the adversarial process brings with it, and (3) to decline to make judgments about the quality of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual; under the due process clause, a state, by requiring proof by clear and convincing evidence, may place an increased risk of an erroneous decision on those seeking to terminate an incompetent individual's life-sustaining treatment, since the interests at stake are more substantial, on both the individual and societal level, than those involved in a run-of-the-mine civil dispute, and since an erroneous decision not to terminate results in a maintenance of the status quo—creating at least the potential that a wrong decision will eventually be corrected, or its impact mitigated, by subsequent developments such as advancements in medical science, the discovery of new evidence regarding the patient's intent, changes in the law, or simply the unexpected death of the patient despite the administration of life-sustaining treatment—while an erroneous decision to withdraw life-sustaining treatment is not susceptible of correction. (Brennan, Marshall, Blackmun, and Stevens, JJ., dissented from this holding.)

Evidence § 918 — sufficiency — intent of incompetent person — withdrawal of nutrition and hydration

2a, 2b. A state's highest court does not commit constitutional error in deciding that the desire of an incompetent patient—diagnosed to be in a persistent vegetative state—to have hydration and nutrition withdrawn was not proved at trial pursuant to a standard of clear and convincing evidence enunciated by that court in its decision, where the testimony adduced at trial consisted primarily of (1) the patient's statements to a housemate, about a year before an automobile accident in which the patient sustained severe injuries which rendered her incompetent, that the patient would not want to live should she face life as a "vegetable," and (2) other observations to the same effect, which observations did not deal in terms with withdrawal of medical treatment or of hydration and nutrition. (Brennan, Marshall, Blackmun, and Stevens, JJ., dissented from this holding.)

Constitutional Law § 528.5 — due process — refusal of medical treatment

3. Pursuant to the due process clause of the Federal Constitution's Fourteenth Amendment, a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment.

Constitutional Law § 525 — due process — liberty interest — balancing test

4. The determination that a person has a liberty interest under the due process clause of the Federal Constitution's Fourteenth Amendment does not end the inquiry as to whether the person's constitutional rights have been violated; such lib-

erty interest must then be balanced against the relevant state interests.

Constitutional Law §§ 101.3, 528.5 — due process — refusal of medical treatment — right of privacy

5a, 5b. The issue whether a person's right to refuse medical treatment is protected by the Federal Constitution is properly analyzed in terms of the person's liberty interest under the due process clause of the Fourteenth Amendment, rather than in terms of a generalized constitutional right of privacy.

Incompetent Persons § 1 — right to refuse medical treatment — necessity of surrogate

6. Because an incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment—or any other right—such right must be exercised for her, if at all, by some sort of surrogate.

Constitutional Law § 829; Evidence § 869(1) — due process — standard of proof

7. The function of a standard of proof, as that concept is embodied in the due process clause of the Federal Constitution's Fourteenth Amendment and in the realm of factfinding, is to instruct the factfinder concerning the degree of confidence society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.

Constitutional Law § 829; Evidence § 869(1) — due process — "clear and convincing" standard

8a, 8b. An intermediate standard of proof—that of "clear and convincing" evidence—may be mandated by the due process clause of the Federal Constitution's Fourteenth Amendment when the individual interests at stake in a state proceeding are both particularly important and more substantial than mere loss of money; such standard not only reflects the importance of a particular adjudication, but also serves as a societal judgment about how the risk of error should be distributed between the litigants, given that the more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision.

Constitutional Law § 514 — due process — protection of individual interests

9a, 9b. In determining whether an individual's important interests are protected by the due process clause of the Federal Constitution's Fourteenth Amendment, there is no reason why such interests should be afforded less protection simply because the government finds itself in the position of defending them.

Evidence § 551 — parol evidence rule

10. At common law and by statute in most states, the parol evidence rule prevents the variations of the terms of a written contract by oral testimony.

Statute of Frauds § 1 — oral contracts

11. The statute of frauds makes oral contracts to leave property by will unenforceable.

Constitutional Law § 8 — effect on general rules

12. The Federal Constitution does not require general rules of law to work faultlessly.

Constitutional Law § 528.3 — due process — incompetent person — family's right of "substituted judgment"

13. The due process clause of the Federal Constitution's Fourteenth Amendment does not require a state to repose the right to judge whether an incompetent patient wishes to have life-sustaining treatment withdrawn with anyone but the patient herself; thus, a state is not required to repose a right of "substituted judgment" as to such decision with close family members of a patient, and may choose to defer to only the patient's wishes, since there is no automatic assurance that the view of close family members will necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation while competent.

Constitutional Law § 347.5 — equal protection — incompetent persons

14a, 14b. A state is warranted, under the equal protection clause of the Federal Constitution's Fourteenth Amendment, in establishing rigorous procedures for the class of cases involving a choice made for an incompetent person by someone else to refuse medical treatment, which procedures do not apply to the class of cases involving a choice made by a competent person to refuse medical treatment, given the obvious differences between such choices.

SYLLABUS BY REPORTER OF DECISIONS

Petitioner Nancy Cruzan is incompetent, having sustained severe injuries in an automobile accident, and now lies in a Missouri state hospital in what is referred to as a persistent vegetative state: generally, a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive function. The State is bearing the cost of her care. Hospital employees refused, without court approval, to honor the request of Cruzan's parents, copetitioners here, to terminate her artificial nutrition and hydration, since that would result in death. A state trial court authorized the termination, finding that a person in Cruzan's condition has a fundamental right under the State and Federal Constitutions to direct or refuse the withdrawal of death-prolonging procedures, and that Cruzan's expression to a former housemate that she would not wish to continue her life if sick or injured unless she could live at least halfway normally suggested that she would not wish to continue on with her nutrition and hydration. The State Supreme Court reversed. While recognizing a right to refuse treatment embodied in the common-law doctrine of informed consent, the court questioned its applicability in this case. It also declined to read into the State Constitution a broad right to privacy that would support an unrestricted right to refuse treatment and expressed doubt that the Federal Constitution embodied such a right. The court then decided that the State Living Will statute embodied a state policy strongly favoring the preservation of life, and that Cruzan's statements to her housemate were unreliable for the purpose of determining her intent. It rejected the argument that her parents were entitled to order the termination of her medical treatment, concluding that no person can assume that choice for an incompetent in the absence of the formalities required by the Living Will statute or clear and convincing evidence of the patient's wishes.

Held:

1. The United States Constitution does not forbid Missouri to require that evidence of an incompetent's wishes as to the withdrawal of life-sustaining treatment be proved by clear and convincing evidence.

(a) Most state courts have based a right to refuse treatment on the common-law right to informed consent, see, e.g., In re Storar, 52 NY2d 363, 420 NE2d 64, or on both that right and a constitutional privacy right, see, e.g., Superintendent of Belchertown State School v Saikewicz, 373 Mass 728, 370 NE2d 417. In addition to relying on state constitutions and the common law, state courts have also turned to state statutes for guidance, see, e.g., Conservatorship of Drabick, 200 Cal App 3d 185, 245 Cal Rptr 840. However, these sources are not available to this Court, where the question is simply whether the Federal Constitution prohibits Missouri from choosing the rule of law which it did.

(b) A competent person has a liberty interest under the Due Process Clause in refusing unwanted medical treatment. Cf., e.g., Jacobson v Massachusetts, 197 US 11, 24-30, 49 L Ed 643, 25 S Ct 358. However, the question whether that constitutional right has been violated must be determined by balancing the liberty interest against relevant state interests. For purposes of this case, it is assumed that a competent person would have a constitutionally protected right to refuse lifesaving hydration and nutrition. This does not mean that an incompetent person should possess the same right, since such a person is unable to make an informed and voluntary choice to exercise that hypothetical right or any other right. While Missouri has in effect recognized that under certain circumstances a surrogate may act for the patient in electing to withdraw hydration and nutrition and thus cause death, it has established a procedural safeguard to assure that the surrogate's action conforms as best it may to the wishes expressed by the patient while competent.

(c) It is permissible for Missouri, in its proceedings, to apply a clear and convincing evidence standard, which is an appropriate standard when the individual interests at stake are both particularly important and more substantial than mere loss of money, Santosky v Kramer, 455 US 745, 756, 71 L Ed 2d 599, 102 S Ct 1388. Here, Missouri has a general interest in the protection and preservation of human life, as well as other, more particular interests, at stake. It may legitimately seek to safeguard the personal element of an individual's choice between life and death. The State is also entitled to guard against potential abuses by surrogates who may not act to protect the patient. Similarly, it is entitled to consider that a judicial proceeding regarding an incompetent's wishes may not be adversarial, with the added guarantee of accurate factfinding that the adversary process brings with it. The State may also properly decline to make judgments about the "quality" of a particular individual's life and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual. It is self-evident that these interests are more substantial, both on an individual and societal level, than those involved in a common civil dispute. The clear and convincing

ing evidence standard also serves as a societal judgment about how the risk of error should be distributed between the litigants. Missouri may permissibly place the increased risk of an erroneous decision on those seeking to terminate life-sustaining treatment. An erroneous decision not to terminate results in a maintenance of the status quo, with at least the potential that a wrong decision will eventually be corrected or its impact mitigated by an event such as an advancement in medical science or the patient's unexpected death. However, an erroneous decision to withdraw such treatment is not susceptible of correction. Although Missouri's proof requirement may have frustrated the effectuation of Cruzan's not-fully-expressed desires, the Constitution does not require general rules to work flawlessly.

2. The State Supreme Court did not commit constitutional error in concluding that the evidence adduced at trial did not amount to clear and convincing proof of Cruzan's desire to have hydration and nutrition withdrawn. The trial court had not adopted a clear and convincing evidence standard, and Cruzan's observations that she did not want to live life as a "vegetable" did not deal in terms with withdrawal of medical treatment or of hydration and nutrition.

3. The Due Process Clause does not require a State to accept the "substituted judgment" of close family members in the absence of substantial proof that their views reflect the patient's. This Court's decision upholding a State's favored treatment of traditional family relationships, Michael H. v Gerald D. 491 US 110, 105 L Ed 2d 91, 109 S Ct 2333, may not be turned into a constitutional requirement that a State must recognize the primacy of these relationships in a situation like this. Nor may a decision upholding a State's right to permit family decisionmaking, Parham v J. R., 442 US 584, 61 L Ed 2d 101, 99 S Ct 2493, be turned into a constitutional requirement that the State recognize such decisionmaking. Nancy Cruzan's parents would surely be qualified to exercise such a right of "substituted judgment" were it required by the Constitution. However, for the same reasons that Missouri may require clear and convincing evidence of a patient's wishes, it may also choose to defer only to those wishes rather than confide the decision to close family members.

760 SW2d 408, affirmed.

Rehnquist, C. J., delivered the opinion of the Court, in which White, O'Connor, Scalia, and Kennedy, JJ., joined. O'Connor, J., and Scalia, J., filed concurring opinions. Brennan, J., filed a dissenting opinion, in which Marshall and Blackmun, JJ., joined. Stevens, J., filed a dissenting opinion.

APPEARANCES OF COUNSEL

William H. Colby argued the cause for petitioners.

Robert L. Presson argued the cause for respondents.

Solicitor General **Kenneth W. Starr** argued the cause for the United States, as amicus curiae, supporting respondents, by special leave of court.

Briefs of Counsel, p 871, infra.

OPINION OF THE COURT

Chief Justice **Rehnquist** delivered the opinion of the Court.

[1a, 2a] Petitioner Nancy Beth Cruzan was rendered incompetent as a result of severe injuries sustained during an automobile accident. Copetitioners Lester and Joyce Cruzan, Nancy's parents and coguardians, sought a court order directing the withdrawal of their daughter's artificial feeding and hydration equipment after it became apparent that she had virtually no chance of recovering her cognitive faculties. The Supreme Court of Missouri held that because there was no clear and convincing evidence of Nancy's desire to have life-sustaining treatment withdrawn under such circumstances, her parents lacked authority to effectuate such a request. We granted certiorari, 492 US 917, 106 L Ed 2d 587, 109 S Ct 3240 (1989), and now affirm.

On the night of January 11, 1983, Nancy Cruzan lost control of her car as she traveled down Elm Road in Jasper County, Missouri. The vehicle overturned, and Cruzan was discovered lying face down in a ditch without detectable respiratory or cardiac function. Paramedics were able to restore her breathing and heartbeat at the accident site, and she was transported to a hospital in an unconscious state. An attending neurosurgeon diagnosed her as having sustained probable cerebral contusions compounded by significant anoxia (lack of oxygen). The Missouri trial court in this case found that permanent brain damage generally results after 6 minutes in an anoxic state; it was estimated that Cruzan was deprived of oxygen from 12 to 14 minutes. She remained in a coma for approximately three weeks and then progressed to an unconscious state in which she was able to orally ingest some nutrition. In order to ease feeding and further the recovery, surgeons implanted a gastrostomy feeding and hydration tube in Cruzan with the consent of her then husband. Subsequent rehabilitative efforts proved unavailing. She now lies in a Missouri state hospital in what is commonly referred to as a persistent vegetative state: generally, a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive function.[1] The State of Missouri is bearing the cost of her care.

---

[1] The State Supreme Court, adopting much of the trial court's findings, described Nancy Cruzan's medical condition as follows:

". . . (1) [H]er respiration and circulation are not artificially maintained and are within the normal limits of a thirty-year-old female; (2) she is oblivious to her environment except for reflexive responses to sound and perhaps painful stimuli; (3) she suffered anoxia of the brain resulting in a massive enlargement of the ventricles filling with cerebrospinal fluid in the area where the brain has degenerated and [her] cerebral cortical atrophy is irreversible, permanent, progressive and ongoing; (4) her highest cognitive brain function is exhibited by her grimacing perhaps in recognition of ordinarily painful stimuli, indicating the experience of pain and apparent response to sound; (5) she is a spastic quadriplegic; (6) her four extremities are contracted with irreversible muscular and tendon damage to all extremities; (7) she has no cognitive or reflexive ability to swallow food or water to maintain her daily essential needs and . . . she will never recover her ability to swallow sufficient [sic] to satisfy her needs. In sum, Nancy is diagnosed as in a persistent vegetative state. She is not dead. She is not terminally ill. Medical experts testified that she could live another thirty years." Cruzan v Harmon, 760 SW2d 408, 411 (Mo 1989) (en banc) (quotations omitted; footnote omitted).

In observing that Cruzan was not dead, the court referred to the following Missouri statute:

[497 US 267]

After it had become apparent that Nancy Cruzan had virtually no chance of regaining her mental faculties, her parents asked hospital employees to terminate the artificial nutrition and hydration procedures. All agree that such a

[497 US 268]

removal would cause her death. The employees refused to honor the request without court approval. The parents then sought and received authorization from the state trial court for termination. The court found that a person in Nancy's condition had a fundamental right under the State and Federal Constitutions to refuse or direct the withdrawal of "death prolonging procedures." App to Pet for Cert A99. The court also found that Nancy's "expressed thoughts at age twenty-five in somewhat serious conversation with a housemate friend that if sick or injured she would not wish to continue her life unless she could live at least halfway normally suggests that given her present condition she would not wish to continue on with her nutrition and hydration." Id., at A97-A98.

The Supreme Court of Missouri reversed by a divided vote. The court recognized a right to refuse treatment embodied in the common-law doctrine of informed consent, but expressed skepticism about the application of that doctrine in the circumstances of this case. Cruzan v Harmon, 760 SW2d 408, 416-417 (1988) (en banc). The court also declined to read a broad right of privacy into the State Constitution which would "support the right of a person to refuse medical treatment in every circumstance," and expressed doubt as to whether such a right existed under the United States Constitution. Id., at 417-418. It then decided that the Missouri Living Will statute, Mo Rev Stat § 459.010 et seq. (1986), embodied a state policy strongly favoring the preservation of life. 760 SW2d, at 419-420. The court found that Cruzan's statements to her roommate regarding her desire to live or die under certain conditions were "unreliable for the purpose of determining her intent," id., at 424, "and thus insufficient to support the co-guardians['] claim to exercise substituted

---

"For all legal purposes, the occurrence of human death shall be determined in accordance with the usual and customary standards of medical practice, provided that death shall not be determined to have occurred unless the following minimal conditions have been met:

"(1) When respiration and circulation are not artificially maintained, there is an irreversible cessation of spontaneous respiration and circulation; or

"(2) When respiration and circulation are artificially maintained, and there is total and irreversible cessation of all brain function, including the brain stem and that such determination is made by a licensed physician." Mo Rev Stat § 194.005 (1986).

Since Cruzan's respiration and circulation were not being artificially maintained, she obviously fit within the first proviso of the statute.

Dr. Fred Plum, the creator of the term "persistent vegetative state" and a renowned expert on the subject, has described the "vegetative state" in the following terms:

" 'Vegetative state describes a body which is functioning entirely in terms of its internal controls. It maintains temperature. It maintains heart beat and pulmonary ventilation. It maintains digestive activity. It maintains reflex activity of muscles and nerves for low level conditioned responses. But there is no behavioral evidence of either self-awareness or awareness of the surroundings in a learned manner.' " In re Jobes, 108 NJ 394, 403, 529 A2d 434, 438 (1987).

See also Brief for American Medical Association et al., as Amici Curiae 6 ("The persistent vegetative state can best be understood as one of the conditions in which patients have suffered a loss of consciousness").

judgment on Nancy's behalf." Id., at 426. It rejected the argument that Cruzan's parents were entitled to order the termination of her medical treatment,

[497 US 269]

concluding that "no person can assume that choice for an incompetent in the absence of the formalities required under Missouri's Living Will statutes or the clear and convincing, inherently reliable evidence absent here." Id., at 425. The court also expressed its view that "[b]road policy questions bearing on life and death are more properly addressed by representative assemblies" than judicial bodies. Id., at 426.

We granted certiorari to consider the question whether Cruzan has a right under the United States Constitution which would require the hospital to withdraw life-sustaining treatment from her under these circumstances.

At common law, even the touching of one person by another without consent and without legal justification was a battery. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 9, pp 39-42 (5th ed 1984). Before the turn of the century, this Court observed that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Union Pacific R. Co. v Botsford, 141 US 250, 251, 35 L Ed 734, 11 S Ct 1000 (1891). This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment. Justice Cardozo, while on the Court of Appeals of New York, aptly described this doctrine: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." Schloendorff v Society of New York Hospital, 211 NY 125, 129-130, 105 NE 92, 93 (1914). The informed consent doctrine has become firmly entrenched in American tort law. See Keeton, Dobbs, Keeton, & Owen, supra, § 32, pp 189-192; F. Rozovsky, Consent to Treatment, A Practical Guide 1-98 (2d ed 1990).

[497 US 270]

The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment. Until about 15 years ago and the seminal decision in In re Quinlan, 70 NJ 10, 355 A2d 647, cert denied sub nom. Garger v New Jersey, 429 US 922, 50 L Ed 2d 289, 97 S Ct 319 (1976), the number of right-to-refuse-treatment decisions was relatively few.[2] Most of the earlier cases involved patients who refused medical treatment forbidden by their religious beliefs, thus implicating First Amendment rights as well as common-law rights of self-determination.[3] More recently, however, with the advance of medical technology capable of sustaining life well past the point where natural forces would have brought certain death in earlier times, cases involving the right to refuse life-sustaining treatment have burgeoned. See 760 SW2d, at 412, n 4 (collecting 54 reported decisions from 1976 through 1988).

---

[2] See generally Karnezis, Patient's Right to Refuse Treatment Allegedly Necessary to Sustain Life, 93 ALR3d 67 (1979) (collecting cases); Cantor, A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life, 26 Rutgers L Rev 228, 229, and n 5 (1973) (noting paucity of cases).

[3] See Chapman, The Uniform Rights of the Terminally Ill Act: Too Little, Too Late?, 42 Ark L Rev 319, 324, n 15 (1989); see also F. Rozovsky, Consent to Treatment, A Practical Guide 415-423 (2d ed 1984).

In the Quinlan case, young Karen Quinlan suffered severe brain damage as the result of anoxia and entered a persistent vegetative state. Karen's father sought judicial approval to disconnect his daughter's respirator. The New Jersey Supreme Court granted the relief, holding that Karen had a right of privacy grounded in the Federal Constitution to terminate treatment. In re Quinlan, 70 NJ, at 38-42, 355 A2d, at 662-664. Recognizing that this right was not absolute, however, the court balanced it against asserted state interests. Noting that the State's interest "weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims," the court concluded that the state interests had to give way in that case. Id., at

[497 US 271]

41, 355 A2d, at 664. The court also concluded that the "only practical way" to prevent the loss of Karen's privacy right due to her incompetence was to allow her guardian and family to decide "whether she would exercise it in these circumstances." Ibid.

After Quinlan, however, most courts have based a right to refuse treatment either solely on the common-law right to informed consent or on both the common-law right and a constitutional privacy right. See L. Tribe, American Constitutional Law § 15-11, p 1365 (2d ed 1988). In Superintendent of Belchertown State School v Saikewicz, 373 Mass 728, 370 NE2d 417 (1977), the Supreme Judicial Court of Massachusetts relied on both the right of privacy and the right of informed consent to permit the withholding of chemotherapy from a profoundly retarded 67-year-old man suffering from leukemia. Id., at 737-738, 370 NE2d, at 424. Reasoning that an incompetent person retains the same rights as a competent individual "because the value of human dignity extends to both," the court adopted a "substituted judgment" standard whereby courts were to determine what an incompetent individual's decision would have been under the circumstances. Id., at 745, 752-753, 757-758, 370 NE2d, at 427, 431, 434. Distilling certain state interests from prior case law—the preservation of life, the protection of the interests of innocent third parties, the prevention of suicide, and the maintenance of the ethical integrity of the medical profession—the court recognized the first interest as paramount and noted it was greatest when an affliction was curable, "as opposed to the State interest where, as here, the issue is not whether, but when, for how long, and at what cost to the individual [a] life may be briefly extended." Id., at 742, 370 NE2d, at 426.

In In re Storar, 52 NY2d 363, 420 NE2d 64, cert denied, 454 US 858, 70 L Ed 2d 153, 102 S Ct 309 (1981), the New York Court of Appeals declined to base a right to refuse treatment on a constitutional privacy right. Instead, it found such a right "adequately

[497 US 272]

supported" by the informed consent doctrine. Id., at 376-377, 420 NE2d, at 70. In In re Eichner (decided with In re Storar, supra), an 83-year-old man who had suffered brain damage from anoxia entered a vegetative state and was thus incompetent to consent to the removal of his respirator. The court, however, found it unnecessary to reach the question whether his rights could be exercised by others since it found the evidence clear and convincing from statements made by the patient when competent that he "did not want to be maintained in a vegetative coma by use of a respirator." Id., at 380, 420 NE2d, at 72. In the companion Storar case, a 52-year-old man suffering from bladder cancer had been profoundly retarded during most of his life. Implicitly rejecting the approach taken in Saikewicz, supra, the court reasoned that due to such life-long incompetency, "it is unrealistic to attempt to determine whether he would want to continue potentially life prolonging treatment if he were competent." 52 NY2d, at 380, 420 NE2d, at 72. As the evidence showed that the patient's required blood transfusions did not involve excessive pain and without them his mental and physical abilities would deteriorate, the court concluded that it should not "allow an incompetent patient to bleed to death because someone, even someone as close as a parent or sibling, fees that this is best for one with an incurable disease." Id., at 382, 420 NE2d, at 73.

Many of the later cases build on the principles established in Quinlan, Saikewicz, and Storar/Eichner. For instance, in In re Conroy, 98 NJ 321, 486 A2d 1209 (1985), the same court that decided Quinlan considered whether a nasogastric feeding tube could be removed from an 84-year-old incompetent nursing-home resident suffering irreversible mental and physical ailments. While recognizing that a federal right of privacy might apply in the case, the court, contrary to its approach in Quinlan, decided to base its decision on the common-law right to self-determination and informed consent.

98 NJ, at 348, 486 A2d, at 1223. "On balance, the right to self-determination ordinarily outweighs any countervailing state interests, and competent persons generally are permitted to refuse medical treatment, even at the risk of death. Most of the cases that have held otherwise, unless they involved the interest in protecting innocent third parties, have concerned the patient's competency to make a rational and considered choice." Id., at 353-354, 486 A2d, at 1225.

Reasoning that the right of self-determination should not be lost merely because an individual is unable to sense a violation of it, the court held that incompetent individuals retain a right to refuse treatment. It also held that such a right could be exercised by a surrogate decisionmaker using a "subjective" standard when there was clear evidence that the incompetent person would have exercised it. Where such evidence was lacking, the court held that an individual's right could still be invoked in certain circumstances under objective "best interest" standards. Id., at 361-368, 486 A2d, at 1229-1233. Thus, if some trustworthy evidence existed that the individual would have wanted to terminate treatment, but not enough to clearly establish a person's wishes for purposes of the subjective standard, and the burden of a prolonged life from the experience of pain and suffering markedly outweighed its satisfactions, treatment could be terminated under a "limited-objective" standard. Where no trustworthy evidence existed, and a person's suffering would make the administration of life-sustaining treatment inhumane, a "pure-objective" standard could be used to terminate treatment. If none of these conditions obtained, the court held it was best to err in favor of preserving life. Id., at 364-368, 486 A2d, at 1231-1233.

The court also rejected certain categorical distinctions that had been drawn in prior refusal-of-treatment cases as lacking substance for decision purposes: the distinction between actively hastening death by terminating treatment and passively

allowing a person to die of a disease; between treating individuals as an initial matter versus withdrawing treatment afterwards; between ordinary versus extraordinary treatment; and between treatment by artificial feeding versus other forms of life-sustaining medical procedures. Id., at 369-374, 486 A2d, at 1233-1237. As to the last item, the court acknowledged the "emotional significance" of food, but noted that feeding by implanted tubes is a "medical procedur[e] with inherent risks and possible side effects, instituted by skilled health-care providers to compensate for impaired physical functioning" which analytically was equivalent to artificial breathing using a respirator. Id., at 373, 486 A2d, at 1236.[4]

In contrast to Conroy, the Court of Appeals of New York recently refused to accept less than the clearly expressed wishes of a patient before permitting the exercise of her right to refuse treatment by a surrogate decisionmaker. In re Westchester County Medical Center on behalf of O'Connor, 72 NY2d 517, 531 NE2d 607 (1988) (O'Connor). There, the court, over the objection of the patient's family members, granted an order to insert a feeding tube into a 77-year-old

woman rendered incompetent as a result of several strokes. While continuing to recognize a common-law right to refuse treatment, the court rejected the substituted judgment approach for asserting it "because it is inconsistent with our fundamental commitment to the notion that no person or court should substitute its judgment as to what would be an acceptable quality of life for another. Consequently, we adhere to the view that, despite its pitfalls and inevitable uncertainties, the inquiry must always be narrowed to the patient's expressed intent, with every effort made to minimize the opportunity for error." Id., at 530, 531 NE2d, at 613 (citation omitted). The court held that the record lacked the requisite clear and convincing evidence of the patient's expressed intent to withhold life-sustaining treatment. Id., at 531-534, 531 NE2d, at 613-615.

---

[4] In a later trilogy of cases, the New Jersey Supreme Court stressed that the analytic framework adopted in Conroy was limited to elderly, incompetent patients with shortened life expectancies, and established alternative approaches to deal with a different set of situations. See In re Farrell, 108 NJ 335, 529 A2d 404 (1987) (37-year-old competent mother with terminal illness had right to removal of respirator based on common law and constitutional principles which overrode competing state interests); In re Peter, 108 NJ 365, 529 A2d 419 (1987) (65-year-old woman in persistent vegetative state had right to removal of nasogastric feeding tube—under Conroy subjective test, power of attorney and hearsay testimony constituted clear and convincing proof of patient's intent to have treatment withdrawn); In re Jobes, 108 NJ 394, 529 A2d 434 (1987) (31-year-old woman in persistent vegetative state entitled to removal of jejunostomy feeding tube—even though hearsay testimony regarding patient's intent insufficient to meet clear and convincing standard of proof, under Quinlan, family or close friends entitled to make a substituted judgment for patient).

Other courts have found state statutory law relevant to the resolution of these issues. In Conservatorship of Drabick, 200 Cal App 3d 185, 245 Cal Rptr 840, cert denied, 488 US 958, 102 L Ed 2d 387, 109 S Ct 399 (1988), the California Court of Appeal authorized the removal of a nasogastric feeding tube from a 44-year-old man who was in a persistent vegetative state as a result of an auto accident. Noting that the right to refuse treatment was grounded in both the common law and a constitutional right of privacy, the court held that a state probate statute authorized the patient's conservator to order the withdrawal of life-sustaining treatment when such a decision was made in good faith based on medical advice and the conservatee's best interests. While acknowledging that "to claim that [a patient's] 'right to choose' survives incompetence is a legal fiction at best," the court reasoned that the respect society accords to persons as individuals is not lost upon incompetence and is best preserved by allowing others "to make a decision that reflects [a patient's] interests more closely than would a purely technological decision to do whatever is possible."[5]

Id., at 208, 245 Cal Rptr, at 854-855. See also In re Conservatorship of Torres, 357 NW2d 332 (Minn 1984) (Minnesota court had constitutional and statutory authority to authorize a conservator to order the removal of an incompetent individual's respirator since in patient's best interests).

In In re Estate of Longeway, 133 Ill 2d 33, 549 NE2d 292 (1989), the Supreme Court of Illinois considered whether a 76-year-old woman rendered incompetent from a series of strokes had a right to the discontinuance of artificial nutrition and hydration. Noting that the boundaries of a federal right of privacy were uncertain, the court found a right to refuse treatment in the doctrine of informed consent. Id., at 43-45, 549 NE2d, at 296-297. The court further held that the State Probate Act impliedly authorized a guardian to exercise a ward's right to refuse artificial sustenance in the event that the ward was terminally ill and irreversibly comatose. Id., at 45-47, 549 NE2d, at 298. Declining to adopt a best interests standard for deciding when it would be appropriate to exercise a ward's right because it "lets another make a determination of a patient's quality of life," the court opted instead for a substituted judgment standard. Id., at 49, 549 NE2d, at 299. Finding the "expressed intent" standard utilized in O'Connor, supra, too rigid, the court noted that other clear and convincing evidence of the patient's intent could be considered. 133 Ill 2d, at 50-51, 549 NE2d, at 300. The court also adopted the "consensus opinion [that] treats artificial nutrition and hydration as medical treatment." Id., at 42, 549 NE2d, at 296. Cf.

---

[5] The Drabick court drew support for its analysis from earlier, influential decisions rendered by California Courts of Appeal. See Bouvia v Superior Court, 179 Cal App 3d 1127, 225 Cal Rptr 297 (1986) (competent 28-year-old quadriplegic had right to removal of nasogastric feeding tube inserted against her will); Bartling v Superior Court, 163 Cal App 3d 186, 209 Cal Rptr 220 (1984) (competent 70-year-old, seriously ill man had right to the removal of respirator); Barber v Superior Court, 147 Cal App 3d 1006, 195 Cal Rptr 484 (1983) (physicians could not be prosecuted for homicide on account of removing respirator and intravenous feeding tubes of patient in persistent vegetative state).

McConnell v Beverly Enterprises-Connecticut, Inc. 209 Conn 692, 705, [497 US 277] 553 A2d 596, 603 (1989) (right to withdraw artificial nutrition and hydration found in the Connecticut Removal of Life Support Systems Act, which "provid[es] functional guidelines for the exercise of the common law and constitutional rights of self-determination"; attending physician authorized to remove treatment after finding that patient is in a terminal condition, obtaining consent of family, and considering expressed wishes of patient).[6]

As these cases demonstrate, the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment. Beyond that, these cases demonstrate both similarity and diversity in their approaches to decision of what all agree is a perplexing question with unusually strong moral and ethical overtones. State courts have available to them for decision a number of sources—state constitutions, statutes, and common law—which are not available to us. In this Court, the question is simply and starkly whether the United States Constitution prohibits Missouri from choosing the rule of decision which it did. This is the first case in which we have been squarely presented with the issue whether the United States Constitution grants what is in common parlance referred to as a "right to die." We follow the judicious counsel of our decision in Twin City Bank v Nebeker, 167 US 196, 202, 42 L Ed 134, 17 S Ct 766 (1897), where we said that in deciding "a question [497 US 278] of such magnitude and importance . . . it is the [better] part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject."

[3] The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions. In Jacobson v Massachusetts, 197 US 11, 24-30, 49 L Ed 643, 25 S Ct 358 (1905), for instance, the Court balanced an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in preventing disease. Decisions prior to the incorporation of the Fourth Amendment into the Fourteenth Amendment analyzed searches and seizures involving the body under the Due Process Clause and were thought to implicate substantial liberty interests. See, e.g., Breithaupt v Abram, 352 US 432, 439, 1 L Ed 2d 448, 77 S Ct 408 (1957) ("As against the right of an individual that his person be held inviolable . . . must be set the interests of society . . .").

---

[6] Besides the Missouri Supreme Court in Cruzan and the courts in McConnell, Longeway, Drabick, Bouvia, Barber, O'Connor, Conroy, Jobes, and Peter, appellate courts of at least four other States and one Federal District Court have specifically considered and discussed the issue of withholding or withdrawing artificial nutrition and hydration from incompetent individuals. See Gray v Romeo, 697 F Supp 580 (RI 1988); In re Gardner, 534 A2d 947 (Me 1987); In re Grant, 109 Wash 2d 545, 747 P2d 445 (1987); Brophy v New England Sinai Hospital, Inc. 398 Mass 417, 497 NE2d 626 (1986); Corbett v D'Alessandro, 487 So 2d 368 (Fla App 1986). All of these courts permitted or would permit the termination of such measures based on rights grounded in the common law, or in the State or Federal Constitution.

Just this Term, in the course of holding that a State's procedures for administering antipsychotic medication to prisoners were sufficient to satisfy due process concerns, we recognized that prisoners possess "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." Washington v Harper, 494 US 210, 221-222, 108 L Ed 2d 178, 110 S Ct 1028 (1990); see also id., at 229, 108 L Ed 2d 178, 110 S Ct 1028 ("The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty"). Still other cases support the recognition of a general liberty interest in refusing medical treatment. Vitek v Jones, 445 US 480, 494, 63 L Ed 2d 552, 100 S Ct 1254 (1980) (transfer to mental hospital coupled with mandatory behavior modification treatment implicated liberty interests); Parham v J. R., 442 US 584, 600, 61 L Ed 2d 101, 99 S Ct 2493 (1979) ("[A] child, in common with adults, has a substantial liberty

interest in not being confined unnecessarily for medical treatment").

[4, 5a] But determining that a person has a "liberty interest" under the Due Process Clause does not end the inquiry;[7] "whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests." Youngberg v Romeo, 457 US 307, 321, 73 L Ed 2d 28, 102 S Ct 2452 (1982). See also Mills v Rogers, 457 US 291, 299, 73 L Ed 2d 16, 102 S Ct 2442 (1982).

Petitioners insist that under the general holdings of our cases, the forced administration of life-sustaining medical treatment, and even of artificially delivered food and water essential to life, would implicate a competent person's liberty interest. Although we think the logic of the cases discussed above would embrace such a liberty interest, the dramatic consequences involved in refusal of such treatment would inform the inquiry as to whether the deprivation of that interest is constitutionally permissible. But for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.

Petitioners go on to assert that an incompetent person should possess the same right in this respect as is possessed by a competent person. They rely primarily on our decisions in Parham v J. R., supra, and Youngberg v Romeo, supra. In Parham, we held that a mentally disturbed minor child had a liberty interest in "not being confined unnecessarily for medical treatment," 442 US, at 600, 61 L Ed 2d 101, 99 S Ct 2493, but we certainly did not intimate that such a minor child, after commitment, would have a liberty interest in refusing treatment. In Youngberg, we held that a seriously retarded adult had a liberty

interest in safety and freedom from

---

[7] **[5b]** Although many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy, we have never so held. We believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest. See Bowers v Hardwick, 478 US 186, 194-195, 92 L Ed 2d 140, 106 S Ct 2841 (1986).

bodily restraint, 457 US, at 320, 73 L Ed 2d 28, 102 S Ct 2452. Youngberg, however, did not deal with decisions to administer or withhold medical treatment.

[1b, 6] The difficulty with petitioners' claim is that in a sense it begs the question: An incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right. Such a "right" must be exercised for her, if at all, by some sort of surrogate. Here, Missouri has in effect recognized that under certain circumstances a surrogate may act for the patient in electing to have hydration and nutrition withdrawn in such a way as to cause death, but it has established a procedural safeguard to assure that the action of the surrogate conforms as best it may to the wishes expressed by the patient while competent. Missouri requires that evidence of the incompetent's wishes as to the withdrawal of treatment be proved by clear and convincing evidence. The question, then, is whether the United States Constitution forbids the establishment of this procedural requirement by the State. We hold that it does not.

Whether or not Missouri's clear and convincing evidence requirement comports with the United States Constitution depends in part on what interests the State may properly seek to protect in this situation. Missouri relies on its interest in the protection and preservation of human life, and there can be no gainsaying this interest. As a general matter, the States—indeed, all civilized nations—demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide.[8] We do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death.

[1c] But in the context presented here, a State has more particular interests at stake. The choice between life and death is a deeply personal decision of obvious and overwhelming finality. We believe Missouri may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements. It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment. Not all incompetent patients will have loved ones available to serve as surrogate decisionmakers. And even where family members are present, "[t]here will, of course, be some unfortunate situations in which family members will not act to protect a patient." In re Jobes, 108 NJ 394, 419, 529 A2d 434, 447 (1987). A State is entitled to guard against potential abuses in such situations. Similarly, a State is entitled to consider that a judicial proceeding to make a determination regarding an incompetent's wishes may very well not be an adversarial one, with the added guarantee of accurate factfinding that the adversary process brings with it.[9] See Ohio v Akron Center for Reproductive

---

[8] See Smith, All's Well That Ends Well: Toward a Policy of Assisted Rational Suicide or Merely Enlightened Self-Determination?, 22 UCD L Rev 275, 290-291, and n 106 (1989) (compiling statutes).

Health, post, at 515-516, 111 L Ed 2d 405, 110 S Ct 2972. Finally, we think a State may properly decline to make judgments about the "quality" of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual.

[1d, 7, 8a, 9a] In our view, Missouri has permissibly sought to advance these interests through the adoption of a "clear and convincing" standard of proof to govern such proceedings. "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" Addington v Texas, 441 US 418, 423, 60 L Ed 2d 323, 99 S Ct 1804 (1979) (quoting In re Winship, 397 US 358, 370, 25 L Ed 2d 368, 90 S Ct 1068 (1970) (Harlan, J., concurring)). "This Court has mandated an intermediate standard of proof—'clear and convincing evidence'—when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" Santosky v Kramer, 455 US 745, 756, 71 L Ed 2d 599, 102 S Ct 1388 (1982) (quoting Addington, supra, at 424, 60 L Ed 2d 323, 99 S Ct 1804). Thus, such a standard has been required in deportation proceedings, Woodby v INS, 385 US 276, 17 L Ed 2d 362, 87 S Ct 483 (1966), in denaturalization proceedings, Schneiderman v United States, 320 US 118, 87 L Ed 1796, 63 S Ct 1333 (1943), in civil commitment proceedings, Addington, supra, and in proceedings for the termination of parental rights, Santosky, supra.[10]

---

[9] Since Cruzan was a patient at a state hospital when this litigation commenced, the State has been involved as an adversary from the beginning. However, it can be expected that many disputes of this type will arise in private institutions, where a guardian ad litem or similar party will have been appointed as the sole representative of the incompetent individual in the litigation. In such cases, a guardian may act in entire good faith, and yet not maintain a position truly adversarial to that of the family. Indeed, as noted by the court below, "[t]he guardian ad litem [in this case] finds himself in the predicament of believing that it is in Nancy's 'best interest to have the tube feeding discontinued,' but 'feeling that an appeal should be made because our responsibility to her as attorneys and guardians ad litem was to pursue this matter to the highest court in the state in view of the fact that this is a case of first impression in the State of Missouri.'" 760 SW2d, at 410, n 1. Cruzan's guardian ad litem has also filed a brief in this Court urging reversal of the Missouri Supreme Court's decision. None of this is intended to suggest that the guardian acted the least bit improperly in this proceeding. It is only meant to illustrate the limits which may obtain on the adversarial nature of this type of litigation.

[10] **[9b]** We recognize that these cases involved instances where the government sought to take action against an individual. See Price Waterhouse v Hopkins, 490 US 228, 253, 104 L Ed 2d 268, 109 S Ct 1775 (1989) (plurality opinion). Here, by contrast, the government seeks to protect the interests of an individual, as well as its own institutional interests, in life. We do not see any reason why important individual interests should be afforded less protection simply because the government finds itself in the position of defending them. "[W]e find it significant that . . . the defendant rather than the plaintiff" seeks the clear and convincing standard of proof—"suggesting that this standard ordinarily serves as a shield rather than . . . a sword." Id., at 253, 104 L Ed 2d 268, 109 S Ct 1775. That it is the government that has picked up the shield should be of no moment.

Further, [497 US 283] this level of proof, "or an even higher one, has traditionally been imposed in cases involving allegations of civil fraud, and in a variety of other kinds of civil cases involving such issues as . . . lost wills, oral contracts to make bequests, and the like." Woodby, supra, at 285, n 18, 17 L Ed 2d 362, 87 S Ct 483.

[1e, 8b] We think it self-evident that the interests at stake in the instant proceedings are more substantial, both on an individual and societal level, than those involved in a run-of-the-mine civil dispute. But not only does the standard of proof reflect the importance of a particular adjudication, it also serves as "a societal judgment about how the risk of error should be distributed between the litigants." Santosky, supra, at 755, 71 L Ed 2d 599, 102 S Ct 1388; Addington, supra, at 423, 60 L Ed 2d 323, 99 S Ct 1804. The more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision. We believe that Missouri may permissibly place an increased risk of an erroneous decision on those seeking to terminate an incompetent individual's life-sustaining treatment. An erroneous decision not to terminate results in a maintenance of the status quo; the possibility of subsequent developments such as advancements in medical science, the discovery of new evidence regarding the patient's intent, changes in the law, or simply the unexpected death of the patient despite the administration of life-sustaining treatment at least create the potential that a wrong decision will eventually be corrected or its impact mitigated. An erroneous decision to withdraw life-sustaining treatment, however, is not susceptible of correction. In Santosky, one of the factors which led the Court to require proof by clear and convincing evidence in a proceeding to terminate parental rights was that a decision in such a case was final and irrevocable. Santosky, supra, at 759, 71 L Ed 2d 599, 102 S Ct 1388. The same must surely be said of the decision to discontinue hydration and nutrition of a patient such as Nancy Cruzan, which all agree will result in her death.

[497 US 284]

[10-12] It is also worth noting that most, if not all, States simply forbid oral testimony entirely in determining the wishes of parties in transactions which, while important, simply do not have the consequences that a decision to terminate a person's life does. At common law and by statute in most States, the parol evidence rule prevents the variations of the terms of a written contract by oral testimony. The statute of frauds makes unenforceable oral contracts to leave property by will, and statutes regulating the making of wills universally require that those instruments be in writing. See 2 A. Corbin, Contracts § 398, pp 360-361 (1950); 2 W. Page, Law of Wills §§ 19.3-19.5, pp 61-71 (1960). There is no doubt that statutes requiring wills to be in writing, and statutes of frauds which require that a contract to make a will be in writing, on occasion frustrate the effectuation of the intent of a particular decedent, just as Missouri's requirement of proof in this case may have frustrated the effectuation of the not-fully-expressed desires of Nancy Cruzan. But the Constitution does not require general rules to work faultlessly; no general rule can.

[1f] In sum, we conclude that a State may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state. We note that many courts which have adopted some sort of substituted judgment procedure in situations like this, whether they limit consideration of evidence to the prior expressed wishes of the incompetent individual, or whether they allow more general proof of what the individual's decision would have been, require a clear and convincing standard of proof for such evidence. See, e.g., Longeway, 133 Ill 2d, at 50-51, 549 NE2d at 300; McConnell, 209 Conn, at 707-710, 553 A2d at 604-605; O'Connor, 72 NY2d, at 529-530, 531 NE2d, at 613; In re Gardner, 534 A2d 947, 952-953 (Me 1987); In re Jobes, 108 NJ, at 412-413, 529 A2d,

[497 US 285]

at 443; Leach v Akron General Medical Center, 68 Ohio Misc 1, 11, 426 NE2d 809, 815 (1980).

[2b] The Supreme Court of Missouri held that in this case the testimony adduced at trial did not amount to clear and convincing proof of the patient's desire to have hydration and nutrition withdrawn. In so doing, it reversed a decision of the Missouri trial court which had found that the evidence "suggest[ed]" Nancy Cruzan would not have desired to continue such measures, App to Pet for Cert A98, but which had not adopted the standard of "clear and convincing evidence" enunciated by the Supreme Court. The testimony adduced at trial consisted primarily of Nancy Cruzan's statements made to a housemate about a year before her accident that she would not want to live should she face life as a "vegetable," and other observations to the same effect. The observations did not deal in terms with withdrawal of medical treatment or of hydration and nutrition. We cannot say that the Supreme Court of Missouri committed constitutional error in reaching the conclusion that it did.[11]

Petitioners alternatively contend that Missouri must accept the "substituted judgment" of close family members even in the absence of substantial proof that their views reflect

[497 US 286]

the views of the patient. They rely primarily upon our decisions in Michael H. v Gerald D., 491 US 110, 105 L Ed 2d 91, 109 S Ct 2333 (1989), and Parham v J. R., 442 US 584, 61 L Ed 2d 101, 99 S Ct 2493 (1979). But we do not think these cases support their claim. In Michael H., we *upheld* the constitutionality of California's favored treatment of traditional family relationships; such a holding may not be turned around into a constitutional requirement that a State *must* recognize the primacy of those relationships in a situation like this. And in Parham, where the patient was a minor, we also *upheld* the constitutionality of a state scheme in which parents made certain decisions for mentally ill minors. Here again petitioners would seek to turn a decision which allowed a State to rely on family decisionmaking into a constitutional requirement that the State recognize such decisionmaking. But constitutional law does not work that way.

---

[11] The clear and convincing standard of proof has been variously defined in this context as "proof sufficient to persuade the trier of fact that the patient held a firm and settled commitment to the termination of life supports under the circumstances like those presented," In re Westchester County Medical Center on behalf of O'Connor, 72 NY2d 517, 531, 531 NE2d 607, 613 (1988) (O'Connor), and as evidence which "produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." In re Jobes, 108 NJ, at 407-408, 529 A2d, at 441 (quotation omitted). In both of these cases the evidence of the patient's intent to refuse medical treatment was arguably stronger than that presented here. The New York Court of Appeals and the Supreme Court of New Jersey, respectively, held that the proof failed to meet a clear and convincing threshold. See O'Connor, supra, at 526-534, 531 NE2d, at 610-615; Jobes, supra, at 442-443.

[13, 14a] No doubt is engendered by anything in this record but that Nancy Cruzan's mother and father are loving and caring parents. If the State were required by the United States Constitution to repose a right of "substituted judgment" with anyone, the Cruzans would surely qualify. But we do not think the Due Process Clause requires the State to repose judgment on these matters with anyone but the patient herself. Close family members may have a strong feeling—a feeling not at all ignoble or unworthy, but not entirely disinterested, either—that they do not wish to witness the continuation of the life of a loved one which they regard as hopeless, meaningless, and even degrading. But there is no automatic assurance that the view of close family members will necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation while competent. All of the reasons previously discussed for allowing Missouri to require clear and convincing evidence of the patient's wishes lead us to conclude that the State may

choose to defer only to those wishes, rather than confide the decision to close family members.[12]

The judgment of the Supreme Court of Missouri is affirmed.

SEPARATE OPINIONS

Justice **O'Connor,** concurring.

I agree that a protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions, see ante, at 278-279, 111 L Ed 2d, at 241-242, and that the refusal of artificially delivered food and water is encompassed within that liberty interest. See ante, at 279, 111 L Ed 2d, at 242. I write separately to clarify why I believe this to be so.

As the Court notes, the liberty interest in refusing medical treatment flows from decisions involving the State's invasions into the body.

---

[12] We are not faced in this case with the question whether a State might be required to defer to the decision of a surrogate if competent and probative evidence established that the patient herself had expressed a desire that the decision to terminate life-sustaining treatment be made for her by that individual.

[14b] Petitioners also adumbrate in their brief a claim based on the Equal Protection Clause of the Fourteenth Amendment to the effect that Missouri has impermissibly treated incompetent patients differently from competent ones, citing the statement in Cleburne v Cleburne Living Center, Inc. 473 US 432, 439, 87 L Ed 2d 313, 105 S Ct 3249 (1985), that the clause is "essentially a direction that all persons similarly situated should be treated alike." The differences between the choice made *by* a competent person to refuse medical treatment, and the choice made *for* an incompetent person by someone else to refuse medical treatment, are so obviously different that the State is warranted in establishing rigorous procedures for the latter class of cases which do not apply to the former class.

See ante, at 278-279, 111 L Ed 2d, at 241-242. Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause. See, e. g., Rochin v California, 342 US 165, 172, 96 L Ed 183, 72 S Ct 205, 25 ALR2d 1396 (1952) ("Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his

[497 US 288]

stomach's contents . . . is bound to offend even hardened sensibilities"); Union Pacific R. Co. v Botsford, 141 US 250, 251, 35 L Ed 734, 11 S Ct 1000 (1891). Our Fourth Amendment jurisprudence has echoed this same concern. See Schmerber v California, 384 US 757, 772, 16 L Ed 2d 908, 86 S Ct 1826 (1966) ("The integrity of an individual's person is a cherished value of our society"); Winston v Lee, 470 US 753, 759, 84 L Ed 2d 662, 105 S Ct 1611 (1985) ("A compelled surgical intrusion into an individual's body for evidence . . . implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime"). The State's imposition of medical treatment on an unwilling competent adult necessarily involves some form of restraint and intrusion. A seriously ill or dying patient whose wishes are not honored may feel a captive of the machinery required for life-sustaining measures or other medical interventions. Such forced treatment may burden that individual's liberty interests as much as any state coercion. See, e. g., Washington v Harper, 494 US 210, 221, 108 L Ed 2d 178, 110 S Ct 1028 (1990); Parham v J. R. 442 US 584, 600, 61 L Ed 2d 101, 99 S Ct 2493 (1979) ("It is not disputed that a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment").

The State's artificial provision of nutrition and hydration implicates identical concerns. Artificial feeding cannot readily be distinguished from other forms of medical treatment. See, e. g., Council on Ethical and Judicial Affairs, American Medical Association, AMA Ethical Opinion 2.20, Withholding or Withdrawing Life-Prolonging Medical Treatment, Current Opinions 13 (1989); The Hastings Center, Guidelines on the Termination of Life-Sustaining Treatment and the Care of the Dying 59 (1987). Whether or not the techniques used to pass food and water into the patient's alimentary tract are termed "medical treatment," it is clear they all involve some degree of intrusion and restraint. Feeding a patient by means of a nasogastric tube requires a physician to pass a long flexible tube through the patient's

[497 US 289]

nose, throat, nose esophagus and into the stomach. Because of the discomfort such a tube causes, "[m]any patients need to be restrained forcibly and their hands put into large mittens to prevent them from removing the tube." Major, The Medical Procedures for Providing Food and Water: Indications and Effects, in By No Extraordinary Means: The Choice to Forgo Life-Sustaining Food and Water 25 (J. Lynn ed 1986). A gastrostomy tube (as was used to provide food and water to Nancy Cruzan, see ante, at 266, 111 L Ed 2d, at 234) or jejunostomy tube must be surgically implanted into the stomach or small intestine. Office of Technology Assessment Task Force, Life-Sustaining Technologies and the Elderly 282 (1988). Requiring a competent adult to endure such procedures against her will burdens the patient's liberty, dignity, and freedom to determine the course of her own treatment. Accordingly, the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water.

I also write separately to emphasize that the Court does not today decide the issue whether a State must also give effect to the decisions of a surrogate decisionmaker. See ante, at 287, n 12, 111 L Ed 2d, at 247 In my view, such a duty may well be constitutionally required to protect the patient's liberty interest in refusing medical treatment. Few individuals provide explicit oral or written instructions regarding their intent to refuse medical treatment should they become incompetent.[1]

[497 US 290]

States which decline to consider any evidence other than such instructions may frequently fail to honor a patient's intent. Such failures might be avoided if the State considered an equally probative source of evidence: the patient's appointment of a proxy to make health care decisions on her behalf. Delegating the authority to make medical decisions to a family member or friend is becoming a common method of planning for the future. See, e. g., Areen, The Legal Status of Consent Obtained from Families of Adult Patients to Withhold or Withdraw Treatment, 258 JAMA 229, 230 (1987). Several States have recognized the practical wisdom of such a procedure by enacting durable power of attorney statutes that specifically authorize an individual to appoint a surrogate to make medical treatment decisions.[2] Some state courts have suggested that an agent appointed pursuant to a general durable power of attorney statute would also be empowered to make health care decisions on behalf of the patient.[3] See, e. g., In re Peter, 108 NJ 365, 378-

---

[1] See 2 President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Making Health Care Decisions 241-242 (1982) (36% of those surveyed gave instructions regarding how they would like to be treated if they ever became too sick to make decisions; 23% put those instructions in writing) (Lou Harris Poll, September 1982); American Medical Association Surveys of Physician and Public Opinion on Health Care Issues 29-30 (1988) (56% of those surveyed had told family members their wishes concerning the use of life-sustaining treatment if they entered an irreversible coma; 15% had filled out a living will specifying those wishes).

[2] At least 13 States and the District of Columbia have durable power of attorney statutes expressly authorizing the appointment of proxies for making health care decisions. See Alaska Stat Ann §§ 13.26.335, 13.26.344(l) (Supp 1989); Cal Civ Code Ann § 2500 (West Supp 1990); DC Code § 21-2205 (1989); Idaho Code § 39-4505 (Supp 1989); Ill Rev Stat, ch 110½ ¶¶ 804-1 to 804-12 (Supp 1988); Kan Stat Ann § 58-625 (Supp 1989); Me Rev Stat Ann, Tit 18-A, § 5-501 (Supp 1989); Nev Rev Stat § 449.800 (Supp 1989); Ohio Rev Code Ann § 1337.11 et seq. (Supp 1989); Ore Rev Stat § 127.510 (1989); Pa Stat Ann, Tit 20, § 5603(h) (Purdon Supp 1989); RI Gen Laws § 23-4.10-1 et seq. (1989); Tex Rev Civ Stat Ann, Art 4590h-1 (Vernon Supp 1990); Vt Stat Ann, Tit 14, § 3451 et seq. (1989).

[3] All 50 States and the District of Columbia have general durable power of attorney statutes. See Ala Code § 26-1-2 (1986); Alaska Stat Ann §§ 13-26-350 to 13-26-356 (Supp 1989); Ariz Rev Stat Ann § 14-5501 (1975); Ark Code Ann §§ 28-68-201 to 28-68-203 (1987); Cal Civ Code Ann § 2400 (West Supp 1990); Colo Rev Stat § 15-14-501 et seq. (1987); Conn Gen Stat § 45-69o (Supp 1989); Del Code Ann, Tit 12, §§ 4901-4905 (1987); DC Code

379, 529 A2d 419, 426 (1987); see also 73 Op Md Atty Gen No. 88-046 (1988) (interpreting Md Est & Trusts Code Ann §§ 13-601 to 13-602 (1974), as authorizing a delegatee to make health care decisions). Other States allow an individual to designate a proxy to carry out the intent of a living will.[4] These procedures for surrogate decisionmaking, which appear to be rapidly gaining in acceptance, may be a valuable additional safeguard of the patient's interest in directing his medical care. Moreover, as patients are likely to select a family member as a surrogate, see 2 President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Making Health Care Decisions 240 (1982), giving effect to a proxy's decisions may also protect the "freedom of personal choice in matters of . . . family life." Cleveland Board of Education v LaFleur, 414 US 632, 639, 39 L Ed 2d 52, 94 S Ct 791 (1974).

Today's decision, holding only that the Constitution permits a State to require clear and convincing evidence of Nancy Cruzan's desire to have artificial hydration and nutrition withdrawn, does not preclude a future determination that the Constitution requires the States to implement the decisions of a patient's duly appointed surrogate. Nor does it prevent States from developing other approaches for protecting an incompetent individual's liberty interest in refusing medical treatment. As is evident from the Court's survey of state court decisions, see ante, at 271-277, 111 L Ed 2d, at 237-241, no national consensus has yet emerged on the best solution for this difficult and sensitive problem. Today we decide only that one State's practice does not violate the Constitution; the more challenging task of crafting appropriate procedures for safeguarding incompetents' liberty interests is entrusted to the "laboratory" of the States, New State Ice Co. v Liebmann, 285 US 262, 311, 76 L Ed 747, 52 S Ct 371 (1932) (Brandeis, J., dissenting), in the first instance.

---

§ 21-2081 et seq. (1989); Fla Stat § 709.08 (1989); Ga Code Ann § 10-6-36 (1989); Haw Rev Stat §§ 551D-1 to 551D-7 (Supp 1989); Idaho Code § 15-5-501 et seq. (Supp 1989); Ill Rev Stat, ch 110½ ¶ 802-6 (1987); Ind Code §§ 30-2-11-1 to 30-2-11-7 (1988); Iowa Code § 633.705 (Supp 1989); Kan Stat Ann § 58-610 (1983); Ky Rev Stat Ann § 386.093 (Baldwin 1983); La Civ Code Ann, Art 3027 (West Supp 1990); Me Rev Stat Ann, Tit 18-A, § 5-501 et seq. (Supp 1989); Md Est & Trusts Code Ann §§ 13-601 to 13-602 (1974) (as interpreted by the Attorney General, see 73 Op Md Atty Gen No. 88-046 (Oct. 17, 1988)); Mass Gen Laws §§ 201B:1 to 201B:7 (1988); Mich Comp Laws §§ 700.495, 700.497 (1979); Minn Stat § 523.01 et seq. (1988); Miss Code Ann § 87-3-13 (Supp 1989); Mo Rev Stat § 404.700 (Supp 1990); Mont Code Ann §§ 72-5-501 to 72-5-502 (1989); Neb Rev Stat §§ 30-2664 to 30-2672, 30-2667 (1985); Nev Rev Stat § 111.460 et seq. (1986); NH Rev Stat Ann § 506:6 et seq. (Supp 1989); NJ Stat Ann § 46:2B-8 (West 1989); NM Stat Ann § 45-5-501 et seq. (1989); NY Gen Oblig Law § 5-1602 (McKinney 1989); NC Gen Stat § 32A-1 et seq. (1987); ND Cent Code §§ 30.1-30-01 to 30.1-30-05 (Supp 1989); Ohio Rev Code Ann § 1337.09 (Supp 1989); Okla Stat, Tit 58, §§ 1071-1077 (Supp 1989); Ore Rev Stat § 127.005 (1989); Pa Stat Ann, Tit 20, §§ 5601 et seq., 5602(a)(9) (Purdon Supp 1989); RI Gen Laws § 34-22-6.1 (1984); SC Code §§ 62-5-501 to 62-5-502 (1987); SD Codified Laws § 59-7-2.1 (1978); Tenn Code Ann § 34-6-101 et seq. (1984); Tex Prob Code Ann § 36A (Supp 1990); Utah Code Ann § 75-5-501 et seq. (1978); Vt Stat Ann, Tit 14, § 3051 et seq. (1989); Va Code § 11-9.1 et seq. (1989); Wash Rev Code § 11.94.020 (1989); W Va Code § 39-4-1 et seq. (Supp 1989); Wis Stat § 243.07 (1987-1988) (as interpreted by the Attorney General, see Wis Op Atty Gen 35-88 (1988)); Wyo Stat § 3-5-101 et seq. (1985).

[4] Thirteen States have living will statutes authorizing the appointment of health care proxies. See Ark Code Ann § 20-17-202 (Supp 1989); Del Code Ann, Tit 16, § 2502 (1983); Fla Stat § 765.05(2) (1989); Idaho Code § 39-4504 (Supp 1989); Ind Code § 16-8-11-14(g)(2) (1988); Iowa Code § 144A.7(1)(a) (1989); La Rev Stat Ann §§ 40:1299.58.1, 40:1299.58.3(C) (West Supp 1990); Minn Stat § 145B.01 et seq. (Supp 1989); Tex Health & Safety Code Ann § 672.003(d) (Supp 1990); Utah Code Ann §§ 75-2-1105, 75-2-1106 (Supp 1989); Va Code § 54.1-2986(2) (1988); 1987 Wash Laws, ch 162, § 1(1)(b); Wyo Stat § 35-22-102 (1988).

Justice **Scalia,** concurring.

The various opinions in this case portray quite clearly the difficult, indeed agonizing, questions that are presented by the constantly increasing power of science to keep the human body alive for longer than any reasonable person would want to inhabit it. The States have begun to grapple with these problems through legislation. I am concerned, from the tenor of today's opinions, that we are poised to confuse that

[497 US 293]

enterprise as successfully as we have confused the enterprise of legislating concerning abortion—requiring it to be conducted against a background of federal constitutional imperatives that are unknown because they are being newly crafted from Term to Term. That would be a great misfortune.

While I agree with the Court's analysis today, and therefore join in its opinion, I would have preferred that we announce, clearly and promptly, that the federal courts have no business in this field; that American law has always accorded the State the power to prevent, by force if necessary, suicide—including suicide by refusing to take appropriate measures necessary to preserve one's life; that the point at which life becomes "worthless," and the point at which the means necessary to preserve it become "extraordinary" or "inappropriate," are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory; and hence, that even when it *is* demonstrated by clear and convincing evidence that a patient no longer wishes certain measures to be taken to preserve his or her life, it is up to the citizens of Missouri to decide, through their elected representatives, whether that wish will be honored. It is quite impossible (because the Constitution says nothing about the matter) that those citizens will decide upon a line less lawful than the one we would choose; and it is unlikely (because we know no more about "life and death" than they do) that they will decide upon a line less reasonable.

The text of the Due Process Clause does not protect individuals against deprivations of liberty simpliciter. It protects them against deprivations of liberty "without due process of law." To determine that such a deprivation would not occur if Nancy Cruzan were forced to take nourishment against her will, it is unnecessary to reopen the historically recurrent debate over whether "due process" includes substantive restrictions. Compare Murray's Lessee v Hoboken Land and Improvement Co. 18 How 272, 15 L Ed 372 (1856), with Scott

[497 US 294]

v Sandford, 19 How 393, 450, 15 L Ed 691 (1857); compare Tyson & Brother v United Theatre Ticket Offices, Inc. 273 US 418, 71 L Ed 718, 47 S Ct 426, 58 ALR 1236 (1927), with Olsen v Nebraska ex rel. Western Reference & Bond Assn. Inc. 313 US 236, 246-247, 85 L Ed 1305, 61 S Ct 862, 133 ALR 1500

(1941); compare Ferguson v Skrupa, 372 US 726, 730, 10 L Ed 2d 93, 83 S Ct 1028, 95 ALR2d 1347 (1963), with Moore v East Cleveland, 431 US 494, 52 L Ed 2d 531, 97 S Ct 1932 (1977) (plurality opinion); see Easterbrook, Substance and Due Process, 1982 S Ct Rev 85; Monaghan, Our Perfect Constitution, 56 NYUL Rev 353 (1981). It is at least true that no "substantive due process" claim can be maintained unless the claimant demonstrates that the State has deprived him of a right historically and traditionally protected against state interference. Michael H. v Gerald D., 491 US 110, 122, 105 L Ed 2d 91, 109 S Ct 2333 (1989) (plurality opinion); Bowers v Hardwick, 478 US 186, 192, 92 L Ed 2d 140, 106 S Ct 2841 (1986); Moore, supra, at 502-503 52 L Ed 2d 531, 97 S Ct 1932 (plurality opinion). That cannot possibly be established here.

At common law in England, a suicide—defined as one who "deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death," 4 W. Blackstone, Commentaries * 189—was criminally liable. Ibid. Although the States abolished the penalties imposed by the common law (i.e., forfeiture and ignominious burial), they did so to spare the innocent family and not to legitimize the act. Case law at the time of the adoption of the Fourteenth Amendment generally held that assisting suicide was a criminal offense. See Marzen, O'Dowd, Crone, & Balch, Suicide: A Constitutional Right?, 24 Duquesne L Rev 1, 76 (1985) ("In short, twenty-one of the thirty-seven states, and eighteen of the thirty ratifying states prohibited assisting suicide. Only eight of the states, and seven of the ratifying states, definitely did not"); see also 1 F. Wharton, Criminal Law § 122 (6th rev ed 1868). The System of Penal Law presented to the House of Representatives by Representative Livingston in 1828 would have criminalized assisted suicide. E. Livingston, A System of Penal Law, Penal Code 122 (1828). The Field Penal Code,

[497 US 295]

adopted by the Dakota Territory in 1877, proscribed attempted suicide and assisted suicide. Marzen, O'Dowd, Crone, & Balch, supra, at 76-77. And most States that did not explicitly prohibit assisted suicide in 1868 recognized, when the issue arose in the 50 years following the Fourteenth Amendment's ratification, that assisted and (in some cases) attempted suicide were unlawful. Id., at 77-100; id., at 148-242 (surveying development of States' laws). Thus, "there is no significant support for the claim that a right to suicide is so rooted in our tradition that it may be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'" Id., at 100 (quoting Palko v Connecticut, 302 US 319, 325, 82 L Ed 288, 58 S Ct 149 (1937)).

Petitioners rely on three distinctions to separate Nancy Cruzan's case from ordinary suicide: (1) that she is permanently incapacited and in pain; (2) that she would bring on her death not by any affirmative act but by merely declining treatment that provides nourishment; and (3) that preventing her from effectuating her presumed wish to die requires violation of her bodily integrity. None of these suffices. Suicide was not excused even when committed "to avoid those ills which [persons] had not the fortitude to endure." 4 Blackstone, supra, at * 189. "The life of those to whom life has become a burden—of those who are hopelessly diseased or fatally wounded—nay, even the lives of criminals condemned to death, are under the protection of the law, equally as the lives of those who are in the full tide of life's enjoyment, and anxious to continue to live." Blackburn v State, 23 Ohio St 146, 163 (1873). Thus, a man who prepared a poison, and placed it within reach of his wife, "to put an end to her suffering" from a terminal illness was convicted of murder, People v Roberts, 211 Mich 187, 198, 178 NW 690, 693 (1920); the "incurable suffering of the suicide, as a legal question, could hardly affect the degree of criminality . . . ." Note, 30 Yale LJ 408, 412 (1921) (discussing Roberts). Nor would the imminence of the patient's death have

[497 US 296]

affected liability. "The lives of all are equally under the protection of the law, and under that protection to their last moment. . . . [Assisted suicide] is declared by the law to be murder, irrespective of the wishes or the condition of the party to whom the poison is administered . . . ." Blackburn, supra, at 163; see also Commonwealth v Bowen, 13 Mass 356, 360 (1816).

The second asserted distinction—suggested by the recent cases canvassed by the Court concerning the right to refuse treatment, ante, at 270-277, 111 L Ed 2d, at 236-241—relies on the dichotomy between action and inaction. Suicide, it is said, consists of an affirmative act to end one's life; refusing treatment is not an affirmative act "causing" death, but merely a passive acceptance of the natural process of dying. I readily acknowledge that the distinction between action and inaction has some bearing upon the legislative judgment of what ought to be prevented as suicide—though even there it would seem to me unreasonable to draw the line precisely between action and inaction, rather than between various forms of inaction. It would not make much sense to say that one may not kill oneself by walking into the sea, but may sit on the beach until submerged by the incoming tide; or that one may not intentionally lock oneself into a cold storage locker, but may refrain from coming indoors when the temperature drops below freezing. Even as a legislative matter, in other words, the intelligent line does not fall between action and inaction but between those forms of inaction that consist of abstaining from "ordinary" care and those that consist of abstaining from "excessive" or "heroic" measures. Unlike action versus inaction, that is not a line to be discerned by logic or legal analysis, and we should not pretend that it is.

But to return to the principal point for present purposes: the irrelevance of the action-inaction distinction. Starving oneself to death is no different from putting a gun to one's temple as far as the common-law definition of suicide is concerned; the cause of death in both cases is the suicide's conscious

[497 US 297]

decision to "pu[t] an end to his own existence." 4 Blackstone, supra, at * 189. See In re Caulk, 125 NH 226, 232, 480 A2d 93, 97 (1984); State ex rel. White v Narick, 170 W Va 195, 292 SE2d 54 (1982); Von Holden v Chapman, 87 App Div 2d 66, 450 NYS2d 623 (1982). Of course the common law rejected the action-inaction distinction in other contexts involving the taking of human life as well. In the prosecution of a parent for the starvation death of her infant, it was no defense that the infant's death was "caused" by no action of the parent but by the natural process of starvation, or by the infant's natural inability to provide for itself. See Lewis v State, 72 Ga 164 (1883); People v McDonald, 49 Hun 67, 1 NYS 703 (5th Dept., App Div 1888); Commonwealth v Hall, 322 Mass 523, 528, 78 NE2d 644, 647 (1948) (collecting cases); F. Wharton, Law of Homicide §§ 134-135, 304 (2d ed 1875); 2 J. Bishop, Commentaries on Criminal Law § 686 (5th ed 1872); J. Hawley & M. McGregor, Criminal Law 152 (3d ed 1899). A physician, moreover, could be criminally liable for failure to provide care that could have extended the patient's life, even if death was immediately caused by the underlying disease that the physician failed to treat. Barrow v State, 17 Okla Cr 340, 188 P 351 (1920); People v Phillips, 64 Cal 2d 574, 414 P2d 353 (1966).

It is not surprising, therefore, that the early cases considering the claimed right to refuse medical treatment dismissed as specious the nice distinction between "passively submitting to death and actively seeking it. The distinction may be merely verbal, as it would be if an adult sought death by starvation instead of a drug. If the State may interrupt one mode of self-destruction, it may with equal authority interfere with the other." John F. Kennedy Memorial Hosp. v Heston, 58 NJ 576, 581-582, 279 A2d 670, 672-673 (1971); see also Application of President & Directors of Georgetown College, Inc. 118 US App DC 80, 88-89, 331 F2d 1000,

1008-1009 (Wright, J., in chambers), cert denied, 377 US 978, 12 L Ed 2d 746, 84 S Ct 1883 (1964).

The third asserted basis of distinction—that frustrating Nancy Cruzan's wish to die in the present case requires interference with her bodily integrity—is likewise inadequate, because such interference is impermissible only if one begs the question whether her refusal to undergo the treatment on her own is suicide. It has always been lawful not only for the State, but even for private citizens, to interfere with bodily integrity to prevent a felony. See Phillips v Trull, 11 Johns 486 (NY 1814); City Council v Payne, 2 Nott & McCord 475 (SC 1821); Vandeveer v Mattocks, 3 Ind 479 (1852); T. Cooley, Law of Torts 174-175 (1879); Wilgus, Arrest Without a Warrant, 22 Mich L Rev 673 (1924); Restatement of Torts § 119 (1934). That general rule has of course been applied to suicide. At common law, even a private person's use of force to prevent suicide was privileged. Colby v Jackson, 12 NH 526, 530-531 (1842); Look v Choate, 108 Mass 116, 120 (1871); Commonwealth v Mink, 123 Mass 422, 429 (1877); In re Doyle, 16 RI 537, 539, 18 A 159, 159-160 (1889); Porter v Ritch, 70 Conn 235, 255, 39 A 169, 175 (1898); Emmerich v Thorley, 35 App Div 452, 456, 54 NYS 791, 793-794 (1898); State v Hembd, 305 Minn 120, 130, 232 NW2d 872, 878 (1975); 2 C. Addison, Law of Torts § 819 (1876); Cooley, supra, at 179-180. It is not even reasonable, much less required by the Constitution, to maintain that although the State has the right to prevent a person from slashing his wrists, it does not have the power to apply physical force to prevent him from doing so, nor the power, should he succeed, to apply, coercively if necessary, medical measures to stop the flow of blood. The state-run hospital, I am certain, is not liable under 42 USC § 1983 [42 USCS § 1983] for violation of constitutional rights, nor the private hospital liable under general tort law, if, in a State where suicide is unlawful, it pumps out the stomach of a person who has intentionally

taken an overdose of barbiturates, despite that person's wishes to the contrary.

The dissents of Justices Brennan and Stevens make a plausible case for our intervention here only by embracing—the latter explicitly and the former by implication—a political principle that the States are free to adopt, but that is demonstrably not imposed by the Constitution. "[T]he State," says Justice Brennan, "has no legitimate general interest in someone's life, completely abstracted from the interest of the person living that life, that could outweigh the person's choice *to avoid medical treatment.*" Post, at 313, 111 L Ed 2d, at 264 (emphasis added). The italicized phrase sounds moderate enough and is all that is needed to cover the present case—but the proposition cannot *logically* be so limited. One who accepts it must also accept, I think, that the State has no such legitimate interest that could outweigh "the person's choice *to put an end to her life.*" Similarly, if one agrees with Justice Brennan that "the State's general interest in life must accede to Nancy Cruzan's particularized and intense interest in self-determination *in her choice of medical treatment,*" ibid. (emphasis added), he must also believe that the State must accede to her "particularized and intense interest in self-determination *in her choice whether to continue living or to die.*" For insofar as balancing the relative interests of the State and the individual is concerned, there is nothing distinctive about accepting death through the refusal of "medical treatment," as opposed to accepting it through the refusal of food, or through the failure to shut off the engine and get out of the car after parking in one's garage after work. Suppose that Nancy Cruzan were in precisely the condition she is in today, except that she could be fed and digest food and water *without* artificial assistance. How is the State's "interest" in keeping her alive thereby increased, or her interest in deciding whether she wants to continue living reduced? It seems to me, in other words, that Justice Brennan's position ultimately rests upon the proposition that it is none of the State's

business if a person wants to commit suicide. Justice Stevens is explicit on the point: "Choices about death touch the core of liberty. . . . [N]ot much may be said with confidence about death unless it is said from faith, and that alone is reason enough to protect the freedom to conform choices about death to individual conscience." Post, at 343, 111 L Ed 2d, at 283. This is a view that some societies have held, and that our States are free to adopt if they wish. But it is not a view imposed by our constitutional traditions, in which the power of the State to prohibit suicide is unquestionable.

What I have said above is not meant to suggest that I would think it desirable, if we were sure that Nancy Cruzan wanted to die, to keep her alive by the means at issue here. I assert only that the Constitution has nothing to say about the subject. To raise up a constitutional right here we would have to create out of nothing (for it exists neither in text nor tradition) some constitutional principle whereby, although the

State may insist that an individual come in out of the cold and eat food, it may not insist that he take medicine; and although it may pump his stomach empty of poison he has ingested, it may not fill his stomach with food he has failed to ingest. Are there, then, no reasonable and humane limits that ought not to be exceeded in requiring an individual to preserve his own life? There obviously are, but they are not set forth in the Due Process Clause. What assures us that those limits will not be exceeded is the same constitutional guarantee that is the source of most of our protection—what protects us, for example, from being assessed a tax of 100% of our income above the subsistence level, from being forbidden to drive cars, or from being required to send our children to school for 10 hours a day, none of which horribles are categorically prohibited by the Constitution. Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me. This Court need not, and has no authority to, inject itself into every field of human activity

[497 US 301]

where irrationality and oppression may theoretically occur, and if it tries to do so it will destroy itself.

Justice **Brennan,** with whom Justice **Marshall** and Justice **Blackmun** join, dissenting.

"Medical technology has effectively created a twilight zone of suspended animation where death commences while life, in some form, continues. Some patients, however, want no part of a life sustained only by medical technology. Instead, they prefer a plan of medical treatment that allows nature to take its course and permits them to die with dignity."[1]

Nancy Cruzan has dwelt in that twilight zone for six years. She is oblivious to her surroundings and will remain so. Cruzan v Harmon, 760 SW2d 408, 411 (Mo 1988). Her body twitches only reflexively, without consciousness. Ibid. The areas of her brain that once thought, felt, and experienced sensations have degenerated badly and are continuing to do so. The cavities remaining are filling with cerebrospinal fluid. The "'cerebral cortical atrophy is irreversible, permanent, progressive and ongoing.'" Ibid. "Nancy will never interact meaningfully with her environment again. She will remain in a persistent vegetative state until her death." Id., at 422.[2] Because she cannot swallow, her nutrition and hydration are delivered through a tube surgically implanted in her stomach.

A grown woman at the time of the accident, Nancy had previously expressed her wish to forgo continuing medical care under circumstances such as these. Her family and her

[497 US 302]

friends are convinced that this is what she would want. See n 20, infra. A guardian ad litem appointed by the trial court is also convinced that this is what Nancy would want. See 760 SW2d, at 444 (Higgins, J., dissenting from denial of rehearing). Yet the Missouri Supreme Court, alone among state courts deciding such a question, has determined that an irreversibly vegetative patient will remain a passive prisoner of medical technology—for Nancy, perhaps for the next 30 years. See id., at 424, 427.

---

[1] Rasmussen v Fleming, 154 Ariz 207, 211, 741 P2d 674, 678 (1987) (en banc).

[2] Vegetative state patients may *react reflexively* to sounds, movements, and normally painful stimuli, but they do not *feel* any pain or *sense* anybody or anything. Vegetative state patients may appear awake but are completely unaware. See Cranford, The Persistent Vegetative State: The Medical Reality, 18 Hastings Ctr Rep 27, 28, 31 (1988).

Today the Court, while tentatively accepting that there is some degree of constitutionally protected liberty interest in avoiding unwanted medical treatment, including life-sustaining medical treatment such as artificial nutrition and hydration, affirms the decision of the Missouri Supreme Court. The majority opinion, as I read it, would affirm that decision on the ground that a State may require "clear and convincing" evidence of Nancy Cruzan's prior decision to forgo life-sustaining treatment under circumstances such as hers in order to ensure that her actual wishes are honored. See ante, at 282-283, 286-287, 111 L Ed 2d, at 245, 247. Because I believe that Nancy Cruzan has a fundamental right to be free of unwanted artificial nutrition and hydration, which right is not outweighed by any interests of the State, and because I find that the improperly biased procedural obstacles imposed by the Missouri Supreme Court impermissibly burden that right, I respectfully dissent. Nancy Cruzan is entitled to choose to die with dignity.

I

A

"[T]he timing of death—once a matter of fate—is now a matter of human choice." Office of Technology Assessment Task Force, Life Sustaining Technologies and the Elderly 41 (1988). Of the approximately 2 million people who die each year, 80% die in hospitals and long-term care institutions,[3]

and perhaps 70% of those after a decision to forgo life-sustaining treatment has been made.[4] Nearly every death involves a decision whether to undertake some medical procedure that could prolong the process of dying. Such decisions are difficult and personal. They must be made on the basis of individual values, informed by medical realities, yet within a framework governed by law. The role of the courts is confined to defining that framework, delineating the ways in which government may and may not participate in such decisions.

The question before this Court is a relatively narrow one: whether the Due Process Clause allows Missouri to require a non-incompetent patient in an irreversible persistent vegetative state to remain on life support absent rigorously clear and convincing evidence that avoiding the treatment represents the patient's prior, express choice. See ante, at 277-278, 111 L Ed 2d, at 241. If a fundamental right is at issue, Missouri's rule of decision must be scrutinized under the standards this Court has always applied in such circumstances. As we said in Zablocki v Redhail, 434 US 374, 388, 54 L Ed 2d 618, 98 S Ct 673 (1978), if a requirement imposed by a State "significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." The Constitution imposes on this Court the obligation to "examine carefully . . . the extent to which [the legitimate government interests advanced] are served by the challenged regulation." Moore v East Cleveland, 431 US 494, 499, 52 L Ed 2d 531, 97 S Ct 1932 (1977). See also Carey v Population Services International, 431 US 678, 690, 52 L Ed 2d 675, 97 S Ct 2010 (1977) (invalidating a requirement that bore "no relation to the State's interest"). An evidentiary rule, just as a substantive prohibition, must meet these standards if it significantly burdens a fundamental liberty interest. Fundamental

---

[3] See President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Deciding to Forego Life Sustaining Treatment 15, n 1, and 17-18 (1983) (hereafter President's Commission).

[4] See Lipton, Do-Not-Resuscitate Decisions in a Community Hospital: Incidence, Implications and Outcomes, 256 JAMA 1164, 1168 (1986).

rights "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." Bates v Little Rock, 361 US 516, 523, 4 L Ed 2d 480, 80 S Ct 412 (1960).

B

The starting point for our legal analysis must be whether a competent person has a constitutional right to avoid unwanted medical care. Earlier this Term, this Court held that the Due Process Clause of the Fourteenth Amendment confers a significant liberty interest in avoiding unwanted medical treatment. Washington v Harper, 494 US 210, 221-222, 108 L Ed 2d 178, 110 S Ct 1028 (1990). Today, the Court concedes that our prior decisions "support the recognition of a general liberty interest in refusing medical treatment." See ante, at 278, 111 L Ed 2d, at 242. The Court, however, avoids discussing either the measure of that liberty interest or its application by assuming, for purposes of this case only, that a competent person has a constitutionally protected liberty interest in being free of unwanted artificial nutrition and hydration. See ante, at 279, 111 L Ed 2d, at 242. Justice O'Connor's opinion is less parsimonious. She openly affirms that "the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause," that there is a liberty interest in avoiding unwanted medical treatment, and that it encompasses the right to be free of "artificially delivered food and water." See ante, at 287, 111 L Ed 2d, at 247.

But if a competent person has a liberty interest to be free of unwanted medical treatment, as both the majority and Justice O'Connor concede, it must be fundamental. "We are dealing here with [a decision] which involves one of the basic civil rights of man." Skinner v Oklahoma ex rel. Williamson, 316 US 535, 541, 86 L Ed 1655, 62 S Ct 1110 (1942) (invalidating a statute authorizing sterilization of certain felons). Whatever other liberties protected by the Due Process Clause are fundamental, "those liberties that are 'deeply rooted in this Nation's history and tradition' " are among them. Bowers v Hardwick,

478 US 186, 192, 92 L Ed 2d 140, 106 S Ct 2841 (1986) (quoting Moore v East Cleveland, supra, at 503, 52 L Ed 2d 531, 97 S Ct 1932 (plurality opinion). "Such a tradition commands respect in part because the Constitution carries the gloss of history." Richmond Newspapers, Inc. v Virginia, 448 US 555, 589, 65 L Ed 2d 973, 100 S Ct

2814 (1980) (Brennan, J., concurring in judgment).

The right to be free from medical attention without consent, to determine what shall be done with one's own body, *is* deeply rooted in this Nation's traditions, as the majority acknowledges. See ante, at 270, 111 L Ed 2d, at 236-237. This right has long been "firmly entrenched in American tort law" and is securely grounded in the earliest common law. Ante, at 269, 111 L Ed 2d, at 236. See also Mills v Rogers, 457 US 291, 294, n 4, 73 L Ed 2d 16, 102 S Ct 2442 (1982) ("[T]he right to refuse any medical treatment emerged from the doctrines of trespass and battery, which were applied to unauthorized touchings by a physician"). "Anglo-American law starts with the premise of thorough-going self determination. It follows that each man is considered to be master of his own body, and he may, if he be of sound mind, expressly prohibit the performance of lifesaving surgery, or other medical treatment." Natanson v Kline, 186 Kan 393, 406-407, 350 P2d 1093, 1104 (1960). "The inviolability of the person" has been held as "sacred" and "carefully guarded" as any common-law right. Union Pacific R. Co. v Botsford, 141 US 250, 251-252, 35 L Ed 734, 11 S Ct 1000 (1891). Thus, freedom from unwanted medical attention is unquestionably among those principles "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v Massachusetts, 291 US 97, 105, 78 L Ed 674, 54 S Ct 330, 90 ALR 575 (1934).[5]

That there may be serious consequences involved in refusal of the medical treatment at issue here does not vitiate the right under our common-law tradition of medical self-determination. It is "a well-established rule of general law . . . that it is the patient, not the physician, who ultimately decides if treatment—any treatment—is to be given at all. . . . The rule has never been qualified in its application by either the nature or purpose of the treatment, or the gravity of the consequences of acceding to or foregoing it." Tune v Walter Reed Army Medical Hospital, 602 F Supp 1452, 1455 (DC 1985). See also Downer v Veilleux, 322 A2d 82, 91 (Me 1974) ("The rationale of this rule lies in the fact that every competent adult has the right to forego treatment, or even cure, if it entails what for him are intolerable consequences or risks, however unwise his sense of values may be to others").[6]

---

[5] See, e.g., Canterbury v Spence, 150 US App DC 263, 271, 464 F2d 772, 780, cert denied, 409 US 1064, 34 L Ed 2d 518, 93 S Ct 560 (1972) ("The root premise" of informed consent "is the concept, fundamental in American jurisprudence, that '[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body' ") (quoting Schloendorff v Society of New York Hospital, 211 NY 125, 129-130, 105 NE 92, 93 (1914) (Cardozo, J.)). See generally Washington v Harper, 494 US 210, 241, 108 L Ed 2d 178, 110 S Ct 1028 (1990) (Stevens, J., dissenting) ("There is no doubt . . . that a competent individual's right to refuse [psychotropic] medication is a fundamental liberty interest deserving the highest order of protection").

[6] Under traditional tort law, exceptions have been found only to protect dependent children. See Cruzan v Harmon, 760 SW2d 408, 422, n 17 (Mo 1988) (citing cases where Missouri courts have ordered blood transfusions for children over the religious objection of parents); see also Winthrop University Hospital v Hess, 128 Misc 2d 804, 490 NYS2d 996 (Sup Ct Nassau Co 1985) (court ordered blood transfusion for religious objector because she was the mother of an infant and had explained that her objection was to the signing

[497 US 307]

No material distinction can be drawn between the treatment to which Nancy Cruzan continues to be subject—artificial nutrition and hydration—and any other medical treatment. See ante, at 288-289, 111 L Ed 2d, at 248 (O'Connor, J., concurring). The artificial delivery of nutrition and hydration is undoubtedly medical treatment. The technique to which Nancy Cruzan is subject—artificial feeding through a gastrostomy tube—involves a tube implanted surgically into her stomach through incisions in her abdominal wall. It may obstruct the intestinal tract, erode and pierce the stomach wall, or cause leakage of the stomach's contents into the abdominal cavity. See Page, Andrassy, & Sandler, Techniques in Delivery of Liquid Diets, in Nutrition in Clinical Surgery 66-67 (M. Deitel 2d ed 1985). The tube can cause pneumonia from reflux of the stomach's contents into the lung. See Bernard & Forlaw, Complications and Their Prevention, in Enteral and Tube Feeding 553 (J. Rombeau & M. Caldwell eds 1984). Typically, and in this case (see Tr 377), commercially prepared formulas are used, rather than fresh food. See Matarese, Enteral Alimentation, in Surgical Nutrition 726 (J. Fischer ed 1983). The type of formula and method of administration must be experimented with to avoid gastrointestinal problems. Id., at 748. The patient must be monitored daily by medical personnel as to weight, fluid intake, and fluid output; blood tests must be done weekly. Id., at 749, 751.

Artificial delivery of food and water is regarded as medical treatment by the medical profession and the Federal Government.[7] According to the American Academy of Neurology:

[497 US 308]

"The artificial provision of nutrition and hydration is a form of medical treatment . . . analogous to other forms of life-sustaining treatment, such as the use of the respirator. When a patient is unconscious, both a respirator and an artificial feeding device serve to support or replace normal bodily functions that are compromised as a result of the patient's illness." Position of the American Academy of Neurology on Certain Aspects of the Care and Management of the Persistent Vegetative State Patient, 39 Neurology

---

of the consent, not the transfusion itself); Application of President & Directors of Georgetown College, Inc. 118 US App DC 80, 88, 331 F2d 1000, 1008, cert denied, 377 US 978, 12 L Ed 2d 746, 84 S Ct 1883 (1964) (blood transfusion ordered for mother of infant). Cf. In re Estate of Brooks, 32 Ill 2d 361, 373, 205 NE2d 435, 441-442 (1965) (finding that lower court erred in ordering a blood transfusion for a woman—whose children were grown—and concluding: "Even though we may consider appellant's beliefs unwise, foolish or ridiculous, in the absence of an overriding danger to society we may not permit interference therewith in the form of a conservatorship established in the waning hours of her life for the sole purpose of compelling her to accept medical treatment forbidden by her religious principles, and previously refused by her with full knowledge of the probable consequences").

[7] The Missouri court appears to be alone among state courts to suggest otherwise, 760 SW2d, at 419 and 423, although the court did not rely on a distinction between artificial feeding and other forms of medical treatment. Id., at 423. See, e.g., Delio v Westchester County Medical Center, 129 App Div 2d 1, 19, 516 NYS2d 677, 689 (1987) ("[R]eview of the decisions in other jurisdictions . . . failed to uncover a single case in which a court confronted with an application to discontinue feeding by artificial means has evaluated medical procedures to provide nutrition and hydration differently from other types of life-sustaining procedures").

125 (Jan. 1989). See also Council on Ethical and Judicial Affairs of the American Medical Association, Current Opinions, Opinion 2.20 (1989) ("Life-prolonging medical treatment includes medication and artifically or technologically supplied respiration, nutrition or hydration"); President's Commission 88 (life-sustaining treatment includes respirators, kidney dialysis machines, and special feeding procedures). The Federal Government permits the cost of the medical devices and formulas used in enteral feeding to be reimbursed under Medicare. See Pub L 99-509, § 9340, note following 42 USC § 1395u, p 592 (1982 ed, Supp V) [Note following 42 USCS § 1395u]. The formulas are regulated by the federal Food and Drug Administration as "medical foods," see 21 USC § 360ee [21 USCS § 360ee], and the feeding tubes are regulated as medical devices, 21 CFR § 876.5980 (1989).

Nor does the fact that Nancy Cruzan is now incompetent deprive her of her fundamental rights. See Youngberg v Romeo, 457 US 307, 315-316, 319, 73 L Ed 2d 28, 102 S Ct 2452 (1982) (holding that severely retarded man's liberty interests in safety, freedom from bodily restraint, and reasonable training survive involuntary commitment); Parham v J. R., 442 US 584, 600, 61 L Ed 2d 101, 99 S Ct 2493 (1979) (recognizing a child's substantial liberty interest in not being confined unnecessarily for medical treatment); Jackson v Indiana, 406 US 715, 730, 738, 32 L Ed 2d 435, 92 S Ct 1845 (1972) (holding that Indiana could not violate the due process and equal protection rights of a mentally retarded deaf mute by committing him for an indefinite amount of time simply because he was incompetent to stand trial on the criminal charges filed against

[497 US 309]

him). As the majority recognizes, ante, at 280, 111 L Ed 2d, at 243, the question is not whether an incompetent has constitutional rights, but how such rights may be exercised. As we explained in Thompson v Oklahoma, 487 US 815, 101 L Ed 2d 702, 108 S Ct 2687 (1988), "[t]he law must often adjust the manner in which it affords rights to those whose status renders them unable to exercise choice freely and rationally. Children, the insane, and *those who are irreversibly ill with loss of brain function, for instance, all retain 'rights,'* to be sure, but often such rights are only meaningful as they are exercised by agents acting with the best interests of their principals in mind." Id., at 825, n 23, 101 L Ed 2d 702, 108 S Ct 2687 (emphasis added). "To deny [its] exercise because the patient is unconscious or incompetent would be to deny the right." Foody v Manchester Memorial Hospital, 40 Conn Super 127, 133, 482 A2d 713, 718 (1984).

II

A

The right to be free from unwanted medical attention is a right to evaluate the potential benefit of treatment and its possible consequences according to one's own values and to make a personal decision whether to subject oneself to the intrusion. For a patient like Nancy Cruzan, the sole benefit of medical treatment is being kept metabolically alive. Neither artificial nutrition nor any other form of medical treatment available today can cure or in any way ameliorate her condition.[8] Irreversibly vegetative patients are devoid of thought,

[497 US 310]

emotion, and sensation; they are permanently and completely unconscious. See n 2, supra.[9] As the President's Commission concluded in approving the withdrawal of life support equipment from irreversibly vegetative patients:

> "[T]reatment ordinarily aims to benefit a patient through preserving life, relieving pain and suffering, protecting against disability, and returning maximally effective functioning. If a prognosis of permanent unconsciousness is correct, however, continued treatment cannot confer such benefits. Pain and suffering are absent, as are joy, satisfaction, and pleasure. Disability is total and no return to an even minimal level of social or human functioning is possible." President's Commission 181-182.

There are also affirmative reasons why someone like Nancy might choose to forgo artificial nutrition and hydration under these circumstances. Dying is personal. And it is profound. For many, the thought of an ignoble end, steeped in decay, is abhorrent. A quiet, proud death, bodily integrity

[497 US 311]

intact, is a matter of extreme consequence. "In certain, thankfully rare, circumstances the burden of maintaining the corporeal existence degrades the very humanity it was meant to serve." Brophy v New England Sinai Hospital, Inc. 398 Mass 417, 434, 497 NE2d 626, 635-636 (1986) (finding the subject of the proceeding "in a condition which [he] has indicated he would consider to be degrading and without human dignity" and holding that "[t]he duty of the State to preserve life must encompass a recognition of an individual's right to avoid circumstances in which the individual himself would feel that efforts to sustain life demean or degrade his humanity"). Another court, hearing a similar case, noted:

> "It is apparent from the testimony

---

[8] While brain stem cells can survive 15 to 20 minutes without oxygen, cells in the cerebral hemispheres are destroyed if they are deprived of oxygen for as few as 4 to 6 minutes. See Cranford & Smith, Some Critical Distinctions Between Brain Death and the Persistent Vegetative State, 6 Ethics Sci & Med 199, 203 (1979). It is estimated that Nancy's brain was deprived of oxygen from 12 to 14 minutes. See ante, at 266, 111 L Ed 2d, at 234. Out of the 100,000 patients who, like Nancy, have fallen into persistive vegetative states in the past 20 years due to loss of oxygen to the brain, there have been only three even partial recoveries documented in the medical literature. Brief for American Medical Association et al. as Amici Curiae 11-12. The longest any person has ever been in a persistent vegetative state and recovered was 22 months. See Snyder, Cranford, Rubens, Bundlie, & Rockswold, Delayed Recovery from Postanoxic Persistent Vegetative State, 14 Annals Neurol 156 (1983). Nancy has been in this state for seven years.

[9] The American Academy of Neurology offers three independent bases on which the medical profession rests these neurological conclusions:

"First, direct clinical experience with these patients demonstrates that there is no behavioral indication of any awareness of pain or suffering.

"Second, in all persistent vegetative state patients studied to date, postmortem examination reveals overwhelming bilateral damage to the cerebral hemispheres to a degree incompatible with consciousness . . . .

"Third, recent data utilizing positron emission tomography indicates that the metabolic rate for glucose in the cerebral cortex is greatly reduced in persistent vegetative state patients, to a degree incompatible with consciousness." Position of the American Academy of Neurology on Certain Aspects of the Care and Management of the Persistent Vegetative State Patient, 39 Neurology 125 (Jan. 1989).

> that what was on [the patient's] mind was not only the invasiveness of life-sustaining systems, such as the [nasogastric] tube, upon the integrity of his body. It was also the utter helplessness of the permanently comatose person, the wasting of a once strong body, and the submission of the most private bodily functions to the attention of others." In re Gardner, 534 A2d 947, 953 (Me 1987).

Such conditions are, for many, humiliating to contemplate,[10] as is visiting a prolonged and anguished vigil on one's parents, spouse, and children. A long, drawn-out death can have a debilitating effect on family members. See Carnwath & Johnson, Psychiatric Morbidity Among Spouses of Patients With Stroke, 294 Brit Med J 409 (1987); Livingston, Families Who Care, 291 Brit Med J 919 (1985). For some, the idea of being remembered in their persistent vegetative **[497 US 312]** states rather than as they were before their illness or accident may be very disturbing.[11]

B

Although the right to be free of unwanted medical intervention, like other constitutionally protected interests, may not be absolute,[12] no state interest could outweigh the rights of an individual in Nancy Cruzan's position. Whatever a State's possible interests in mandating life-support treatment under other circumstances, there is no good to be obtained here by Missouri's insistence that Nancy Cruzan remain on life-support systems if it is indeed her wish not to do so. Missouri does not claim, nor could it, that society as a whole will be benefited by Nancy's receiving medical treatment.

[497 US 313]

No third party's situation will be improved and no harm to others will be averted. Cf. nn 6 and 8, supra.[13]

---

[10] Nancy Cruzan, for instance, is totally and permanently disabled. All four of her limbs are severely contracted; her fingernails cut into her wrists. App to Pet for Cert A93. She is incontinent of bowel and bladder. The most intimate aspects of her existence are exposed to and controlled by strangers. Brief for Respondent Guardian Ad Litem 2. Her family is convinced that Nancy would find this state degrading. See n 20, infra.

[11] What general information exists about what most people would choose or would prefer to have chosen for them under these circumstances also indicates the importance of ensuring a means for now-incompetent patients to exercise their right to avoid unwanted medical treatment. A 1988 poll conducted by the American Medical Association found that 80% of those surveyed favored withdrawal of life support systems from hopelessly ill or irreversibly comatose patients if they or their families requested it. New York Times, June 5, 1988, p 14, col 4 (citing American Medical News, June 3, 1988, p 9, col 1). Another 1988 poll conducted by the Colorado University Graduate School of Public Affairs showed that 85% of those questioned would not want to have their own lives maintained with artificial nutrition and hydration if they became permanently unconscious. The Coloradoan, Sept. 29, 1988, p 1.

Such attitudes have been translated into considerable political action. Since 1976, 40 States and the District of Columbia have enacted natural death acts, expressly providing for self-determination under some or all of these situations. See Brief for Society for the Right to Die, Inc., as Amicus Curiae 8; Weiner, Privacy, Family, and Medical Decision Making for Persistent Vegetative Patients, 11 Cardozo L Rev 713, 720 (1990). Thirteen States and the District of Columbia have enacted statutes authorizing the appointment of proxies for making health care decisions. See ante, at 290, n 2, 111 L Ed 2d, at 249 (O'Connor, J., concurring).

[12] See Jacobson v Massachusetts, 197 US 11, 26-27, 49 L Ed 643, 25 S Ct 358 (1905) (upholding a Massachusetts law imposing fines or imprisonment on those refusing to be vaccinated as "of paramount necessity" to that State's fight against a smallpox epidemic).

The only state interest asserted here is a general interest in the preservation of life.[14] But the State has no legitimate general interest in someone's life, completely abstracted from the interest of the person living that life, that could outweigh the person's choice to avoid medical treatment. "[T]he regulation of constitutionally protected decisions . . . must be predicated on legitimate state concerns *other than* disagreement with the choice the individual has made. . . . Otherwise, the interest in liberty protected by the Due Process Clause would be a nullity." Hodgson v Minnesota, post, at

435, 111 L Ed 2d 344, 110 S Ct 2926 (opinion of Stevens, J.) (emphasis added). Thus, the State's general interest in life must accede to Nancy Cruzan's particularized and intense interest in self-determination in her choice of medical treatment. There is simply nothing legitimately within the State's purview to be gained by superseding her decision.

Moreover, there may be considerable danger that Missouri's rule of decision would impair rather than serve any interest the State does have in sustaining life. Current medical practice recommends use of heroic measures if there is a scintilla of a chance that the patient will recover, on the assumption that the measures will be discontinued should the patient improve. When the President's Commission in 1982 approved the withdrawal of life support equipment from irreversibly vegetative patients, it explained that "[a]n even more troubling wrong occurs when a treatment that might save life or improve health is not started because the health care personnel are afraid that they will find it very difficult to stop the treatment if, as is fairly likely, it proves to be of little benefit and greatly burdens the patient." President's Commission 75. A New Jersey court recognized that families as well as doctors might be discouraged by an inability to stop life-support measures from "even attempting certain types of care [which] could thereby force them into hasty and premature decisions to allow a patient to die." In re Conroy, 98 NJ 321, 370, 486 A2d 1209, 1234 (1985). See also Brief for American Academy of Neurology as Amicus Curiae 9 (expressing same concern).[15]

---

[13] Were such interests at stake, however, I would find that the Due Process Clause places limits on what invasive medical procedures could be forced on an unwilling comatose patient in pursuit of the interests of a third party. If Missouri were correct that its interests outweigh Nancy's interest in avoiding medical procedures as long as she is free of pain and physical discomfort, see 760 SW2d, at 424, it is not apparent why a State could not choose to remove one of her kidneys without consent on the ground that society would be better off if the recipient of that kidney were saved from renal poisoning. Nancy cannot feel surgical pain. See n 2, supra. Nor would removal of one kidney be expected to shorten her life expectancy. See The American Medical Association Family Medical Guide 506 (J. Kunz ed 1982). Patches of her skin could also be removed to provide grafts for burn victims and scrapings of bone marrow to provide grafts for someone with leukemia. Perhaps the State could lawfully remove more vital organs for transplanting into others who would then be cured of their ailments, provided the State placed Nancy on some other life-support equipment to replace the lost function. Indeed, why could the State not perform medical experiments on her body, experiments that might save countless lives, and would cause her no greater burden than she already bears by being fed through the gastrostomy tube? This would be too brave a new world for me and, I submit, for our Constitution.

[14] The Missouri Supreme Court reviewed the state interests that had been identified by other courts as potentially relevant—prevention of homicide and suicide, protection of interests of innocent third parties, maintenance of the ethical integrity of the medical profession, and preservation of life—and concluded that: "In this case, only the state's interest in the preservation of life is implicated." 760 SW2d, at 419.

[497 US 315]

III

This is not to say that the State has no legitimate interests to assert here. As the majority recognizes, ante, at 281-282, 111 L Ed 2d, at 242, Missouri has a parens patriae interest in providing Nancy Cruzan, now incompetent, with as accurate as possible a determination of how she would exercise her rights under these circumstances. Second, if and when it is determined that Nancy Cruzan would want to continue treatment, the State may legitimately assert an interest in providing that treatment. But *until* Nancy's wishes have been determined, [497 US 316] the only state interest that may be asserted is an interest in safeguarding the accuracy of that determination.

Accuracy, therefore, must be our touchstone. Missouri may constitutionally impose only those procedural requirements that serve to enhance the accuracy of a determination of Nancy Cruzan's wishes or are at least consistent with an accurate determination. The Missouri "safeguard" that the Court upholds today does not meet that standard. The determination needed in this context is whether the incompetent person would choose to live in a persistent vegetative state on life support or to avoid this medical treatment. Missouri's rule of decision imposes a markedly asymmetrical evidentiary burden. Only evidence of specific statements of treatment choice made by the patient when competent is admissible to support a finding that the patient, now in a persistent vegetative state, would wish to avoid further medical treatment. Moreover, this evidence must be clear and convincing. No proof is required to support a finding that the incompetent person would wish to continue treatment.

---

[15] In any event, the state interest identified by the Missouri Supreme Court—a comprehensive and "unqualified" interest in preserving life, id., at 420, 424—is not even well supported by that State's own enactments. In the first place, Missouri has no law requiring every person to procure any needed medical care nor a state health insurance program to underwrite such care. Id., at 429 (Blackmar, J., dissenting). Second, as the state court admitted, Missouri has a living will statute which specifically "allows and encourages the pre-planned termination of life." Ibid.; see Mo Rev Stat § 459.015(1) (1986). The fact that Missouri actively provides for its citizens to choose a natural death under certain circumstances suggests that the State's interest in life is not so unqualified as the court below suggests. It is true that this particular statute does not apply to nonterminal patients and does not include artificial nutrition and hydration as one of the measures that may be declined. Nonetheless, Missouri has also not chosen to require court review of every decision to withhold or withdraw life support made on behalf of an incompetent patient. Such decisions are made every day, without state participation. See 760 SW2d, at 428 (Blackmar, J., dissenting).

In addition, precisely what implication can be drawn from the statute's limitations is unclear given the inclusion of a series of "interpretive" provisions in the Act. The first such provision explains that the Act is to be interpreted consistently with the following: "Each person has the primary right to request or refuse medical treatment subject to the state's interest in protecting innocent third parties, preventing homicide and suicide and preserving good ethical standards in the medical profession." Mo Rev Stat § 459.055(1) (1986). The second of these subsections explains that the Act's provisions are cumulative and not intended to increase or decrease the right of a patient to make decisions or lawfully effect the withholding or withdrawal of medical care. § 459.055(2). The third subsection provides that "no presumption concerning the intention of an individual who has not executed a declaration to consent to the use or withholding of medical procedures" shall be created. § 459.055(3).

Thus, even if it were conceivable that a State could assert an interest sufficiently compelling to overcome Nancy Cruzan's constitutional right, Missouri law demonstrates a more modest interest at best. See generally Capital Cities Cable, Inc. v Crisp, 467 US 691, 715, 81 L Ed 2d 580, 104 S Ct 2694 (1984) (finding that state regulations narrow in scope indicated that State had only a moderate interest in its professed goal).

A

The majority offers several justifications for Missouri's heightened evidentiary standard. First, the majority explains that the State may constitutionally adopt this rule to govern determinations of an incompetent's wishes in order to advance the State's substantive interests, including its unqualified interest in the preservation of human life. See ante, at 282-283, 111 L Ed 2d, at 244, and n 10. Missouri's evidentiary standard, however, cannot rest on the State's own interest in a particular substantive result. To be sure, courts have long erected clear and convincing evidence standards to place the greater risk of erroneous decisions on those bringing disfavored claims.[16] In such cases, however, the choice to discourage

certain claims was a legitimate, constitutional policy choice. In contrast, Missouri has no such power to disfavor a choice by Nancy Cruzan to avoid medical treatment, because Missouri has no legitimate interest in providing Nancy with treatment until it is established that this represents her choice. See supra, at 312-314, 111 L Ed 2d, at 263-265. Just as a State may not override Nancy's choice directly, it may not do so indirectly through the imposition of a procedural rule.

Second, the majority offers two explanations for why Missouri's clear and convincing evidence standard is a means of enhancing accuracy, but neither is persuasive. The majority initially argues that a clear and convincing evidence standard is necessary to compensate for the possibility that such proceedings will lack the "guarantee of accurate factfinding that the adversary process brings with it," citing Ohio v Akron Center for Reproductive Health, post, at 515-516, 111 L Ed 2d 405, 110 S Ct 2972 (upholding a clear and convincing evidence standard for an ex parte proceeding). Ante, at 281-282, 111 L Ed 2d, at 243-244.

---

[16] See Colorado v New Mexico, 467 US 310, 81 L Ed 2d 247, 104 S Ct 2433 (1984) (requiring clear and convincing evidence before one State is permitted to divert water from another to accommodate society's interests in stabile property rights and efficient use of resources); New York v New Jersey, 256 US 296, 65 L Ed 937, 41 S Ct 492 (1921) (promoting federalism by requiring clear and convincing evidence before using Court's power to control the conduct of one State at the behest of another); Maxwell Land-Grant Case, 121 US 325, 30 L Ed 949, 7 S Ct 1015 (1887) (requiring clear, unequivocal, and convincing evidence to set aside, annul, or correct a patent or other title to property issued by the Government in order to secure settled expectations concerning property rights); Marcum v Zaring, 406 P2d 970 (Okla 1965) (promoting stability of marriage by requiring clear and convincing evidence to prove its invalidity); Stevenson v Stein, 412 Pa 478, 195 A2d 268 (1963) (promoting settled expectations concerning property rights by requiring clear and convincing evidence to prove adverse possession).

Without supporting the Court's decision in that case, I note that the proceeding to determine an incompetent's wishes is quite different from a proceeding to determine whether a minor may bypass notifying her parents before undergoing an abortion on the ground that she is mature enough to make the decision or that the abortion is in her best interests.

[497 US 318]

An adversarial proceeding is of particular importance when one side has a strong personal interest which needs to be counterbalanced to assure the court that the questions will be fully explored. A minor who has a strong interest in obtaining permission for an abortion without notifying her parents may come forward whether or not society would be satisfied that she has made the decision with the seasoned judgment of an adult. The proceeding here is of a different nature. Barring venal motives, which a trial court has the means of ferreting out, the decision to come forward to request a judicial order to stop treatment represents a slowly and carefully considered resolution by at least one adult and more frequently several adults that discontinuation of treatment is the patient's wish.

In addition, the bypass procedure at issue in Akron, supra, is ex parte and secret. The court may not notify the minor's parents, siblings, or friends. No one may be present to submit evidence unless brought forward by the minor herself. In contrast, the proceeding to determine Nancy Cruzan's wishes was neither ex parte nor secret. In a hearing to determine the treatment preferences of an incompetent person, a court is not limited to adjusting burdens of proof as its only means of protecting against a possible imbalance. Indeed, any concern that those who come forward will present a one-sided view would be better addressed by appointing a guardian ad litem, who could use the State's powers of discovery to gather and present evidence regarding the patient's wishes. A guardian ad litem's task is to uncover any conflicts of interest and ensure that each party likely to have relevant evidence is consulted and brought forward—for example, other members of the family, friends, clergy, and doctors. See, e.g., In re Colyer, 99 Wash 2d 114, 133, 660 P2d 738, 748-749 (1983). Missouri's heightened evidentiary standard attempts to achieve balance by discounting evidence; the guardian ad litem technique achieves balance by probing for additional evidence. Where, as here, the family members,

[497 US 319]

friends, doctors, and guardian ad litem agree, it is not because the process has failed, as the majority suggests. See ante, at 281, n 9, 111 L Ed 2d, at 244. It is because there is no genuine dispute as to Nancy's preference.

The majority next argues that where, as here, important individual rights are at stake, a clear and convincing evidence standard has long been held to be an appropriate means of enhancing accuracy, citing decisions concerning what process an individual is due before he can be deprived of a liberty interest. See ante, at 283, 111 L Ed 2d, at 245. In those cases, however, this Court imposed a clear and convincing standard as a constitutional minimum on the basis of its evaluation that one side's interests clearly outweighed the second side's interests and therefore the second side should bear the risk of error. See Santosky v Kramer, 455 US 745, 753, 766-767, 71 L Ed 2d 599, 102 S Ct 1388 (1982) (requiring a clear and convincing evidence standard for termination of parental rights because the parent's interest is fundamental but the State has no legitimate interest in termination unless the parent is unfit, and finding that the State's interest in finding the best home for the child does not arise until the parent has been found unfit); Addington v Texas, 441 US 418, 426-427, 60 L Ed 2d 323, 99 S Ct 1804 (1979) (requiring clear and convincing evidence in an involuntary commitment hearing because the interest of the individual far outweighs that of a State, which has no legitimate interest in confining individuals who are not mentally ill and do not pose a danger to themselves or others). Moreover, we have always recognized that shifting the risk of error reduces the likelihood of errors in one direction at the cost of increasing the likelihood of errors in the other. See Addington, supra, at 423, 60 L Ed 2d 323, 99 S Ct 1804 (contrasting heightened standards of proof to a preponderance standard in which the two sides "share the risk of error in roughly equal fashion" because society does not favor one outcome over the other). In the cases cited by the majority, the imbalance imposed by a heightened evidentiary standard was not only acceptable but required because the standard was deployed to protect an individual's

exercise of a fundamental right, as the majority admits, ante, at 282-283, n 10, 111 L Ed 2d, at 244. In contrast, the Missouri court imposed a clear and convincing standard as an obstacle to the exercise of a fundamental right.

The majority claims that the allocation of the risk of error is justified because it is more important not to terminate life support for someone who would wish it continued than to honor the wishes of someone who would not. An erroneous decision to terminate life support is irrevocable, says the majority, while an erroneous decision not to terminate "results in a maintenance of the status quo." See ante, at 283, 111 L Ed 2d, at 245.[17] But, from the point of view of the patient, an erroneous decision in either direction is irrevocable. An erroneous decision to terminate artificial nutrition and hydration, to be sure, will lead to failure of that last remnant of physiological life, the brain stem, and result in complete brain death. An erroneous decision not to terminate life support, however, robs a patient of the very qualities protected by the right to avoid unwanted medical treatment. His own degraded existence is perpetuated; his family's suffering is protracted; the memory he leaves behind becomes more and more distorted.

---

[17] The majority's definition of the "status quo," of course, begs the question. Artificial delivery of nutrition and hydration represents the "status quo" only if the State has chosen to permit doctors and hospitals to keep a patient on life-support systems over the protests of his family or guardian. The "status quo" absent that state interference would be the natural result of his accident or illness (and the family's decision). The majority's definition of status quo, however, is "to a large extent a predictable, yet accidental confluence of technology, psyche, and inertia. The general citizenry . . . never said that it favored the creation of coma wards where permanently unconscious patients would be tended for years and years. Nor did the populace as a whole authorize the preeminence of doctors over families in making treatment decisions for incompetent patients." Rhoden, Litigating Life and Death, 102 Harv L Rev 375, 433-434 (1988).

Even a later decision to grant him his wish cannot undo the intervening harm. But a later decision is unlikely in any event. "[T]he discovery of new evidence," to which the majority

refers, ibid., is more hypothetical than plausible. The majority also misconceives the relevance of the possibility of "advancements in medical science," ibid., by treating it as a reason to force someone to continue medical treatment against his will. The possibility of a medical miracle is indeed part of the calculus, but it is a part of the *patient's* calculus. If current research suggests that some hope for cure or even moderate improvement is possible within the lifespan projected, this is a factor that should be and would be accorded significant weight in assessing what the patient himself would choose.[18]

B

Even more than its heightened evidentiary standard, the Missouri court's categorical exclusion of relevant evidence dispenses with any semblance of accurate factfinding. The court adverted to no evidence supporting its decision, but held that no clear and convincing, inherently reliable evidence had been presented to show that Nancy would want to avoid further treatment. In doing so, the court failed to consider statements Nancy had made to family members and a close friend.[19] The court also failed to consider testimony

---

[18] For Nancy Cruzan, no such cure or improvement is in view. So much of her brain has deteriorated and been replaced by fluid, see App to Pet for Cert A94, that apparently the only medical advance that could restore consciousness to her body would be a brain transplant. Cf. n 22, infra.

[19] The trial court had relied on the testimony of Athena Comer, a longtime friend, co-worker, and housemate for several months, as sufficient to show that Nancy Cruzan would wish to be free of medical treatment under her present circumstances. App to Pet for Cert A94. Ms. Comer described a conversation she and Nancy had while living together, concerning Ms. Comer's sister who had become ill suddenly and died during the night. The Comer family had been told that if she had lived through the night, she would have been in a vegetative state. Nancy had lost a grandmother a few months before. Ms. Comer testified that: "Nancy said she would never want to live [in a vegetative state] because if she couldn't be normal or even, you know, like half way, and do things for yourself, because Nancy always did, that she didn't want to live . . . and we talked about it a lot." Tr 388-389. She said "several times" that "she wouldn't want to live that way because if she was going to live, she wanted to be able to live, not to just lay in a bed and not be able to move because you can't do anything for yourself." Id., at 390, 396. "[S]he said that she hoped that [all the] people in her family knew that she wouldn't want to live [in a vegetative state] because she knew it was usually up to the family whether you lived that way or not." Id., at 399.

The conversation took place approximately a year before Nancy's accident and was described by Ms. Comer as a "very serious" conversation that continued for approximately half an hour without interruption. Id., at 390. The Missouri Supreme Court dismissed Nancy's statement as "unreliable" on the ground that it was an informally expressed reaction to other people's medical conditions. 760 SW2d, at 424.

The Missouri Supreme Court did not refer to other evidence of Nancy's wishes or explain why it was rejected. Nancy's sister Christy, to whom she was very close, testified that she and Nancy had had two very serious conversations about a year and a half before the accident. A day or two after their niece was stillborn (but would have been badly damaged if she had lived), Nancy had said that maybe it was part of a "greater plan" that the baby had been stillborn and did not have to face "the possible life of mere existence." Tr 537. A month later, after their grandmother had died after a long battle with heart problems, Nancy said that "it was better for my grandmother not to be kind of brought back and forth [by] medical [treatment], brought back from a critical near point of death . . . ." Id., at 541.

from Nancy's mother and sister that they were certain that Nancy would want to discontinue artificial nutrition and hydration,[20] even after the court found that Nancy's family was loving and without malignant motive. See 760 SW2d, at 412. The court also failed to consider the conclusions of the guardian ad litem, appointed by the trial court, that there was clear and convincing evidence that Nancy would want to

discontinue medical treatment and that this was in her best interests. Id., at 444 (Higgins, J., dissenting from denial of rehearing); Brief for Respondent Guardian Ad Litem 2-3. The court did not specifically define what kind of evidence it would consider clear and convincing, but its general discussion suggests that only a living will or equivalently formal directive from the patient when competent would meet this standard. See 760 SW2d, at 424-425.

Too few people execute living wills or equivalently formal directives for such an evidentiary rule to ensure adequately that the wishes of incompetent persons will be honored.[21] While it might be a wise social policy to encourage people to furnish such instructions, no general conclusion about a patient's choice can be drawn from the absence of formalities. The probability of becoming irreversibly vegetative is so low that many people may not feel an urgency to marshal formal evidence of their preferences. Some may not wish to dwell on their own physical deterioration and mortality. Even someone with a resolute determination to avoid life support under circumstances such as Nancy's would still need to know that such things as living wills exist and how to execute one. Often legal help would be necessary, especially given the majority's apparent willingness to permit States to insist that a person's wishes are not truly known unless the particular medical treatment is specified. See ante, at 285, 111 L Ed 2d, at 246.

As a California appellate court observed: "The lack of generalized public awareness of the statutory scheme and the typically human characteristics of procrastination and reluctance to contemplate the need for such arrangements however makes this a tool which will all too often go unused by those who might desire it." Barber v Superior Court, 147 Cal App 3d 1006, 1015, 195 Cal

---

[20] Nancy's sister Christy, Nancy's mother, and another of Nancy's friends testified that Nancy would want to discontinue the hydration and nutrition. Christy said that "Nancy would be horrified at the state she is in." Id., at 535. She would also "want to take that burden away from [her family]." Id., at 544. Based on "a lifetime of experience [I know Nancy's wishes] are to discontinue the hydration and the nutrition." Id., at 542. Nancy's mother testified: "Nancy would not want to be like she is now. [I]f it were me up there or Christy or any of us, she would be doing for us what we are trying to do for her. I know she would, . . . as her mother." Id., at 526.

[21] Surveys show that the overwhelming majority of Americans have not executed such written instructions. See Emmanuel & Emmanuel, The Medical Directive: A New Comprehensive Advance Care Document, 261 JAMA 3288 (1989) (only 9% of Americans execute advance directives about how they would wish treatment decisions to be handled if they became incompetent); American Medical Association Surveys of Physician and Public Opinion on Health Care Issues 29-30 (1988) (only 15% of those surveyed had executed living wills); 2 President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Making Health Care Decisions 241-242 (1982) (23% of those surveyed said that they had put treatment instructions in writing).

Rptr 484, 489 (1983). When a person tells family or close friends that she does not want her life sustained artificially, she is "express[ing] her wishes in the only terms familiar to her, and . . . as clearly as a lay person should be asked to express them. To require more is unrealistic, and for all practical purposes, it precludes the right of patients to forego life-sustaining treatment." In re O'Connor, 72 NY2d 517, 551, 531 NE2d 607, 626 (1988) (Simons, J., dissenting).[22] When Missouri enacted a living will statute, it specifically provided that the absence of a living will does not warrant a presumption that a patient wishes continued medical treatment. See n 15, supra.

Thus, apparently not even Missouri's own legislature believes that a person who does not execute a living will fails to do so because he wishes continuous medical treatment under all circumstances.

The testimony of close friends and family members, on the other hand, may often be the best evidence available of what the patient's choice would be. It is they with whom the patient most likely will have discussed such questions and they who know the patient best. "Family members have a unique knowledge of the patient which is vital to any decision on his or her behalf." Newman, Treatment Refusals for the Critically and Terminally Ill: Proposed Rules for the Family, the Physician, and the State, 3 NYLS Human Rights Annual 35, 46 (1985). The Missouri court's decision to ignore this whole category of testimony is also at odds with the practices of other States. See, e.g., In re Peter, 108 NJ 365, 529 A2d 419 (1987); Brophy v New England Sinai Hospital, Inc. 398 Mass 417, 497 NE2d 626 (1986); In re Severns, 425 A2d 156 (Del Ch 1980).

The Missouri court's disdain for Nancy's statements in serious conversations not long before her accident, for the opinions of Nancy's family and friends as to her values, beliefs and certain choice, and even for the opinion of an outside objective factfinder appointed by the State evinces a disdain for Nancy Cruzan's own right to choose. The rules by which an incompetent person's wishes are determined must represent every effort to determine those wishes. The rule that the Missouri court adopted and that this Court upholds, however, skews the result away from a determination that as accurately as possible reflects the individual's own preferences and beliefs. It is a rule that transforms human beings into passive subjects of medical technology.

---

[22] New York is the only State besides Missouri to deny a request to terminate life support on the ground that clear and convincing evidence of prior, expressed intent was absent, although New York did so in the context of very different situations. Mrs. O'Connor, the subject of In re O'Connor, had several times expressed her desire not to be placed on life support if she were not going to be able to care for herself. However, both of her daughters testified that they did not know whether their mother would want to decline artificial nutrition and hydration under her present circumstances. Cf. n 13, supra. Moreover, despite damage from several strokes, Mrs. O'Connor was conscious and capable of responding to simple questions and requests and the medical testimony suggested she might improve to some extent. Cf. supra, at 301, 111 L Ed 2d, at 256. The New York Court of Appeals also denied permission to terminate blood transfusions for a severely retarded man with terminal cancer because there was no evidence of a treatment choice made by the man when competent, as he had never been competent. See In re Storar, 52 NY2d 363, 420 NE2d 64, cert denied, 454 US 858, 70 L Ed 2d 153, 102 S Ct 309 (1981). Again, the court relied on evidence that the man was conscious, functioning in the way he always had, and that the transfusions did not cause him substantial pain (although it was clear he did not like them).

> "[M]edical care decisions must be guided by the individual patient's interests and values. Allowing persons to determine their own medical treatment is an important way in which society respects persons as individuals.
>
> [497 US 326]
>
> Moreover, the respect due to persons as individuals does not diminish simply because they have become incapable of participating in treatment decisions. . . . [I]t is still possible for others to make a decision that reflects [the patient's] interests more closely than would a purely technological decision to do whatever is possible. Lacking the ability to decide, [a patient] has a right to a decision that takes his interests into account." In re Drabick, 200 Cal App 3d 185, 208; 245 Cal Rptr 840, 854-855 (1988).

C

I do not suggest that States must sit by helplessly if the choices of incompetent patients are in danger of being ignored. See ante, at 281, 111 L Ed 2d, at 243. Even if the Court had ruled that Missouri's rule of decision is unconstitutional, as I believe it should have, States would nevertheless remain free to fashion procedural protections to safeguard the interests of incompetents under these circumstances. The Constitution provides merely a framework here: Protections must be genuinely aimed at ensuring decisions commensurate with the will of the patient, and must be reliable as instruments to that end. Of the many States which have instituted such protections, Missouri is virtually the only one to have fashioned a rule that lessens the likelihood of accurate determinations. In contrast, nothing in the Constitution prevents States from reviewing the advisability of a family decision, by requiring a court proceeding or by appointing an impartial guardian ad litem.

There are various approaches to determining an incompetent patient's treatment choice in use by the several States today, and there may be advantages and disadvantages to each and other approaches not yet envisioned. The choice, in largest part, is and should be left to the States, so long as each State is seeking, in a reliable manner, to discover what the patient would want. But with such momentous interests in the balance, States must avoid procedures that will prejudice

[497 US 327]

the decision. "To err either way—to keep a person alive under circumstances under which he would rather have been allowed to die, or to allow that person to die when he would have chosen to cling to life—would be deeply unfortunate." In re Conroy, 98 NJ, at 343, 486 A2d, at 1220.

D

Finally, I cannot agree with the majority that where it is not possible to determine what choice an incompetent patient would make, a State's role as parens patriae permits the State automatically to make that choice itself. See ante, at 286, 111 L Ed 2d, at 246-247 (explaining that the Due Process Clause does not require a State to confide the decision to "anyone but the patient herself"). Under fair rules of evidence, it is improbable that a court could not determine what the patient's choice would be. Under the rule of decision adopted by Missouri and upheld today by this Court, such occasions might be numerous. But in neither case does it follow that it is constitutionally acceptable for the State invariably to assume the role of deciding for the patient. A State's legitimate interest in safeguarding a patient's choice cannot be furthered by simply appropriating it.

The majority justifies its position by arguing that, while close family members may have a strong feeling about the question, "there is no automatic assurance that the view of close family members will necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation while competent." Ibid. I cannot quarrel with this observation. But it leads only to another question: Is there any reason to suppose that a State is *more* likely to make the choice that the patient would have made than someone who knew the patient intimately? To ask this is to answer it. As the New Jersey Supreme Court observed: "Family members are best qualified to make substituted judgments for incompetent patients not only because of their peculiar grasp of the patient's approach to life, but also

because of their special bonds with him or her. . . . It is . . . they who treat the patient as a person, rather than a symbol of a cause." In re Jobes, 108 NJ 394, 416, 529 A2d 434, 445 (1987). The State, in contrast, is a stranger to the patient.

A State's inability to discern an incompetent patient's choice still need not mean that a State is rendered powerless to protect that choice. But I would find that the Due Process Clause prohibits a State from doing more than that. A State may ensure that the person who makes the decision on the patient's behalf is the one whom the patient himself would have selected to make that choice for him. And a State may exclude from consideration anyone having improper motives. But a State generally must either repose the choice with the person whom the patient himself would most likely have chosen as proxy or leave the decision to the patient's family.[23]

IV

As many as 10,000 patients are being maintained in persistent vegetative states in the United States, and the number is expected to increase significantly in the near future. See Cranford, supra n 2, at 27, 31. Medical technology, developed over the past 20 or so years, is often capable of resuscitating people after they have stopped breathing or their hearts have stopped beating. Some of those people are brought fully back to life. Two decades ago, those who were not and could not swallow and digest food, died. Intravenous solutions could not provide sufficient calories to maintain people for more than a short time. Today, various forms of artificial feeding have been developed that are able to keep people metabolically alive for years, even decades. See Spencer & Palmisano, Specialized Nutritional Support of

Patients—A Hospital's Legal Duty?, 11 Quality Rev Bull 160, 160-

---

[23] Only in the exceedingly rare case where the State cannot find any family member or friend who can be trusted to endeavor genuinely to make the treatment choice the patient would have made does the State become the legitimate surrogate decisionmaker.

161 (1985). In addition, in this century, chronic or degenerative ailments have replaced communicable diseases as the primary causes of death. See R. Weir, Abating Treatment with Critically Ill Patients 12-13 (1989); President's Commission 15-16. The 80% of Americans who die in hospitals are "likely to meet their end . . . 'in a sedated or comatose state; betubed nasally, abdominally and intravenously; and far more like manipulated objects than like moral subjects.' "[24] A fifth of all adults surviving to age 80 will suffer a progressive dementing disorder prior to death. See Cohen & Eisdorfer, Dementing Disorders, in The Practice of Geriatrics 194 (E. Calkins, P. Davis, & A. Ford eds 1986).

"[L]aw, equity and justice must not themselves quail and be helpless in the face of modern technological marvels presenting questions hitherto unthought of." In re Quinlan, 70 NJ 10, 44, 355 A2d 647, 665, cert denied, 429 US 922, 50 L Ed 2d 289, 97 S Ct 319 (1976). The new medical technology can reclaim those who would have been irretrievably lost a few decades ago and restore them to active lives. For Nancy Cruzan, it failed, and for others with wasting incurable disease, it may be doomed to failure. In these unfortunate situations, the bodies and preferences and memories of the victims do not escheat to the State; nor does our Constitution permit the State or any other government to commandeer them. No singularity of feeling exists upon which such a government might confidently rely as parens patriae. The President's Commission, after years of research, concluded:

> "In few areas of health care are people's evaluations of their experiences so varied and uniquely personal as in their assessments of the nature and value of the processes associated with dying. For some, every moment of life is of inestimable value; for others, life without
>
>
>
> some desired level of mental or physical ability is worthless or burdensome. A moderate degree of suffering may be an important means of personal growth and religious experience to one person, but only frightening or despicable to another." President's Commission 276.

Yet Missouri and this Court have displaced Nancy's own assessment of the processes associated with dying. They have discarded evidence of her will, ignored her values, and deprived her of the right to a decision as closely approximating her own choice as humanly possible. They have done so disingenuously in her name and openly in Missouri's own. That Missouri and this Court may truly be motivated only by concern for incompetent patients makes no matter. As one of our most prominent jurists warned us decades ago: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficient. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding." Olmstead v United States, 277 US 438, 479, 72 L Ed 944, 48 S Ct 564, 66 ALR 376 (1928) (Brandeis, J., dissenting).

I respectfully dissent.

---

[24] Fadiman, The Liberation of Lolly and Gronsky, Life Magazine, Dec. 1986, p 72 (quoting medical ethicist Joseph Fletcher).

Justice **Stevens,** dissenting.

Our Constitution is born of the proposition that all legitimate governments must secure the equal right of every person to "Life, Liberty, and the pursuit of Happiness."[1] In the ordinary case we quite naturally assume that these three

ends are compatible, mutually enhancing, and perhaps even coincident.

The Court would make an exception here. It permits the State's abstract, undifferentiated interest in the preservation of life to overwhelm the best interests of Nancy Beth Cruzan, interests which would, according to an undisputed finding, be served by allowing her guardians to exercise her constitutional right to discontinue medical treatment. Ironically, the Court reaches this conclusion despite endorsing three significant propositions which should save it from any such dilemma. First, a competent individual's decision to refuse life-sustaining medical procedures is an aspect of liberty protected by the Due Process Clause of the Fourteenth Amendment. See ante, at 278-279, 111 L Ed 2d, at 242. Second, upon a proper evidentiary showing, a qualified guardian may make that decision on behalf of an incompetent ward. See, e.g., ante, at 284-285, 111 L Ed 2d, at 245-246. Third, in answering the important question presented by this tragic case, it is wise "'not to attempt, by any general statement, to cover every possible phase of the subject.'" See ante, at 278, 111 L Ed 2d, at 241 (citation omitted). Together, these considerations suggest that Nancy Cruzan's liberty to be free from medical treatment must be understood in light of the facts and circumstances particular to her.

I would so hold: In my view, the Constitution requires the State to care for Nancy Cruzan's life in a way that gives appropriate respect to her own best interests.

I

This case is the first in which we consider whether, and how, the Constitution protects the liberty of seriously ill patients to be free from life-sustaining medical treatment. So put, the question is both general and profound. We need not, however, resolve the question in the abstract. Our responsibility as judges both enables and compels us to treat the problem as it is illuminated by the facts of the controversy before us.

The most important of those facts are these: "Clear and convincing evidence" established that Nancy Cruzan is "oblivious to her environment except for reflexive responses to sound and perhaps to painful stimuli"; that "she has no cognitive or reflexive ability to swallow food or water"; that "she will never recover" these abilities; and that her "cerebral cortical atrophy is irreversible, permanent, progressive and ongoing." App to Pet for Cert A94-A95. Recovery and consciousness are impossible; the highest cognitive brain function that can be hoped for is a grimace in "recognition of ordinarily painful stimuli" or an "apparent response to sound." Id., at A95.[2]

---

[1] 1. It is stated in the Declaration of Independence that:

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."

After thus evaluating Nancy Cruzan's medical condition, the trial judge next examined how the interests of third parties would be affected if Nancy's parents were allowed to withdraw the gastrostomy tube that had been implanted in

their daughter. His findings make it clear that the parents' request had no economic motivation,[3] and that granting their request would neither adversely affect any innocent third parties nor breach the ethical standards of the medical profession.[4] He then considered, and rejected, a religious objection to his decision,[5] and explained why he concluded that the ward's constitutional "right to liberty" outweighed the general public policy on which the State relied:

> "There is a fundamental natural right expressed in our Constitution as the 'right to liberty,' which permits an individual to refuse or direct the withholding or withdrawal of artificial death prolonging procedures when the person has no more cognitive brain function than our Ward and all the physicians agree there is no hope of further recovery while the deterioration of the brain continues with further overall worsening physical contractures. To the extent that the statute or public policy prohibits withholding or withdrawal of nutrition and hyd-

---

[2] The trial court found as follows on the basis of "clear and convincing evidence":

"1. That her respiration and circulation are not artificially maintained and within essentially normal limits for a 30 year old female with vital signs recently reported as BP 130/80; pulse 78 and regular; respiration spontaneous at 16 to 18 per minute.

"2. That she is oblivious to her environment except for reflexive responses to sound and perhaps to painful stimuli.

"3. That she has suffered anoxia of the brain resulting in massive enlargement of the ventricles filling with cerebrospinal fluid in the area where the brain has degenerated. This cerebral cortical atrophy is irreversible, permanent, progressive and ongoing.

"4. That her highest cognitive brain function is exhibited by her grimacing perhaps in recognition of ordinarily painful stimuli, indicating the experience of pain and her apparent response to sound.

"5. That she is spastic quadriplegic.

"6. That she has contractures of her four extremities which are slowly progressive with irreversible muscular and tendon damage to all extremities.

"7. That she has no cognitive or reflexive ability to swallow food or water to maintain her daily essential needs. That she will never recover her ability to swallow sufficient to satisfy her needs." App to Pet for Cert A94-A95.

[3] "The only economic considerations in this case rest with Respondent's employer, the State of Missouri, which is bearing the entire cost of care. Our ward is an adult without financial resources other than Social Security whose not inconsiderable medical insurance has been exhausted since January 1986." Id., at A96.

[4] "In this case there are no innocent third parties requiring state protection, neither homicide nor suicide will be committed and the consensus of the medical witnesses indicated concerns personal to themselves or the legal consequences of such actions rather than any objections that good ethical standards of the profession would be breached if the nutrition and hydration were withdrawn the same as any other artificial death prolonging procedures the statute specifically authorizes." Id., at A98.

[5] "Nancy's present unresponsive and hopeless existence is not the will of the Supreme Ruler but of man's will to forcefully feed her when she herself cannot swallow thus fueling respiratory and circulatory pumps to no cognitive purpose for her except sound and perhaps pain." Id., at A97.

> ration or euthanasia or mercy killing, if such be the definition, under all circumstances, arbitrarily and with no exceptions, it is in violation of our ward's constitutional rights by depriving her of liberty without due process of
>
> [497 US 334]
>
> law. To decide otherwise that medical treatment once undertaken must be continued irrespective of its lack of success or benefit to the patient in effect gives one's body to medical science without their [sic] consent.
>
> . . . . .
>
> "The Co-guardians are required only to exercise their legal authority to act in the best interests of their Ward as they discharge their duty and are free to act or not with this authority as they may determine." Id., at A98-A99 (footnotes omitted).

II

Because he believed he had a duty to do so, the independent guardian ad litem appealed the trial court's order to the Missouri Supreme Court. In that appeal, however, the guardian advised the court that he did not disagree with the trial court's decision. Specifically, he endorsed the critical finding that "it was in Nancy Cruzan's best interests to have the tube feeding discontinued."[6]

That important conclusion thus was not disputed by the litigants. One might reasonably suppose that it would be dispositive: If Nancy Cruzan has no interest in continued treatment, and if she has a liberty interest in being free from unwanted treatment, and if the cessation of treatment would have no adverse impact on third parties, and if no reason exists to doubt the good faith of Nancy's parents, then what possible basis could the State have for insisting upon continued medical treatment? Yet, instead of questioning or endorsing the trial court's conclusions about Nancy Cruzan's interests, the State Supreme Court largely ignored them.

[497 US 335]

The opinion of that court referred to four different state interests that have been identified in other somewhat similar cases, but acknowledged that only the State's general interest in "the preservation of life" was implicated by this case.[7] It defined that interest as follows:

> "The state's interest in life embraces two separate concerns: an interest in the prolongation of the life of the individual patient and an interest in the sanctity of life itself." Cruzan v Harmon, 760 SW2d 408, 419 (1988).

Although the court did not characterize this interest as absolute, it repeatedly indicated that it outweighs any countervailing interest that is based on the "quality of life" of any individual patient.[8] In the view of the state-court majority,

---

[6] "Appellant guardian ad litem advises this court:
"'we informed the [trial] court that we felt it was in Nancy Cruzan's best interests to have the tube feeding discontinued. We now find ourselves in the position of appealing from a judgment we basically agree with.'" Cruzan v Harmon, 760 SW2d 408, 435 (Mo 1988) (Higgins, J., dissenting).

[7] "Four state interests have been identified: preservation of life, prevention of homicide and suicide, the protection of interests of innocent third parties and the maintenance of the ethical integrity of the medical profession. See Section 459.055(1), RSMo 1986; Brophy, 497 NE2d at 634. In this case, only the state's interest in the preservation of life is implicated." Id., at 419.

that general interest is strong enough to foreclose any decision to refuse treatment for an incompetent person unless that person had previously evidenced, in a clear and convincing terms, such a decision for herself. The best interests of the incompetent individual who had never confronted the issue—or perhaps had been incompetent since birth—are entirely irrelevant and unprotected under the reasoning of the State Supreme Court's four-judge majority.

The three dissenting judges found Nancy Cruzan's interests compelling. They agreed with the trial court's evaluation of state policy. In his persuasive dissent, Judge Blackmar explained that decisions about the care of chronically ill patients were traditionally private:

> "My disagreement with the principal opinion lies fundamentally in its emphasis on the interest of and the role of the state, represented by the Attorney General. Decisions about prolongation of life are of recent origin. For most of the world's history, and presently in most parts of the world, such decisions would never arise because the technology would not be available. Decisions about medical treatment have customarily been made by the patient, or by those closest to the patient if the patient, because of youth or infirmity, is unable to make the decisions. This is nothing new in substituted decisionmaking. The state is seldom called upon to be the decisionmaker.
>
> "I would not accept the assumption, inherent in the principal opinion, that, with our advanced technology, the state must necessarily become involved in a decision about using extraordinary measures to prolong life. Decisions of this kind are made daily by the patient or relatives, on the basis of medical advice and their conclusion as to what is best. Very few cases reach court, and

> I doubt whether this case would be before us but for the fact that Nancy lies in a state hospital. I do not place primary emphasis on the patient's expressions, except possibly in the very unusual case, of which I find no example in the books, in which the patient expresses a view that all available life supports should

---

[8] "The state's concern with the sanctity of life rests on the principle that life is precious and worthy of preservation without regard to its quality." Ibid.

"It is tempting to equate the state's interest in the preservation of life with some measure of quality of life. As the discussion which follows shows, some courts find quality of life a convenient focus when justifying the termination of treatment. But the state's interest is not in quality of life. The broad policy statements of the legislature make no such distinction; nor shall we. Were quality of life at issue, persons with all manner of handicaps might find the state seeking to terminate their lives. Instead, the state's interest is in life; that interest is unqualified." Id., at 420.

"As we previously stated, however, the state's interest is not in quality of life. The state's interest is an unqualified interest in life." Id., at 422. "The argument made here, that Nancy will not recover, is but a thinly veiled statement that her life in its present form is not worth living. Yet a diminished quality of life does not support a decision to cause death." Ibid.

"Given the fact that Nancy is alive and that the burdens of her treatment are not excessive for her, we do not believe her right to refuse treatment, whether that right proceeds from a constitutional right of privacy or a common law right to refuse treatment, outweighs the immense, clear fact of life in which the state maintains a vital interest." Id., at 424.

> be made use of. Those closest to the patient are best positioned to make judgments about the patient's best interest." Id., at 428.

Judge Blackmar then argued that Missouri's policy imposed upon dying individuals and their families a controversial and objectionable view of life's meaning:

> "It is unrealistic to say that the preservation of life is an absolute, without regard to the quality of life. I make this statement only in the context of a case in which the trial judge has found that there is no chance for amelioration of Nancy's condition. The principal opinion accepts this conclusion. It is appropriate to consider the quality of life in making decisions about the extraordinary medical treatment. Those who have made decisions about such matters without resort to the courts certainly consider the quality of life, and balance this against the unpleasant consequences to the patient. There is evidence that Nancy may react to pain stimuli. If she has any awareness of her surroundings, her life must be a living hell. She is unable to express herself or to do anything at all to alter her situation. Her parents, who are her closest relatives, are best able to feel for her and to decide what is best for her. The state should not substitute its decisions for theirs. Nor am I impressed with the crypto-philosophers cited in the principal opinion, who declaim about the sanctity of any life without regard to its quality. They dwell in ivory towers." Id., at 429.

Finally, Judge Blackmar concluded that the Missouri policy was illegitimate because it treats life as a theoretical abstraction, severed from, and indeed opposed to, the person of Nancy Cruzan.

> "The Cruzan family appropriately came before the court seeking relief. The circuit judge properly found the facts and applied the law. His factual findings are supported by the record and his legal conclusions by overwhelming weight of authority. The principal opinion attempts to establish absolutes, but does so at the expense of human factors. In so doing it unnecessarily subjects Nancy and those close to her to continuous torture which no family should be forced to endure." Id., at 429-430.

Although Judge Blackmar did not frame his argument as such, it propounds a sound constitutional objection to the Missouri majority's reasoning: Missouri's regulation is an unreasonable intrusion upon traditionally private matters encompassed within the liberty protected by the Due Process Clause.

The portion of this Court's opinion that considers the merits of this case is similarly unsatisfactory. It, too, fails to respect the best interests of the patient.[9] It, too, relies on what is tantamount to a waiver rationale: The dying patient's best interests are put to one side, and the entire inquiry is focused on her prior expressions of intent.[10] An innocent person's constitutional right to be free from unwanted medical treatment is thereby categorically limited to those patients who had the foresight to make an unambiguous statement

---

[9] See especially, ante, at 282, 111 L Ed 2d, at 244 ("[W]e think a State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual"); ante, at 282, n 10, 111 L Ed 2d, at 244 (stating that the government is seeking to protect "its own institutional interests" in life).

of their wishes while competent. The Court's decision affords no protection to children, to young people who are victims of unexpected accidents or illnesses, or to the countless thousands of elderly persons who either fail to decide, or fail to explain, how they want to be treated if they should experience a similar fate. Because Nancy Beth Cruzan did not have the foresight to preserve her constitutional right in a living will, or some comparable "clear and convincing" alternative, her right is gone forever and her fate is in the hands of the state legislature instead of in those of her family, her independent neutral guardian ad litem, and an impartial judge—all of whom agree on the course of action that is in her best interests. The Court's willingness to find a waiver of this constitutional right reveals a distressing misunderstanding of the importance of individual liberty.

III

It is perhaps predictable that courts might undervalue the liberty at stake here. Because death is so profoundly personal, public reflection upon it is unusual. As this said case shows, however, such reflection must become more common if we are to deal responsibly with the modern circumstances of death. Medical advances have altered the physiological conditions of death in ways that may be alarming: Highly invasive treatment may perpetuate human existence through a merger of body and machine that some might reasonably regard as an insult to life rather than as its continuation. But those same advances, and the reorganization of medical care accompanying the new science and technology, have also transformed the political and social conditions of death: People are less likely to die at home, and more likely to die in relatively public places, such as hospitals or nursing homes.[11]

---

[10] See, e.g., ante, at 284, 111 L Ed 2d, at 245-246.

[11] "Until the latter part of this century, medicine had relatively little treatment to offer the dying and the vast majority of persons died at home rather than in the hospital." Brief for American Medical Association et al. as Amici Curiae 6. "In 1985, 83% of deaths [of] Americans age 65 or over occurred in a hospital or nursing home. Sager, Easterling, et al., Changes in the Location of Death After Passage of Medicare's Prospective Payment System: A National Study, 320 New Eng J Med 433, 435 (1989)." Id., at 6, n 2.

According to the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research:

"Just as recent years have seen alterations in the underlying causes of death, the places where people die have also changed. For most of recorded history, deaths (of natural causes) usually occurred in the home.

" 'Everyone knew about death at first hand; there was nothing unfamiliar or even queer about the phenomenon. People seem to have known a lot more about the process itself than is the case today. The "deathbed" was a real place, and the dying person usually knew where he was and when it was time to assemble the family and call for the priest.'

"Even when people did get admitted to a medical care institution, those whose conditions proved incurable were discharged to the care of their families. This was not only because the health care system could no longer be helpful, but also because alcohol and opiates (the only drugs available to ease pain and suffering) were available without a prescription. Institutional care was reserved for the poor or those without family support; hospitals often aimed more at saving patients' souls than at providing medical care.

[497 US 340]

Ultimate questions that might once have been dealt with in intimacy by a family and its physician[12] have now become the concern of institutions. When the institution is a state hospital,

[497 US 341]

as it is in this case, the government itself becomes involved.[13] Dying nonetheless remains a part of "the life which characteristically has its place in the home," Poe v Ullman, 367 US 497, 551, 6 L Ed 2d 989, 81 S Ct 1752 (1961) (Harlan, J., dissenting). The "integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right," id., at 551-552, 6 L Ed 2d 989, 81 S Ct 1752, and our decisions have demarcated a "private realm of family life which the state cannot enter." Prince v Massachusetts, 321 US 158, 166-167, 88 L Ed 645, 64 S Ct 438 (1944). The physical boundaries of the home, of course, remain crucial guarantors of the life within it. See, e.g., Payton v New York, 445 US 573, 589, 63 L Ed 2d 639, 100 S Ct 1371 (1980); Stanley v Georgia, 394 US 557, 565, 22 L Ed 2d 542, 89 S Ct 1243 (1969). Nevertheless, this Court has long recognized that the liberty to make the decisions and choices constitutive of private life is so fundamental to our "concept of ordered liberty," Palko v Connecticut, 302 US 319, 325, 82 L Ed 288, 58 S Ct 149 (1937), that those choices must occasionally be afforded more direct protection.

[497 US 342]

See, e.g., Meyer v Nebraska, 262 US 390, 67 L Ed 1042, 43 S Ct 625, 29 ALR 1446 (1923); Griswold v Connecticut,

---

"As medicine has been able to do more for dying patients, their care has increasingly been delivered in institutional settings. By 1949, institutions were the sites of 50% of all deaths; by 1958, the figure was 61%; and by 1977, over 70%. Perhaps 80% of all deaths in the United States now occur in hospitals and long-term care institutions, such as nursing homes. The change in where very ill patients are treated permits health care professionals to marshall the instruments of scientific medicine more effectively. But people who are dying may well find such a setting alienating and unsupportive." Deciding to Forego Life-Sustaining Treatment 17-18 (1983) (footnotes omitted), quoting Thomas, Dying as Failure, 447 Annals Am Acad Pol & Soc Sci 1, 3 (1980).

[12] **12.** We have recognized that the special relationship between patient and physician will often be encompassed within the domain of private life protected by the Due Process Clause. See, e.g., Griswold v Connecticut, 381 US 479, 481, 14 L Ed 2d 510, 85 S Ct 1678 (1965); Roe v Wade, 410 US 113, 152-153, 35 L Ed 2d 147, 93 S Ct 705 (1973); Thornburgh v American College of Obstetricians and Gynecologists, 476 US 747, 759, 90 L Ed 2d 779, 106 S Ct 2169 (1986).

[13] **13.** The Court recognizes that "the State has been involved as an adversary from the beginning" in this case only because Nancy Cruzan "was a patient at a state hospital when this litigation commenced," ante, at 281, n 9, 111 L Ed 2d, at 244. It seems to me, however, that the Court draws precisely the wrong conclusion from this insight. The Court apparently believes that the absence of the State from the litigation would have created a problem, because agreement among the family and the independent guardian ad litem as to Nancy Cruzan's best interests might have prevented her treatment from becoming the focus of a "truly adversarial" proceeding. Ibid. It may reasonably be debated whether some judicial process should be required before life-sustaining treatment is discontinued; this issue has divided the state courts. Compare In re Estate of Longeway, 133 Ill 2d 33, 51, 549 NE2d 292, 300 (1989) (requiring judicial approval of guardian's decision), with In re Hamlin, 102 Wash 2d 810, 818-819, 689 P2d 1372, 1377-1378 (1984) (discussing circumstances in which judicial approval is unnecessary). Cf. In re Torres, 357 NW2d 332, 341, n 4 (Minn 1984) ("At oral argument it was disclosed that on an average about 10 life support systems are disconnected weekly in Minnesota"). I tend, however, to agree with Judge Blackmar that the intervention of the State in these proceedings as an *adversary* is not so much a cure as it is part of the disease.

381 US 479, 14 L Ed 2d 510, 85 S Ct 1678 (1965); Roe v Wade, 410 US 113, 35 L Ed 2d 147, 93 S Ct 705 (1973); Thornburgh v American College of Obstetricians and Gynecologists, 476 US 747, 772-782, 90 L Ed 2d 779, 106 S Ct 2169 (1986) (Stevens, J., concurring).

Respect for these choices has guided our recognition of rights pertaining to bodily integrity. The constitutional decisions identifying those rights, like the common-law tradition upon which they built,[14] are mindful that the "makers of our Constitution . . . recognized the significance of man's spiritual nature." Olmstead v United States, 277 US 438, 478, 72 L Ed 944, 48 S Ct 564, 66 ALR 376 (1928) (Brandeis, J., dissenting). It may truly be said that "our notions of liberty are inextricably entwined with our idea of physical freedom and self determination." Ante, at 287, 111 L Ed 2d, at 248 (O'Connor, J., concurring). Thus we have construed the Due Process Clause to preclude physically invasive recoveries of evidence not only because such procedures are "brutal" but also because they are "offensive to human dignity." Rochin v California, 342 US 165, 174, 96 L Ed 183, 72 S Ct 205, 25 ALR2d 1396 (1952). We have interpreted the Constitution to interpose barriers to a State's efforts to sterilize some criminals not only because the proposed punishment would do "irreparable injury" to bodily integrity, but because "[m]arriage and procreation" concern "the basic civil rights of man." Skinner v Oklahoma ex rel. Williamson, 316 US 535, 541, 86 L Ed 1655, 62 S Ct 1110 (1942). The sanctity, and individual privacy, of the human body is obviously fundamental to liberty. "Every violation of a person's bodily integrity is an invasion of his or her liberty." Washington v Harper, 494 US 210, 237, 108 L Ed 2d 178, 110 S Ct 1028 (1990) (Stevens, J., concurring in part and dissenting in part). Yet, just as the constitutional protection for the "physical curtilage of the home . . . is surely

[497 US 343]

. . . a result of solicitude to protect the privacies of the life within," Poe v Ullman, 367 US, at 551, 6 L Ed 2d 989, 81 S Ct 1752 (Harlan, J., dissenting), so too the constitutional protection for the human body is surely inseparable from concern for the mind and spirit that dwell therein.

It is against this background of decisional law, and the constitutional tradition which it illuminates, that the right to be free from unwanted life-sustaining medical treatment must be understood. That right presupposes no abandonment of the desire for life. Nor is it reducible to a protection against batteries undertaken in the name of treatment, or to a guarantee against the infliction of bodily discomfort. Choices about death touch the core of liberty. Our duty, and the concomitant freedom, to come to terms with the conditions of our own mortality are undoubtedly "so rooted in the traditions and conscience of our people as to be ranked as fundamental," Snyder v Massachusetts, 291 US 97, 105, 78 L Ed 674, 54 S Ct 330, 90 ALR 575

---

[14] See ante, at 269, 111 L Ed 2d, at 236; ante, at 278, 111 L Ed 2d, at 241. "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Union Pacific R. Co. v Botsford, 141 US 250, 251, 35 L Ed 734, 11 S Ct 1000 (1891).

(1934), and indeed are essential incidents of the unalienable rights to life and liberty endowed us by our Creator. See Meachum v Fano, 427 US 215, 230, 49 L Ed 2d 451, 96 S Ct 2532 (1976) (Stevens, J., dissenting).

The more precise constitutional significance of death is difficult to describe; not much may be said with confidence about death unless it is said from faith, and that alone is reason enough to protect the freedom to conform choices about death to individual conscience. We may also, however, justly assume that death is not life's simple opposite, or its necessary terminus,[15] but rather its completion. Our ethical tradition has long regarded an appreciation of mortality as essential to understanding life's significance. It may, in fact, be impossible to live for anything without being prepared to die for something. Certainly there was no disdain for life in Nathan Hale's most famous declaration or in Patrick Henry's;

[497 US 344]

their words instead bespeak a passion for life that forever preserves their own lives in the memories of their countrymen.[16] From such "honored dead we take increased devotion to that cause for which they gave the last full measure of devotion."[17]

These considerations cast into stark relief the injustice, and unconstitutionality, of Missouri's treatment of Nancy Beth Cruzan. Nancy Cruzan's death, when it comes, cannot be an historic act of heroism; it will inevitably be the consequence of her tragic accident. But Nancy Cruzan's interest in life, no less than that of any other person, includes an interest in how she will be thought of after her death by those whose opinions mattered to her. There can be no doubt that her life made her dear to her family and to others. How she dies will affect how that life is remembered. The trial court's order authorizing Nancy's parents to cease their daughter's treatment would have permitted the family that cares for Nancy to bring to a close her tragedy and her death. Missouri's objection to that order subordinates Nancy's body, her family, and the lasting significance of her life to the State's own interests. The decision we review thereby interferes with constitutional interests of the highest order.

To be constitutionally permissible, Missouri's intrusion upon these fundamental liberties must, at a minimum, bear a reasonable relationship to a legitimate state end. See, e.g., Meyer v Nebraska, 262 US, at 400, 67 L Ed 1042, 43 S Ct 625, 29 ALR 1446; Doe v Bolton, 410 US 179, 194-195, 199, 35 L Ed 2d 201, 93 S Ct 739 (1973). Missouri asserts that its policy is related to a state interest in the protection of life. In my view, however, it is an effort to define life, rather than to protect it, that is the heart of Missouri's policy. Missouri insists, without regard to Nancy Cruzan's own interests, upon

[497 US 345]

equating her life with the biological persistence of her bodily functions. Nancy Cruzan, it must be remembered, is not now simply incompetent. She is in a persistent vegetative state and has been so for seven years. The trial court found, and no party contested, that Nancy has no possibility of recovery and no consciousness.

---

[15] Many philosophies and religions have, for example, long venerated the idea that there is a "life after death," and that the human soul endures even after the human body has perished. Surely Missouri would not wish to define its interest in life in a way antithetical to this tradition.

[16] See, e.g., H. Johnston, Nathan Hale 1776: Biography and Memorials 128-129 (1914); J. Axelrad, Patrick Henry: The Voice of Freedom 110-111 (1947).

[17] A. Lincoln, Gettysburg Address, 1 Documents of American History 429 (H. Commager ed) (9th ed 1973).

It seems to me that the Court errs insofar as it characterizes this case as involving "judgments about the 'quality' of life that a particular individual may enjoy," ante, at 282, 111 L Ed 2d, at 244. Nancy Cruzan is obviously *"alive"* in a physiological sense. But for patients like Nancy Cruzan, who have no consciousness and no chance of recovery, there is a serious question as to whether the mere persistence of their bodies is *"life"* as that word is commonly understood, or as it is used in both the Constitution and the Declaration of Independence.[18] The State's unflagging determination to perpetuate Nancy Cruzan's physical existence is comprehensible only as an effort to define life's meaning, not as an attempt to preserve its sanctity.

This much should be clear from the oddity of Missouri's definition alone. Life, particularly human life, is not commonly thought of as a merely physiological condition or function.[19]

Its sanctity is often thought to derive from the impossibility of any such reduction. When people speak of life, they often mean to describe the experiences that comprise a person's history, as when it is said that somebody "led a good life."[20] They may also mean to refer to the practical manifestation of the human spirit, a meaning captured by the familiar observation that somebody "added life" to an assembly. If there is a shared thread among the various opinions on this subject, it may be that life is an activity which is at once the matrix for, and an integration of, a person's interests. In

---

[18] The Supreme Judicial Court of Massachusetts observed in this connection: "When we balance the State's interest in prolonging a patient's life against the rights of the patient to reject such prolongation, we must recognize that the State's interest in life encompasses a broader interest than mere corporeal existence. In certain, thankfully rare, circumstances the burden of maintaining the corporeal existence degrades the very humanity it was meant to serve." Brophy v New England Sinai Hospital, Inc. 398 Mass 417, 433-434, 497 NE2d 626, 635 (1986). The Brophy court then stressed that this reflection upon the nature of the State's interest in life was distinguishable from any considerations related to the quality of a particular patient's life, considerations which the court regarded as irrelevant to its inquiry. See also In re Eichner, 73 App Div 2d 431, 465, 426 NYS2d 517, 543 (1980) (A patient in a persistent vegetative state "has no health, and, in the true sense, no life, for the State to protect"), modified in In re Storar, 52 NY2d 363, 420 NE2d 64 (1981).

[19] One learned observer suggests, in the course of discussing persistent vegetative states, that "few of us would accept the preservation of such a reduced level of function as a proper *goal* for medicine, even though we sadly accept it as an unfortunate and unforeseen *result* of treatment that had higher aspirations, and even if we refuse actively to cause such vegetative life to cease." L. Kass, Toward a More Natural Science 203 (1985). This assessment may be controversial. Nevertheless, I again tend to agree with Judge Blackmar, who in his dissent from the Missouri Supreme Court's decision contended that it would be unreasonable for the State to assume that most people *did* in fact hold a view contrary to the one described by Dr. Kass.

My view is further buttressed by the comments of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research:

"The primary basis for medical treatment of patients is the prospect that each individual's interests (specifically, the interest in well-being) will be promoted. Thus, treatment ordinarily aims to benefit a patient through preserving life, relieving pain and suffering, protecting against disability, and returning maximally effective functioning. If a prognosis of permanent unconsciousness is correct, however, continued treatment cannot confer such benefits. Pain and suffering are absent, as are joy, satisfaction, and pleasure. Disability is total and no return to an even minimal level of social or human functioning is possible." Deciding to Forego Life-Sustaining Treatment 181-182 (1983).

[497 US 347]

any event, absent some theological abstraction, the idea of life is not conceived separately from the idea of a living person. Yet, it is by precisely such a separation that Missouri asserts an interest in Nancy Cruzan's life in opposition to Nancy Cruzan's own interests. The resulting definition is uncommon indeed.

The laws punishing homicide, upon which the Court relies, ante, at 280, 111 L Ed 2d, at 243, do not support a contrary inference. Obviously, such laws protect both the life *and* interests of those who would otherwise be victims. Even laws against suicide presuppose that those inclined to take their own lives have *some* interest in living, and, indeed, that the depressed people whose lives are preserved may later be thankful for the State's intervention. Likewise, decisions that address the "quality of life" of incompetent, but conscious, patients rest upon the recognition that these patients have *some* interest in continuing their lives, even if that interest pales in some eyes when measured against interests in dignity or comfort. Not so here. Contrary to the Court's suggestion, Missouri's protection of life in a form abstracted from the living is not commonplace; it is aberrant.

Nor does Missouri's treatment of Nancy Cruzan find precedent in the various state-law cases surveyed by the majority. Despite the Court's assertion that state courts have demonstrated "both similarity and diversity in their approaches" to the issue before us, *none* of the decisions surveyed by the Court interposed an absolute bar to the termination of treatment for a patient in a persistent vegetative state. For example, In re Westchester County Medical Center on behalf of O'Connor, 72 NY2d 517, 531 NE2d 607 (1988), pertained to an incompetent patient who "was not in a coma or vegetative state. She was conscious, and capable of responding to simple questions or requests sometimes by squeezing the questioner's hand and sometimes verbally."

[497 US 348]

Id., at 524-525, 531 NE2d, at 609-610. Likewise, In re Storar, 52 NY2d 363, 420 NE2d 64 (1981), involved a conscious patient who was incompetent because "profoundly retarded with a mental age of about 18 months." Id., at 373, 420 NE2d, at 68. When it decided In re Conroy, 98 NJ 321, 486 A2d 1209 (1985), the New Jersey Supreme Court noted that "Ms. Conroy was not brain dead, comatose, or in a chronic vegetative state," 98 NJ, at 337, 486 A2d, at 1217, and then distinguished In re Quinlan, 70 NJ 10, 355 A2d 647 (1976), on the ground that Karen Quinlan had been in a "persistent vegetative or comatose state." 98 NJ, at 358-359, 486 A2d, at 1228. By contrast, an unbroken stream of cases has authorized procedures for the cessation of treatment of patients in persistent vegetative states.[21] Considered **[497 US 349]** against the background of other cases involving patients in persistent vegetative states, instead of against the broader—and inapt—category of cases involving chronically ill incompetent patients, Missouri's decision is anomolous.

---

[20] It is this sense of the word that explains its use to describe a biography: for example, Boswell's Life of Johnson or Beveridge's The Life of John Marshall. The reader of a book so titled would be surprised to find that it contained a compilation of biological data.

[497 US 350]

In short, there is no reasonable ground for believing that Nancy Beth Cruzan has any *personal* interest in the perpetuation of what the

---

[21] See, e. g., In re Estate of Longeway, 133 Ill 2d 33, 549 NE2d 292 (1989) (authorizing removal of a gastrostomy tube from a permanently unconscious patient after judicial approval is obtained); McConnell v Beverly Enterprises-Connecticut, Inc. 209 Conn 692, 705, 553 A2d 596, 603 (1989) (authorizing, pursuant to statute, removal of a gastrostomy tube from patient in a persistent vegetative state, where patient had previously expressed a wish not to have treatment sustained); Gray v Romeo, 697 F Supp 580 (RI 1988) (authorizing removal of a feeding tube from a patient in a persistent vegetative state); Rasmussen v Fleming, 154 Ariz 207, 741 P2d 674 (1987) (en banc) (authorizing procedures for the removal of a feeding tube from a patient in a persistent vegetative state); In re Gardner, 534 A2d 947 (Me 1987) (allowing discontinuation of life-sustaining procedures for a patient in a persistent vegetative state); In re Peter, 108 NJ 365, 529 A2d 419 (1987) (authorizing procedures for cessation of treatment to elderly nursing home patient in a persistent vegetative state); In re Jobes, 108 NJ 394, 529 A2d 434 (1987) (authorizing procedures for cessation of treatment to nonelderly patient determined by "clear and convincing" evidence to be in a persistent vegetative state); Brophy v New England Sinai Hospital, Inc., 398 Mass 417, 497 NE2d 626 (1986) (permitting removal of a feeding tube from a patient in a persistent vegetative state); John F. Kennedy Memorial Hospital, Inc. v Bludworth, 452 So 2d 921 (Fla 1984) (holding that court approval was not needed to authorize cessation of life-support for patient in a persistent vegetative state who had executed a living will); In re Torres, 357 NW2d 332 (Minn 1984) (authorizing removal of a permanently unconscious patient from life-support systems); In re L. H. R. 253 Ga 439, 321 SE2d 716 (1984) (allowing parents to terminate life support for infant in a chronic vegetative state); In re Hamlin, 102 Wash 2d 810, 689 P2d 1372 (1984) (allowing termination, without judicial intervention, of life support for patient in a vegetative state if doctors and guardian concur; conflicts among doctors and the guardian with respect to cessation of treatment are to be resolved by a trial court); In re Colyer, 99 Wash 2d 114, 660 P2d 738 (1983), modified on other grounds, In re Hamlin, 102 Wash 2d 810, 689 P2d 1372 (1984) (allowing court-appointed guardian to authorize cessation of treatment of patient in persistent vegetative state); In re Eichner (decided with In re Storar), 52 NY2d 363, 420 NE2d 64, cert denied, 454 US 858, 70 L Ed 2d 153, 102 S Ct 309 (1981) (authorizing the removal of a patient in a persistent vegetative state from a respirator); In re Quinlan, 70 NJ 10, 355 A2d 647, cert denied, 429 US 922, 50 L Ed 2d 289, 97 S Ct 319 (1976) (authorizing, on constitutional grounds, the removal of a patient in a persistent vegetative state from a respirator); Corbett v D'Alessandro, 487 So 2d 368 (Fla App 1986) (authorizing removal of nasogastric feeding tube from patient in persistent vegetative state); In re Drabick, 200 Cal App 3d 185, 218, 245 Cal Rptr 840, 861 (1988) ("Life sustaining treatment is not 'necessary' under Probate Code section 2355 if it offers no reasonable possibility of returning the conservatee to cognitive life and if it is not otherwise in the conservatee's best interests, as determined by the conservator in good faith") (footnote omitted); Delio v Westchester County Medical Center, 129 App Div 2d 1, 516 NYS2d 677 (1987) (authorizing discontinuation of artificial feeding for a 33-year-old patient in a persistent vegetative state); Leach v Akron General Medical Center, 68 Ohio Misc 1, 426 NE2d 809 (1980) (authorizing removal of a patient in a persistent vegetative state from a respirator); In re Severns, 425 A2d 156 (Del Ch 1980) (authorizing discontinuation of all medical support measures for a patient in a "virtual vegetative state").

These cases are not the only ones which have allowed the cessation of life-sustaining treatment to incompetent patients. See, e. g., Superintendant of Belchertown State School v Saikewicz, 373 Mass 728, 370 NE2d 417 (1977) (holding that treatment could have been withheld from a profoundly mentally retarded patient); Bouvia v Superior Court of Los Angeles County, 179 Cal App 3d 1127, 225 Cal Rptr 297 (1986) (allowing removal of life-saving nasogastric tube from competent, highly intelligent patient who was in extreme pain).

State has decided is her life. As I have already suggested, it would be possible to hypothesize such an interest on the basis of theological or philosophical conjecture. But even to posit such a basis for the State's action is to condemn it. It is not within the province of secular government to circumscribe the liberties of the people by regulations designed wholly for the purpose of establishing a sectarian definition of life. See Webster v Reproductive Health Services, 492 US 490, 566-572, 106 L Ed 2d 410, 109 S Ct 3040 (1989) (Stevens, J., dissenting).

My disagreement with the Court is thus unrelated to its endorsement of the clear and convincing standard of proof for cases of this kind. Indeed, I agree that the controlling facts must be established with unmistakable clarity. The critical question, however, is not how to prove the controlling facts but rather what proven facts should be controlling. In my view, the constitutional answer is clear: The best interests of the individual, especially when buttressed by the interests of all related third parties, must prevail over any general state policy that simply ignores those interests.[22] Indeed, the only apparent *secular* basis for the State's interest in life is the policy's persuasive impact upon people other than Nancy and her family. Yet, "[a]lthough the State may properly perform a teaching function," and although that teaching may foster respect for the sanctity of life, the State may not pursue its project by infringing constitutionally protected interests

for "*symbolic* effect." Carey v Population Services International, 431 US 678, 715, 52 L Ed 2d 675, 97 S Ct 2010 (1977) (Stevens, J., concurring in part and concurring in judgment). The failure of Missouri's policy to heed the interests of a dying individual with respect to matters so private is ample evidence of the policy's illegitimacy.

Only because Missouri has arrogated to itself the power to define life, and only because the Court permits this usurpation, are Nancy Cruzan's life and liberty put into disquieting conflict. If Nancy Cruzan's life were defined by reference to her own interests, so that her life expired when her biological existence ceased serving *any* of her own interests, then her constitutionally protected interest in freedom from unwanted treatment would not come into conflict with her constitutionally protected interest in life. Conversely, if there were *any* evidence that Nancy Cruzan herself defined life to encompass every form of biological persistence by a human being, so that the continuation of treatment would serve Nancy's own liberty, then once again there would be no conflict between life and liberty. The opposition of life and liberty in this case are thus not the result of Nancy Cruzan's tragic accident, but are instead the artificial consequence of Missouri's effort, and this Court's willingness, to abstract Nancy Cruzan's life from Nancy Cruzan's person.

---

[22] Although my reasoning entails the conclusion that the best interests of the incompetent patient must be respected even when the patient is conscious, rather than in a vegetative state, considerations pertaining to the "quality of life," in addition to considerations about the definition of life, might then be relevant. The State's interest in protecting the life, and thereby the interests, of the incompetent patient would accordingly be more forceful, and the constitutional questions would be correspondingly complicated.

IV

Both this Court's majority and the state court's majority express great deference to the policy choice made by the state legislature.[23] That deference is, in my view, based

upon a severe error in the Court's constitutional logic. The Court believes that the liberty interest claimed here on behalf of Nancy Cruzan is peculiarly problematic because "[a]n incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right." Ante, at 280, 111 L Ed 2d, at 243. The impossibility of such an exercise affords the State, according to the Court, some discretion to interpose "a procedural requirement" that effectively compels the continuation of Nancy Cruzan's treatment.

There is, however, nothing "hypothetical" about Nancy Cruzan's constitutionally protected interest in freedom from unwanted treatment, and the difficulties involved in ascertaining what her interests are do not in any way justify the State's decision to oppose her interests with its own. As this case comes to us, the crucial question—and the question addressed by the Court—is not what Nancy Cruzan's interests are, but whether the State must give effect to them. There is certainly nothing novel about the practice of permitting a next friend to assert constitutional rights on behalf of an incompetent patient who is unable to do so. See, e. g., Youngberg v Romeo, 457 US 307, 310, 73 L Ed 2d 28, 102 S Ct 2452 (1982); Whitmore v Arkansas, 495 US 149, 161-164, 109 L Ed 2d 135, 110 S Ct 1717 (1990). Thus, if Nancy Cruzan's incapacity to "exercise" her rights is to alter the balance between her interests and the State's, there must be some further explanation of how it does so. The Court offers two possibilities, neither of them satisfactory.

The first possibility is that the State's policy favoring life is by its nature less intrusive upon the patient's interest than any alternative. The Court suggests that Missouri's policy "results in a maintenance of the status quo," and is subject to reversal, while a decision to terminate treatment "is not susceptible

of correction" because death is irreversible. Ante, at 283, 111 L Ed 2d, at 245. Yet, this explanation begs the question, for it assumes either that the State's policy is consistent with Nancy Cruzan's own interests, or that no damage is done by ignoring her interests. The first assumption is without basis in the record of this case, and would obviate any need for the State to rely, as it does, upon its own interests rather than upon the patient's. The second assumption is unconscionable. Insofar as Nancy Cruzan has an interest in being remembered for how she lived rather than how she died, the damage done to those memories by the prolongation of her death is irreversible. Insofar as Nancy Cruzan has an interest in the cessation of any pain, the continuation of her pain is irreversible. Insofar as Nancy Cruzan has an interest in a closure to her life consistent with her own beliefs rather than those of the Missouri legislature, the State's imposition of its contrary view is irreversible. To deny the importance of these consequences is in effect to deny that Nancy Cruzan has interests at all, and thereby to deny her personhood in the name of preserving the sanctity of her life.

---

[23] Thus, the state court wrote:

"This State has expressed a strong policy favoring life. We believe that policy dictates that we err on the side of preserving life. If there is to be a change in that policy, it must come from the people through their elected representatives. Broad policy questions bearing on life and death issues are more properly addressed by representative assemblies. These have vast fact and opinion gathering and synthesizing powers unavailable to courts; the exercise of these powers is particularly appropriate where issues invoke the concerns of medicine, ethics, morality, philosophy, theology and law. Assuming change is appropriate, this issue demands a comprehensive resolution which courts cannot provide." 760 SW2d, at 426.

The second possibility is that the State must be allowed to define the interests of incompetent patients with respect to life-sustaining treatment because there is no procedure capable of determining what those interests are in any particular case. The Court points out various possible "abuses" and inaccuracies that may affect procedures authorizing the termination of treatment. See ante, at 281-282, 111 L Ed 2d, at 243-244. The Court correctly notes that in some cases there may be a conflict between the interests of an incompetent patient and the interests of members of his or her family. A State's procedures must guard against the risk that the survivors' interests are not mistaken for the patient's. Yet, the appointment of the neutral guardian ad litem, coupled with the searching inquiry conducted by the trial judge and the imposition of the clear and convincing standard of proof, all effectively avoided that risk in this case. Why such procedural safeguards should not

[497 US 354]

be adequate to avoid a similar risk in other cases is a question the Court simply ignores.

Indeed, to argue that the mere possibility of error in *any* case suffices to allow the State's interests to override the particular interests of incompetent individuals in *every* case, or to argue that the interests of such individuals are unknowable and therefore may be subordinated to the State's concerns, is once again to deny Nancy Cruzan's personhood. The meaning of respect for her personhood, and for that of others who are gravely ill and incapacitated, is, admittedly, not easily defined: Choices about life and death are profound ones, not susceptible of resolution by recourse to medical or legal rules. It may be that the best we can do is to ensure that these choices are made by those who will care enough about the patient to investigate his or her interests with particularity and caution. The Court seems to recognize as much when it cautions against formulating any general or inflexible rule to govern all the cases that might arise in this area of the law. Ante, at 277-278, 111 L Ed 2d, at 241 The Court's deference to the legislature is, however, itself an inflexible rule, one that the Court is willing to apply in this case even though the Court's principal grounds for deferring to Missouri's legislature are hypothetical circumstances not relevant to Nancy Cruzan's interests.

On either explanation, then, the Court's deference seems ultimately to derive from the premise that chronically incompetent persons have no constitutionally cognizable interests at all, and so are not persons within the meaning of the Constitution. Deference of this sort is patently unconstitutional. It is also dangerous in ways that may not be immediately apparent. Today the State of Missouri has announced its intent to spend several hundred thousand dollars in preserving the life of Nancy Beth Cruzan in order to vindicate its general policy favoring the preservation of human life. Tomorrow, another State equally eager to champion an interest in the "quality of life" might favor a policy designed to ensure quick

and comfortable deaths by denying treatment to categories of marginally hopeless cases. If the State in fact has an interest in defining life, and if the State's policy with respect to the termination of life-sustaining treatment commands deference from the judiciary, it is unclear how any resulting conflict between the best interests of the individual and the general policy of the State would be resolved.[24] I believe the Constitution requires that the individual's vital interest in liberty should prevail over the general policy in that case, just as in this.

That a contrary result is readily imaginable under the majority's theory makes manifest that this Court cannot defer to any state policy that drives a theoretical wedge between a person's life, on the one hand, and that person's liberty or happiness, on the other.[25] The consequence of such a theory

is to deny the personhood of those whose lives are defined by the State's interests rather than their own. This consequence may be acceptable in theology or in speculative philosophy, see Meyer, 262 US, at 401-402, 67 L Ed 1042, 43 S Ct 625, 29 ALR 1446, but it is radically inconsistent with the foundation of all legitimate government. Our Constitution presupposes a respect for the personhood of every individual, and nowhere is strict adherence to that principle more essential than in the judicial branch. See, e. g., Thornburgh v American College of Obstetricians and Gynecologists, 476 US, at 781-782, 90 L Ed 2d 779, 106 S Ct 2169 (Stevens, J., concurring).

V

In this case, as is no doubt true in many others, the predicament confronted by the healthy members of the Cruzan family merely adds emphasis to the best interests finding made by the trial judge. Each of us has an interest in the kind of memories that will survive after death. To that end, individual decisions are often motivated by their impact on others. A member of the kind of family identified in the trial court's findings in this case would likely have not only a normal interest in minimizing the burden that her own illness imposes on others, but also an interest in having their memories of her filled predominantly with thoughts about her past vitality rather than her current condition. The meaning and completion of her life should be controlled by persons who have her best interests at heart—not by a state legislature concerned only with the "preservation of human life."

---

[24] The Supreme Judicial Court of Massachusetts anticipated this possibility in its Brophy decision, where it observed that the "duty of the State to preserve life must encompass a recognition of an individual's right to avoid circumstances in which the individual himself would feel that efforts to sustain life demean or degrade his humanity," because otherwise the State's defense of life would be tantamount to an effort by "the State to make decisions regarding the individual's quality of life." 398 Mass, at 434, 497 NE2d, at 635. Accord, Gray v Romeo, 697 F Supp, at 588.

[25] Judge Campbell said on behalf of the Florida District Court of Appeal for the Second District:
"[W]e want to acknowledge that we began our deliberations in this matter, as did those who drafted our Declaration of Independence, with the solemnity and the gratefulness of the knowledge 'that all men are . . . endowed by their Creator with . . . Life.' It was not without considerable searching of our hearts, souls, and minds, as well as the jurisprudence of this great Land that we have reached our conclusions. We forcefully affirm that Life having been endowed by our Creator should not be lightly taken nor relinquished. We recognize, however, that we are also endowed with a certain amount of dignity and the right to the 'Pursuit of Happiness.' When, therefore, it may be determined by reason of the advanced scientific and medical technologies of this day that Life has, through causes beyond our control, reached the unconscious and vegetative state where all that remains is the forced function of the body's vital functions, including the artificial sustenance of the body itself, then we recognize the right to allow the natural consequence of the removal of those artificial life sustaining measures." Corbett v D'Alessandro, 487 So 2d, at 371.

The Cruzan family's continuing concern provides a concrete reminder that Nancy Cruzan's interests did not disappear with her vitality or her consciousness. However commendable may be the State's interest in human life, it cannot pursue that interest by appropriating Nancy Cruzan's life as a symbol for its own purposes. Lives do not exist in abstraction

from persons, and to pretend otherwise is not to honor but to desecrate the State's responsibility for protecting life. A State that seeks to demonstrate its commitment to life may do so by aiding those who are actively struggling for life and health. In this endeavor, unfortunately, no State can lack for opportunities: There can be no need to make an example of tragic cases like that of Nancy Cruzan.

I respectfully dissent.

[497 US 358]

EVERETT A. SISSON, Petitioner

v

BURTON B. RUBY et al.

497 US 358, 111 L Ed 2d 292, 110 S Ct 2892

[No. 88-2041]

Argued April 23, 1990. Decided June 25, 1990.

Decision: Federal District Court held to have maritime jurisdiction, under 28 USCS § 1333(1), of suit to limit liability for damages resulting from fire on board yacht docked in marina on navigable waters.

SUMMARY

A fire broke out on board a pleasure yacht docked at a marina on Lake Michigan. The fire destroyed the yacht and damaged several neighboring vessels and the marina. Claims in excess of $275,000 were filed against the yacht's owner. The owner of the yacht filed a petition for declaratory and injunctive relief in the United States District Court for the Northern District of Illinois, contending that under the Limited Liability Act (46 USCS Appx §§ 181 et seq.) his liability was limited to $800, the salvage value of his yacht after the fire. The owner argued that the District Court had maritime jurisdiction over his suit pursuant to 28 USCS § 1333(1). The District Court disagreed and dismissed the petition for lack of subject-matter jurisdiction (663 F Supp 858). The owner sought reconsideration on the ground that the Limited Liability Act independently conferred jurisdiction over his suit. The District Court denied reconsideration, both on the merits and on the basis of the owner's failure to raise the argument before the dismissal of his suit (668 F Supp 1196). On appeal, the United States Court of Appeals for the Seventh Circuit affirmed, holding that neither 28 USCS § 1333(1) nor the Limited Liability Act conferred jurisdiction (867 F2d 341).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by Marshall, J., joined by Rehnquist, Ch. J., and Brennan, Blackmun, Stevens, O'Connor, and Kennedy, JJ., it was held that 28 USCS § 1333(1) conferred maritime jurisdiction over the owner's suit, because (1) although no commercial vessels were docked at the marina when the fire occurred, the fire aboard the yacht had a potentially disruptive

Briefs of Counsel, p 874, infra.

impact on maritime commerce; and (2) regardless of the precise cause of the fire, the general conduct giving rise to the incident—the storage and maintenance of a boat on a marina on navigable waters—was substantially related to traditional maritime activity.

SCALIA, J., joined by WHITE, J., concurring in the judgment, expressed the view that any tort occurring on a vessel conducting normal maritime activities in navigable waters falls within the admiralty jurisdiction of the federal courts.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

2 Am Jur 2d, Admiralty §§ 47, 78; 12 Am Jur 2d, Boats and Boating §§ 56-58

23 Federal Procedure, L Ed, Maritime Law and Procedure § 53:249

12B Federal Procedural Forms, L Ed, Maritime Law and Procedure § 47:287

US L Ed Digest, Admiralty § 70

28 USCS § 1333(1); 46 USCS Appx § 183(a)

Index to Annotations, Admiralty; Limitation of Liability; Marinas; Ships and Vessels

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Robins Dry Dock Doctrine limiting recovery for economic losses due to unintentional maritime torts. 88 ALR Fed 295.

Admiralty jurisdiction: maritime nature of tort. 80 ALR Fed 105.

Effect on other proceedings of shipowner's petition in admiralty for limitation of liability under 46 USCS §§ 183 et seq. 47 ALR Fed 490.

Shipowner's assertion in state court of limitation of liability under 46 USCS §§ 183 et seq. 45 ALR Fed 890.

What constitutes significant relationship to traditional maritime activity to support federal court's admiralty jurisdiction in aviation tort cases. 30 ALR Fed 759.

Validity, construction, and application of Admiralty Jurisdiction Extension Act (46 USCS § 740). 14 ALR Fed 664.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Admiralty § 70 — jurisdiction of suit to limit owner's liability

1a-1h. Under 28 USCS § 1333(1), a United States District Court has maritime jurisdiction over an action for declaratory and injunctive relief brought by the owner of a yacht to limit the owner's liability, pursuant to 46 USCS Appx § 183(a), for damages caused by a fire which began aboard the yacht while it was docked at a marina on navigable waters and which damaged neighboring noncommercial vessels and the marina; maritime jurisdiction is properly invoked under such circumstances, even though no commercial vessels were docked at the marina when the fire occurred, and regardless of the particular activity that caused the fire, because (1) such a fire has a potentially disruptive impact on maritime commerce, as the fire can spread to nearby commercial vessels or make the marina inaccessible to such vessels, and (2) the general conduct that gave rise to the incident—the storage and maintenance of a boat at a marina on navigable waters—is substantially related to traditional maritime activity.

Appeal § 1662 — effect of decision on other grounds

2a, 2b. On certiorari to review a United States Court of Appeals decision as to whether a United States District Court has maritime jurisdiction over an action for declaratory and injunctive relief brought by the owner of a yacht to limit the owner's liability, pursuant to 46 USCS Appx § 183(a), for damages caused by a fire which began aboard the yacht while it was docked at a marina on navigable waters and which damaged neighboring vessels and the marina, the United States Supreme Court need not decide whether the Limited Liability Act (46 USCS Appx §§ 181 et seq.) provides an independent basis for federal jurisdiction, where the Supreme Court holds that 28 USCS § 1333(1) is sufficient to confer jurisdiction over the action.

Appeal § 1113 — jurisdiction of District Court — issue not raised

3a, 3b. On certiorari to review a United States Court of Appeals decision as to whether a United States District Court has maritime jurisdiction, under 28 USCS § 1333(1), of an action for declaratory and injunctive relief brought by the owner of a yacht to limit the owner's liability, pursuant to 46 USCS Appx § 183(a), for damages caused by a fire which began aboard the yacht while it was docked at a marina on navigable waters and which damaged neighboring vessels and the marina, the United States Supreme Court will decline to consider whether the Admiralty Extension Act (46 USCS § 740) provides an independent basis for federal jurisdiction, where that issue was not raised below.

Admiralty § 45 — jurisdictional test

4. For the purposes of the rule that federal admiralty jurisdiction under 28 USCS § 1333(1) is appropriate in cases where a potential hazard to maritime commerce arises out of activity that bears a substantial relationship to traditional maritime activity, the United States Supreme Court will determine the potential impact of a given type of incident on maritime commerce by examining

the general character of the incident; the jurisdictional inquiry does not turn on the actual effects on maritime commerce of the incident, nor on the particular facts of the incident that may have rendered it more or less likely to disrupt commercial activity; rather, the court will assess the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity.

Admiralty § 45 — jurisdictional tests

5a, 5b. The United States Supreme Court (1) will not abandon the requirement that an incident, in order to give rise to federal maritime jurisdiction under 28 USCS § 1333(1), must have the potential for disrupting maritime commerce, and (2) will not adopt an approach under which every tort occurring on a vessel in navigable waters would give rise to maritime jurisdiction, no matter how divorced the incident might be from the purposes that give rise to such jurisdiction.

Admiralty § 45 — jurisdictional test

6. For the purposes of the rule that a party seeking to invoke federal admiralty jurisdiction under 28 USCS § 1333(1) must show a substantial relationship between the activity giving rise to the incident in question and traditional maritime activity, the relevant "activity" giving rise to the incident is defined not by the particular circumstances of the incident, but by the general conduct from which the incident arose; this focus on the general character of the activity is suggested by the nature of the jurisdictional inquiry, inasmuch as if courts were required to focus more particularly on the causes of the harm, they would have to decide to some extent the merits of the causation issue to answer the legally and analytically antecedent jurisdictional question.

Admiralty § 45; Appeal § 1332 — jurisdiction

7a, 7b. A formula adopted by the United States Supreme Court to test for the appropriateness of federal maritime jurisdiction under 28 USCS § 1333(1)—that admiralty jurisdiction is appropriate when a potential hazard to maritime commerce arises out of activity that bears a substantial relationship to traditional maritime activity—provides appropriate and sufficient guidance to the federal courts, at least in cases in which all the relevant entities are engaged in similar types of activity; thus, on certiorari to review a United States Court of Appeals decision as to the appropriateness of maritime jurisdiction in a case in which all the relevant entities were engaged in similar types of activity, the Supreme Court will not use the case before it to refine this test for admiralty jurisdiction further—or to adopt some other test entirely—by approving or disapproving the approaches used by various Courts of Appeals to determine whether an activity is substantially related to traditional maritime activity.

Admiralty § 45 — jurisdiction — traditional maritime activity

8a, 8b. For the purposes of the rule that federal admiralty jurisdiction under 28 USCS § 1333(1) is appropriate in cases where a potential hazard to maritime commerce arises out of activity that bears a substantial relationship to traditional maritime activity, the United States Supreme Court will decline to adopt a rule that, at least in the context of noncommercial activity, only navigation can be characterized as substantially related to traditional maritime activity, given that (1) a narrow focus on navigation would not serve the federal policies that underlie the jurisdictional test; (2) the fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce, and that interest cannot be fully vindicated unless all operators of vessels on navigable waters are subject to uniform rules of conduct; and (3) the need for uniform rules of maritime conduct and liability is not limited to navigation, but extends at least to any other activities traditionally undertaken by vessels, commercial or noncommercial; thus, for the purposes of the admiralty jurisdiction rule, not only navigation but also storing and maintaining a vessel at a marina on navigable waters is substantially related to traditional maritime activity.

Appeal § 1336 — review of jurisdictional issue — merits not addressed

9. On certiorari to review a United States Court of Appeals decision as to whether a United States District Court has maritime jurisdiction under 28 USCS § 1333(1) of an action for declaratory and injunctive relief brought by the owner of a yacht to limit the owner's liability, pursuant to 46 USCS Appx § 183(a), for damages caused by a fire which began aboard the yacht while it was docked at a marina on navigable waters and which damaged neighboring vessels and the marina, the United States Supreme Court—upon holding that the District Court has such jurisdiction—will not address the merits of the owner's claim, where neither the District Court nor the Court of Appeals has done so.

SYLLABUS BY REPORTER OF DECISIONS

A fire erupted in the washer/dryer area of petitioner Sisson's pleasure yacht while it was docked at a Lake Michigan marina, destroying the yacht and damaging several neighboring vessels and the marina. Respondents filed claims against Sisson for over $275,000 in damages. Invoking a Limited Liability Act provision that limits a vessel owner's liability for any damage done without the owner's privity or knowledge to the value of the vessel and its freight, Sisson filed a petition for declaratory and injunctive relief in the Federal District Court to limit his liability to $800, his yacht's salvage value after the fire. The court dismissed the petition for lack of subject-matter jurisdiction, rejecting Sisson's argument that it had, inter alia, jurisdiction under 28 USC § 1333(1) [28 USCS § 1333(1)], which grants district courts maritime jurisdiction. The Court of Appeals affirmed.

Held: The District Court has jurisdiction over Sisson's limitation claim pursuant to § 1333(1). Maritime jurisdiction is appropriate when a potential hazard to maritime commerce arises out of an activity that bears a substantial relationship to traditional maritime activity. Foremost Ins. Co. v Richardson, 457 US 668, 675, n 5, 73 L Ed 2d 300, 102 S Ct 2654. The first half of the test—that there be a potential hazard to maritime activity—is met because the fire, which began on a noncommercial vessel at a marina on a navigable waterway, could have spread to nearby commercial vessels or made the marina inaccessible to such vessels. Respondents' argument that the potential effect on maritime commerce was minimal because no commercial vessels were docked in the marina misunderstands the nature of the inquiry, which determines an activity's potential impact by examining its general character, not the actual effects on maritime commerce nor the particular facts about the incident that may have rendered it more or less likely to disrupt commercial activity. See Executive Jet Aviation, Inc. v City of Cleveland, 409 US 249, 34 L Ed 2d 454, 93 S Ct 493; Foremost, supra. In determining, as to the second half of the test, whether there is a substantial relationship between the activity giving rise to the incident and traditional maritime activity, the relevant activity in this case was the storage and maintenance of a vessel at a marina on navigable waters. A vessel's storage and maintenance is substantially related to a traditional maritime activity. Respondents' contention that navigation is the sole instance, rather than an example, of an activity substantially related to traditional maritime activity is incorrect. Were navigation the only activity, Foremost could have stated the jurisdictional test much more clearly and economically. Moreover, a narrow focus on navigation would not serve the federal policies underlying the jurisdictional test since the need for uniform rules of maritime conduct and liability is not limited to navigation, but extends at least to any other activities traditionally undertaken by commercial or noncommercial vessels.

867 F2d 341, reversed and remanded.

Marshall, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Brennan, Blackmun, Stevens, O'Connor, and Kennedy, JJ., joined. Scalia, J., filed an opinion concurring in the judgment, in which White, J., joined.

APPEARANCES OF COUNSEL

Warren J. Marwedel argued the cause for petitioner.

Robert J. Kopka argued the cause for respondents.

Briefs of Counsel, p 874, infra.

OPINION OF THE COURT

Justice **Marshall** delivered the opinion of the Court.

[1a, 2a, 3a] We must decide whether 28 USC § 1333(1) [28 USCS § 1333(1)], which grants federal district courts jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction," confers federal jurisdiction over petitioner's limitation of liability suit brought in connection with a fire on his vessel. We hold that it does.[1]

---

[1] **[2b, 3b]** Sisson has also argued throughout this litigation that the Limited Liability Act, Rev Stat § 4281 et seq., 46 USC App § 181 et seq. (1982 ed, Supp V) [46 USCS Appx §§ 181 et seq.], provides an independent basis for federal jurisdiction. Respondents contend that the Act does not create jurisdiction, but instead may be invoked only in cases otherwise within the maritime jurisdiction of § 1333(1). We need not decide which party is correct, for even were we to agree that the Limited Liability Act does not independently provide a basis for this action, § 1333(1) is sufficient to confer jurisdiction. Petitioner also

[497 US 360]

Everett Sisson was the owner of the Ultorian, a 56-foot pleasure yacht. On September 24, 1985, while the Ultorian was docked at a marina on Lake Michigan, a navigable waterway, a fire erupted in the area of the vessel's washer/dryer unit. The fire destroyed the Ultorian and damaged several neighboring vessels and the marina. In the wake of the fire, respondents filed claims against Sisson for over $275,000 for damages to the marina and the other vessels. Invoking the provision of the Limited Liability Act that limits the liability of an owner of a vessel for any damage done "without the privity or knowledge of such owner" to the value of the vessel and its freight, 46 USC App § 183(a) (1982 ed, Supp V) [46 USCS Appx § 183(a)], Sisson filed a petition for declaratory and injunctive relief in Federal District Court to limit his liability to $800, the salvage value of the Ultorian after the fire. Sisson argued that the federal court had maritime jurisdiction over his limitation of liability action pursuant to § 1333(1). The District Court disagreed, dismissing the petition for lack of subject-matter jurisdiction. In re Complaint of Sisson, 663 F Supp 858 (ND Ill 1987). Sisson sought reconsideration on the ground that the Limited Liability Act independently conferred jurisdiction over the action. The District Court denied Sisson's motion, both on the merits and on the basis of Sisson's failure to raise the argument before the dismissal of the action. In re Complaint of Sisson, 668 F Supp 1196 (ND Ill 1987). The Court of Appeals for the Seventh Circuit affirmed, holding that neither § 1333(1) nor the Limited Liability Act conferred jurisdiction. In re Complaint of Sisson, 867 F2d 341 (1989). We granted certiorari, 493 US 1055, 107 L Ed 2d 947, 110 S Ct 863 (1990), and now reverse.

[1b] Until recently, § 1333(1) jurisdiction over tort actions was determined largely by the application of a "locality" test. As this Court stated the test in The Plymouth, 3 Wall 20,

[497 US 361]

36, 18 L Ed 125 (1866): "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." See also Executive Jet Aviation, Inc. v City of Cleveland, 409 US 249, 253-254, 34 L Ed 2d 454, 93 S Ct 493 (1972) (describing the locality test). Executive Jet marked this Court's first clear departure from the strict locality test. There, a jet aircraft struck a flock of sea gulls while taking off, lost power, and crashed into the navigable waters of Lake Erie, which lay just past the end of the runway. The owner of the aircraft sued the city of Cleveland, the owner of the airport, in federal court, arguing that § 1333(1) conferred federal jurisdiction over the action. Noting "serious difficulties with the locality test," id., at 255, 34 L Ed 2d 454, 93 S Ct 493, we refused to enter into a debate over whether the tort occurred where the plane had crashed and been destroyed (the navigable waters of Lake Erie) or where it had struck the sea gulls (over land), id., at 266-267, 34 L Ed 2d 454, 93 S Ct 493. Rather, we held that jurisdiction was lacking because "the wrong [did not] bear a significant relationship to traditional maritime activity." Id., at 268, 34 L Ed 2d 454, 93 S Ct 493.

---

argues that the Admiralty Extension Act, 62 Stat 496, 46 USC App § 740 (1982 ed, Supp V) [46 USCS Appx § 740], provides an independent basis for jurisdiction. We decline to consider that argument because it was not raised below.

Although our holding in Executive Jet was limited by its terms to cases involving aviation torts, that case's "thorough discussion of the theoretical and practical problems inherent in broadly applying the traditional locality rule . . . prompted several courts and commentators to construe Executive Jet as applying to determinations of federal admiralty jurisdiction outside the context of aviation torts." Foremost Ins. Co. v Richardson, 457 US 668, 673, 73 L Ed 2d 300, 102 S Ct 2654 (1982). In Foremost, we approved this broader interpretation of Executive Jet. 457 US, at 673, 73 L Ed 2d 300, 102 S Ct 2654. Foremost involved a collision, on what we assumed to be navigable waters, id., at 670, n 2, 73 L Ed 2d 300, 102 S Ct 2654, between an 18-foot pleasure boat and a 16-foot recreational fishing boat, see Richardson v Foremost Ins. Co. 470 F Supp 699, 700 (MD La 1979). Neither vessel had ever been engaged in any commercial maritime activity. 457 US, at 670-671, 73 L Ed 2d 300, 102 S Ct 2654.

[497 US 362]

We began our application of Executive Jet by rejecting "petitioners' argument that a substantial relationship with *commercial* maritime activity is necessary" to a finding of maritime jurisdiction. 457 US, at 674, 73 L Ed 2d 300, 102 S Ct 2654 (emphasis added). Although we recognized that protecting commercial shipping is at the heart of admiralty jurisdiction, we also noted that that interest

> "cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually *engaged* in commercial maritime activity. This interest can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct. The failure to recognize the breadth of this federal interest ignores the potential effect of noncommercial maritime activity on maritime commerce. . . . The potential disruptive impact of a collision between boats on navigable waters, when coupled with the traditional concern that admiralty law holds for navigation, compels the conclusion that this collision between two pleasure boats on navigable waters has a significant relationship with maritime commerce." Id., at 674-675, 73 L Ed 2d 300, 102 S Ct 2654 (footnote omitted).

In a footnote to the above passage, we noted that "[n]ot every accident in navigable waters that might disrupt maritime commerce will support federal admiralty jurisdiction," id., at 675, n 5, 73 L Ed 2d 300, 102 S Ct 2654 (citing Executive Jet), but that when a "potential hazard to maritime commerce arises out of activity that bears a substantial relationship to traditional maritime activity, as does the navigation of boats in this case, admiralty jurisdiction is appropriate." 457 US, at 675, n 5, 73 L Ed 2d 300, 102 S Ct 2654.

This case involves a fire that began on a noncommercial vessel at a marina located on a navigable waterway. Certainly, such a fire has a potentially disruptive impact on maritime commerce, as it can spread to nearby commercial vessels or make the marina inaccessible to such vessels. Indeed, fire is one of the most significant hazards facing commercial vessels.

[497 US 363]

See, e. g., Southport Fisheries, Inc. v Saskatchewan Govt. Ins. Office, 161 F Supp 81, 83-84 (EDNC 1958).

[1c, 4] Respondents' only argument to the contrary is that the potential effect on maritime commerce in this case was minimal because no commercial vessels happened to be docked at the marina when the fire occurred. This argument misunderstands the nature of our inquiry. We determine the potential impact of a given type of incident by examining its general character. The jurisdictional inquiry does not turn on the *actual* effects on maritime commerce of the fire on Sisson's vessel; nor does it turn on the particular facts of the incident in this case, such as the source of the fire or the specific location of the yacht at the marina, that may have rendered the fire on the Ultorian more or less likely to disrupt commercial activity. Rather, a court must assess the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity. Here, the general features—a fire on a vessel docked at a marina on navigable waters—plainly satisfy the requirement of potential disruption to commercial maritime activity.

[1d, 5a] Our approach here comports with the way in which we characterized the potential disruption of the types of incidents involved in Executive Jet and Foremost. This first aspect of the jurisdictional test was satisfied in Executive Jet because "an aircraft sinking in the water could create a hazard for the navigation of commercial vessels in the vicinity." Foremost, 457 US, at 675, n 5, 73 L Ed 2d 300, 102 S Ct 2654. Likewise, in Foremost the Court noted "[t]he potential[ly] disruptive impact of a collision between boats on navigable waters." Id., at 675, 73 L Ed 2d 300, 102 S Ct 2654. Indeed, we supported our finding of potential disruption there with a description of the likely effects of a collision at the mouth of the St. Lawrence Seaway, ibid., an area heavily traveled by commercial vessels, even though the place where the collision actually had occurred apparently was "seldom, if ever, used for commercial traffic," id., at 670, n 2, 73 L Ed 2d 300, 102 S Ct 2654. Our cases

thus lead us to eschew the fact-specific jurisdictional inquiry urged on us by respondents.[2]

---

[2] **[5b]** Justice Scalia argues that we should abandon the requirement that the incident have the potential for disrupting maritime commerce. He argues that, "as a practical matter, *every* tort occurring on a vessel in navigable waters" should give rise to maritime jurisdiction, post, at 373, 111 L Ed 2d, at 306 (emphasis added), no matter how divorced the incident from the purposes that give rise to such jurisdiction. Justice Scalia is correct that his approach would be simpler to apply than the one embraced by Executive Jet and Foremost and that, all things being equal, simpler jurisdictional formulae are to be preferred. Such a preference, in fact, informs our refusal to consider the particulars of the fire on the Ultorian in determining whether maritime jurisdiction lies. See supra, at 363, 111 L Ed 2d, at 300. But the demand for tidy rules can go too far, and when that demand entirely divorces the jurisdictional inquiry from the purposes that support the exercise of jurisdiction, it *has* gone too far. In Foremost, the Court unanimously agreed that the purpose underlying the existence of federal maritime jurisdiction is the federal interest in the protection of maritime commerce, and that a case must implicate that interest to give rise to such jurisdiction. Compare Foremost, 457 US, at 674-675, 73 L Ed 2d 300, 102 S Ct 2654, with id., at 679-680, 73 L Ed 2d 300, 102 S Ct 2654 (Powell, J., dissenting). The only point of debate in Foremost was whether the Court was straying too *far* from that purpose by requiring no more than that the wrong have a potentially disruptive impact on maritime commerce and arise from an activity with a substantial relationship to traditional maritime activity. Justice Scalia's view that Foremost did not go far *enough* is thus plainly inconsistent with the unanimous view of the Court in Foremost.

[1e, 6] We now turn to the second half of the Foremost test, under which the party seeking to invoke maritime jurisdiction must show a substantial relationship between the activity giving rise to the incident and traditional maritime activity. As a first step, we must define the relevant activity in this case. Our cases have made clear that the relevant "activity" is defined not by the particular circumstances of the incident, but by the general conduct from which the incident arose. In Executive Jet, for example, the relevant activity was not a plane sinking in Lake Erie, but air travel generally. 409 US, at 269-270, 34 L Ed 2d 454, 93 S Ct 493. See also Foremost, supra, at 675-677, 73 L Ed 2d 300, 102 S Ct 2654 (relevant activity is navigation of vessels generally). This

focus on the general character of the activity is, indeed, suggested by the nature of the jurisdictional inquiry. Were courts required to focus more particularly on the causes of the harm, they would have to decide to some extent the merits of the causation issue to answer the legally and analytically antecedent jurisdictional question. Thus, in this case, we need not ascertain the precise cause of the fire to determine what "activity" Sisson was engaged in; rather, the relevant activity was the storage and maintenance of a vessel at a marina on navigable waters.[3]

[1f, 7a, 8a] Our final inquiry, then, is whether the storage and maintenance of a boat at a marina on navigable waters has a substantial relationship to a "traditional maritime activity" within the meaning of Executive Jet and Foremost.[4] Respondents

---

[3] In this case, all of the instrumentalities involved in the incident were engaged in a similar activity. The Ultorian and the other craft damaged by the fire were docked at a marina, and the marina itself provided docking and related services. The facts of Executive Jet and Foremost also reveal that all the relevant entities were engaged in a common form of activity. See Executive Jet Aviation, Inc. v City of Cleveland, 409 US 249, 34 L Ed 2d 454, 93 S Ct 493 (1972) (entities involved in the incident were engaged in nonmaritime activity of facilitating air travel); Foremost Ins. Co. v Richardson, 457 US 668, 73 L Ed 2d 300, 102 S Ct 2654 (1982) (entities were both engaged in navigation). Different issues may be raised by a case in which one of the instrumentalities is engaged in a traditional maritime activity, but the other is not. Our resolution of such issues awaits a case that squarely raises them.

[4] **[7b]** The Circuits have interpreted this aspect of the jurisdictional inquiry variously. After Executive Jet, but before Foremost, the Fifth Circuit adopted a four-factor test for deciding whether an activity is substantially related to traditional maritime activity. The factors are "the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of injury; and traditional concepts of the role of admiralty law." Kelly v Smith, 485 F2d 520, 525 (1973). In other Circuits, this test has continued to dominate the landscape even in the wake of Foremost. See, e. g., Drake v Raymark Industries, Inc. 772 F2d 1007, 1015 (CA1 1985); Guidry v Durkin, 834 F2d 1465, 1471 (CA9 1987); Lewis Charters, Inc. v Huckins Yacht Corp. 871 F2d 1046, 1051 (CA11 1989). The Fourth Circuit appears to follow Kelly as well, although how closely is unclear. Compare Oman v Johns-Manville Corp., 764 F2d 224, 230, and n 3 (CA4 1985) (en banc) (stating that "a thorough analysis of the nexus requirement should include a consideration of *at least* [the Kelly factors]") (emphasis added), with Bubla v Bradshaw, 795 F2d 349, 351 (CA4 1986) (implicitly treating Kelly factors as exclusive). The precise state of the law in the Fifth Circuit after Foremost is also unclear. Compare Mollett v Penrod Drilling Co. 826 F2d 1419, 1426 (CA5 1987) (Mollett I) (applying, in addition to the Kelly factors, "(1) the impact of the event on maritime shipping and commerce (2) the desirability of a uniform national rule to apply to such matters and (3) the need for admiralty 'expertise' in the trial and decision of the case"), with Mollett v Penrod Drilling Co. 872 F2d 1221,

[497 US 366]

would have us hold that, at least in the context of noncommercial activity, only navigation can be characterized as substantially related to traditional maritime activity. We decline to do so. In Foremost, we identified navigation as an example, rather than as the sole instance, of conduct that is substantially related to traditional maritime activity. See 457 US, at 675, n 5, 73 L Ed 2d 300, 102 S Ct 2654. Indeed, had we intended to suggest

[497 US 367]

that navigation is the only activity that is sufficient to confer jurisdiction, we could have stated the jurisdictional test much more clearly and economically by stating that maritime jurisdiction over torts is limited to torts in which the vessels are in "navigation." Moreover, a narrow focus on navigation would not serve the federal policies that underlie our jurisdictional test. The fundamental interest giving rise to maritime jurisdiction is "the protection of maritime commerce," id., at 674, 73 L Ed 2d 300, 102 S Ct 2654, and we have said that that interest cannot be fully vindicated unless "*all* operators of vessels on navigable waters are subject to uniform rules of conduct," id., at 675, 73 L Ed 2d 300, 102 S Ct 2654. The need for uniform rules of maritime conduct and liability is not limited to navigation, but extends at least to any other activities traditionally undertaken by vessels, commercial or noncommercial.

[1g, 8b] Clearly, the storage and maintenance of a vessel at a marina on navigable waters is substantially related to "traditional maritime activity" given the broad perspective demanded by the second aspect of the test. Docking a vessel at a marina on a navigable waterway is a common, if not indispensable, maritime activity. At such a marina, vessels are stored for an extended period, docked to obtain fuel or supplies, and moved into and out of navigation. Indeed, most maritime voyages begin and end with the docking of the craft at a marina. We therefore conclude that, just as navigation, storing and maintaining a vessel at a marina on a navigable waterway is substantially related to traditional maritime activity.

[1h, 9] For the foregoing reasons, we conclude that the District Court has jurisdiction over Sisson's limitation claim pursuant to § 1333(1). Neither the District Court nor the

---

1224-1226 (CA5 1989) (Mollett II) (applying the Kelly factors without explicit mention of the extra factors identified in Mollett I).

Other Circuits have adopted different approaches. The Seventh Circuit in this case held that an activity must either be commercial or involve navigation to satisfy the "traditional maritime activity" standard. In re Complaint of Sisson, 867 F2d 341, 345 (1989). The Second Circuit directly applies our language requiring a substantial relationship to traditional maritime activity without applying any additional factors. See Keene Corp. v United States, 700 F2d 836, 844 (1983); Kelly v United States, 531 F2d 1144, 1147-1148 (1976). Finally, the Sixth Circuit has criticized the Seventh Circuit's analysis in this case as "an indefensibly narrow reading of Foremost Insurance," In re Young, 872 F2d 176, 178-179, n 4 (1989), but has not set forth in concrete terms the test it would apply, cf. Petersen v Chesapeake & Ohio R. Co. 784 F2d 732, 736 (1986).

The parties and various amici suggest that we resolve this dispute by adopting one of the Circuits' tests (or some other test entirely). We believe that, at least in cases in which all of the relevant entities are engaged in similar types of activity (cf. n 3, supra), the formula initially suggested by Executive Jet and more fully refined in Foremost and in this case provides appropriate and sufficient guidance to the federal courts. We therefore decline the invitation to use this case to refine further the test we have developed.

Court of Appeals have addressed the merits of Sisson's claim, and we therefore intimate no view on that matter. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

SEPARATE OPINION

Justice **Scalia,** with whom Justice **White** joins, concurring in the judgment.

I agree that the District Court has jurisdiction over this case under 28 USC §1333(1) [28 USCS §1333(1)],[1] but I do not agree with the test the Court applies to conclude that this is so. Prior to Foremost Ins. Co. v Richardson, 457 US 668, 73 L Ed 2d 300, 102 S Ct 2654 (1982), our clear case law extended admiralty jurisdiction to all torts involving vessels on navigable waters. Foremost recited as applicable to such torts the test of "significant relationship to traditional maritime activity," which had been devised 10 years earlier for torts *not* involving vessels, see Executive Jet Aviation, Inc. v City of Cleveland, 409 US 249, 268, 34 L Ed 2d 454, 93 S Ct 493 (1972). In my view that test does not add any new substantive requirement for vessel-related torts, but merely explains *why all* vessel-related torts (which ipso facto have such a "significant relationship"), but only *some* non-vessel-related torts, come within §1333(1). The Court's description of how one goes about determining whether a vessel-related tort meets the "significant relationship" test threatens to sow confusion in what had been, except at the margins, a settled area of the law.

In The Plymouth, 3 Wall 20, 36, 18 L Ed 125 (1866), we stated that "[e]very species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." Despite that passage, however, we held in Executive Jet Aviation, Inc. v City of Cleveland, supra, that a tort action involving the crash of a jet aircraft in Lake Erie was not a "civil case of admiralty or maritime jurisdiction" within the meaning of §1333(1), even assuming the accident could be regarded as having "occurred" on navigable waters. We acknowledged the traditional

rule as set forth in The Plymouth, but thought it significant that this "strict locality" test "was established and grew up in an era when it was difficult to conceive of a tortious occurrence on navigable waters other than in connection with a waterborne vessel." 409 US, at 254, 34 L Ed 2d 454, 93 S Ct 493. Whereas where vessels were involved the test tended properly to capture only those cases that had been the traditional business of the admiralty courts, in other contexts it had produced "perverse and casuistic borderline situations" in which "the invocation of admiralty jurisdiction seem[ed] almost absurd." Id., at 255, 34 L Ed 2d 454, 93 S Ct 493.

---

[1] Like the Court, because I conclude that the claims sought to be pursued against petitioner are maritime in nature, I do not reach the question whether, if jurisdiction did not exist on that basis, there would exist an independent basis for jurisdiction under the provisions of the Limited Liability Act, 46 USC App § 181 et seq. (1982 ed, Supp V) [46 USCS Appx §§ 181 et seq.].

> "If a swimmer at a public beach is injured by another swimmer or by a submerged object on the bottom, or if a piece of machinery sustains water damage from being dropped into a harbor by a land-based crane, a literal application of the locality test invokes not only the jurisdiction of the federal courts, but the full panoply of the substantive admiralty law as well. In cases such as these, some courts have adhered to a mechanical application of the strict locality rule and have sustained admiralty jurisdiction despite the lack of any connection between the wrong and traditional forms of maritime commerce and navigation." Id., at 255-256, 34 L Ed 2d 454, 93 S Ct 493.

We noted the general criticism of these cases, and pointed out the particular difficulties that had arisen from efforts to apply a "locality-alone" test to cases involving airplane crashes. Accordingly, we interpreted § 1333(1) to require, in the case of torts involving aircraft, not only that the Plymouth "locality" requirement be met, but also that "the wrong bear a significant relationship to traditional maritime activity," Executive Jet, 409 US, at 268, 34 L Ed 2d 454, 93 S Ct 493. We concluded that wrongs in connection with "flights by land-based aircraft between points within the continental United States," id., at 274, 34 L Ed 2d 454, 93 S Ct 493, did not meet this test.

Our decision in Executive Jet could be understood as resting on the quite simple ground that the tort did not involve a

[497 US 370]

vessel, which had traditionally been thought required by the leading scholars in the field (notwithstanding the contrary dictum in The Plymouth). See E. Benedict, American Admiralty: Its Jurisdiction and Practice 173 (1850); G. Robinson, Handbook of Admiralty Law in the United States 42, 56, 88 (1939); G. Gilmore & C. Black, Law of Admiralty 23-24 (2d ed 1975). At the very least, the opinion conveyed the strong implication that a case involving a tort occurring "in connection with a waterborne vessel," 409 US, at 254, 34 L Ed 2d 454, 93 S Ct 493, would be deemed within the admiralty jurisdiction without further inquiry.

In Foremost Ins. Co. v Richardson, supra, however, a case involving the collision of two pleasure boats on what we presumed to be navigable waters, we read Executive Jet for the broader proposition that a "significant relationship to traditional maritime activity" is required even for torts involving vessels. "Because the 'wrong' here," we said, "involves the negligent operation of a vessel on navigable waters, we believe that it has a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction in the District Court." 457 US, at 674, 73 L Ed 2d 300, 102 S Ct 2654. We then proceeded to consider and reject the petitioner's argument that outside the strictly commercial context "the need for uniform rules to govern conduct and liability disappears, and 'federalism' concerns dictate that these torts be litigated in the state courts." Ibid. To the contrary, we concluded, traditional admiralty concerns arise whenever the rules of navigation are implicated in a particular suit; a pleasure boat's failure to follow the "uniform rules of conduct" that govern navigation on navigable waters could have a "potential disruptive impact" on maritime commerce just as surely as could a similar transgression by a commercial vessel. Id., at 675, 73 L Ed 2d 300, 102 S Ct 2654.

This discussion in Foremost has caused many lower courts to read the opinion as not only requiring a "significant relationship to traditional maritime activity" in all cases, i. e., even when a vessel is involved, but as requiring more specifically

a particularized showing that the activity engaged in at the time of the alleged tort, if generally engaged in to some indeterminate extent, would have an actual effect on maritime commerce. See ante, at 365, n 3, 111 L Ed 2d, at 301 (collecting cases). In my view the reading that imputes the latter requirement is in error. We referred to "the potential disruptive impact of a collision" merely to rebut the petitioner's argument that jurisdiction in that particular case would not further the general purposes of admiralty jurisdiction, since navigation by pleasure craft could not affect maritime commerce. It was enough in that case to answer that it could. But that response cannot reasonably be converted into a holding that *in every case* such an answer must be available—that no single instance of admiralty tort jurisdiction can exist where there is no potentially disruptive impact upon maritime commerce. No jurisdictional rule susceptible of ready and general application (and therefore no practical jurisdictional rule) can be so precise as to pass such an "overbreadth" test. One can afford, and perhaps cannot avoid, such case by case analysis for the few cases lying at the margins—when, for example, a plane falls into a lake—but it is folly to apply it to the generality of cases involving vessels.[2] Today's opinion, by engaging in an extended discussion of the degree to which fire (the instrumentality by which the damage in this particular case was caused) might disrupt commercial maritime activity, ante, at 362-364, 111 L Ed 2d, at 299-300, reinforces this erroneous reading of Foremost.

What today's opinion achieves for admiralty torts is reminiscent of the state of the law with respect to admiralty contracts. The general test, of course, must be whether the

contract "touch[es] rights and duties appertaining to commerce and navigation," 3 J. Story, Commentaries on the Constitution of the United States 528 (1833). But instead of adopting, for contracts as we had (until today) for torts, a general rule that matters directly related to vessels were covered, we sought to draw the line more finely, case-by-case. That body of law has long been the object of criticism. The impossibility of drawing a principled line with respect to what, in addition to the fact that the contract relates to a vessel (which is by nature maritime) is needed in order to make the contract itself "maritime," has brought ridicule upon the enterprise. As one scholar noted in 1924, "[t]he rules as to building and repairing vessels"—the former having been deemed nonmaritime, see People's Ferry Co. of Boston v Beers, 20 How 393, 15 L Ed 961 (1857), and the latter maritime, see New Bedford Dry Dock Co. v Purdy, 258 US 96, 66 L Ed 482, 42 S Ct 243 (1922)—"and the results obtained therefrom, are so humorous that they deserve insertion in the laws of Gerolstein." Hough, Admiralty Jurisdiction—Of Late Years, 37 Harv L Rev 529, 534 (1924).[3] There is perhaps more justification for this approach with respect to contracts, since in that field the "vessel" test would not be further limited by the "locality" test, as it is for torts. And I am not suggesting an abandonment of our approach in that other field, which by now has developed some rules, however irrational they may be.[4] But there is no reason for expanding that approach to the tort field. I agree with, and apply to today's opinion, the commentary

---

[2] The Court describes this point as a "demand for tidy rules." Ante, at 364, n 2, 111 L Ed 2d, at 300. I think it is rather an aversion to chaos—of the sort represented by the conflicting lower court decisions that the Court painstakingly describes, ante, at 365-366, n 4, 111 L Ed 2d, at 301-302, but makes no effort to alleviate. The Court's statement that "the formula initially suggested by Executive Jet and more fully refined in Foremost and in this case provides appropriate and sufficient guidance," ante, at 366, n 4, 111 L Ed 2d, at 302, is neither an accurate description of the past nor a plausible prediction for the future.

on an earlier judicial effort to do so: "The decision . . . seems . . . unfortunate as increasing complication and uncertainty in the law without, apparently, securing any practical gain to compensate for these disadvantages." Note, Admiralty Jurisdiction Over Torts, 16 Harv L Rev 210, 211 (1903), discussing Campbell v H. Hackfield & Co., Ltd., (D. Haw., Oct 21, 1902), aff'd, 125 F 696 (CA9 1903).

The sensible rule to be drawn from our cases, including Executive Jet and Foremost, is that a tort occurring on a vessel conducting normal maritime activities in navigable waters—that is, as a practical matter, every tort occurring on a vessel in navigable waters—falls within the admiralty jurisdiction of the federal courts. Foremost is very clear that the Executive Jet requirement that the wrong bear a "significant relationship to traditional maritime activity" applies across the board. But it is not conclusive as to what is required to *establish* such a relationship in the case of torts aboard vessels. The "wrong" in Foremost not only occurred on a vessel *while it was engaged in* traditional maritime activity (navigating), but also consisted precisely of conducting that activity in a tortious fashion—and the discussion emphasized the latter reality. But the holding of the case did not establish (and could not, since the facts did not present the question) that the former alone would not suffice. In the case of a vessel it traditionally had sufficed, and Foremost gave no indication that it was revolutionizing admiralty jurisdiction. It is noteworthy, moreover, that a later case, Offshore Logistics, Inc. v Tallentire, 477 US 207, 91 L Ed 2d 174, 106 S Ct 2485 (1986), described the Executive Jet "relationship" requirement not with reference to the cause of the injury, but with reference to the activity that was being engaged in when the injury occurred: "[A]dmiralty jurisdiction is appropriately invoked here under traditional principles because the accident occurred on the high seas and in furtherance of an activity [transporting workers to a drilling platform at sea] bearing a significant relationship to a traditional maritime activity." 477 US, at 218-219, 91 L Ed 2d 174, 106 S Ct 2485. I would

---

[3] Those music lovers are better than I who immediately recognize Gérolstein as the fictitious European principality that is the setting of Offenbach's once-popular operetta, La Grande-Duchesse de Gérolstein.

[4] As Professor Black has put it, in the field of maritime contracts "[t]he attempt to project some 'principle' is best left alone. There is about as much 'principle' as there is in a list of irregular verbs. Fortunately, the contracts involved tend to fall into a not-too-great number of stereotypes, the proper placing of which can be learned, like irregular verbs, and errors in grammar thus avoided." Black, Admiralty Jurisdiction: Critique and Suggestions, 50 Colum L Rev 259, 264 (1950) (footnote omitted).

hold that a wrong which occurs (1) in navigable waters, (2) on a vessel, and (3) while that vessel is engaged in a traditional maritime activity, bears a significant relationship to a traditional maritime activity. A vessel engages in traditional maritime activity for these purposes when it navigates, as in Foremost, when it lies in dock, as in the present case, and when it does anything else (e. g., dropping anchor) that vessels normally do in navigable waters. It would be more straightforward to jettison the "traditional maritime activity" analysis entirely, and to return (for vessels) to the simple locality test—which in that context, as we observed in Executive Jet, "worked quite satisfactorily," 409 US, at 254, 34 L Ed 2d 454, 93 S Ct 493. But that would eliminate what Foremost evidently sought to achieve—the elegance of a general test applicable to *all* torts. That test will produce sensible results if interpreted in the manner I have suggested.

This approach might leave within admiralty jurisdiction a few unusual actions such as defamation for "a libel published and circulated exclusively on shipboard," Hough, supra, at 531,[5] but there seems to me little difference in principle between bringing such an issue to the federal courts and bringing a slip-and-fall case. In any event, exotic actions appear more frequently in the theoretical musings of the "thoroughbred admiralty men," ibid., than in the federal reports. The time expended on such rare freakish cases will be saved many

times over by a clear jurisdictional rule that makes it unnecessary to decide, in hundreds of other cases, what particular activities aboard a vessel are "traditionally maritime" in nature, and what effect a particular tort will have on maritime commerce. The latter tests produce the sort of vague boundary that is to be avoided in the area of subject-matter jurisdiction wherever possible.

> "The boundary between judicial power and nullity should . . . , if possible, be a bright line, so that very little thought is required to enable judges to keep inside it. If, on the contrary, that boundary is vague and obscure, raising 'questions of penumbra, of shadowy marches,' two bad consequences will ensue similar to those on the traffic artery. Sometimes judges will be misled into trying lengthy cases and laboriously reaching decisions which do not bind anybody. At other times, judges will be so fearful of exceeding the uncertain limits of their powers that they

---

[5] It should not be thought that this approach will bring within admiralty jurisdiction torts occurring in navigable waters aboard any craft designed to carry people or cargo and to float. For a discussion of what constitutes a "vessel," see generally G. Robinson, Handbook of Admiralty Law in the United States § 8, pp 42-50 (1939). The definition is not necessarily static. "The modern law of England and America rules out of the admiralty jurisdiction all vessels propelled by oars simply because they are the smallest class and beneath the dignity of the court of admiralty; but long within the historic period, and for at least seven hundred years, the triremes and quadriremes of the Greek and Roman navies were the largest and most powerful vessels afloat." The Robert W. Parsons, 191 US 17, 32-33, 48 L Ed 73, 24 S Ct 8 (1903).

will cautiously throw out disputes which they really have capacity to settle, and thus justice which badly needs to be done will be completely denied. Furthermore, an enormous amount of expensive legal ability will be used up on jurisdictional issues when it could be much better spent upon elucidating the merits of cases. In short, a trial judge ought to be able to tell easily and fast what belongs in his court and what has no business there." Z. Chafee, The Thomas M. Cooley Lectures, Some Problems of Equity 312 (1950) (quoting Hanover Star Milling Co. v Metcalf, 240 US 403, 426, 60 L Ed 713, 36 S Ct 357 (1916) (Holmes, J., concurring)).

For these reasons, I concur in the judgment.

[497 US 376]

GEORGIA, Plaintiff

v

SOUTH CAROLINA

497 US 376, 111 L Ed 2d 309, 110 S Ct 2903

[No. 74, Orig.]

Argued January 8, 1990. Decided June 25, 1990.

Decision: Disputes between Georgia and South Carolina over location of their boundary along Savannah River, at river's mouth, and their lateral seaward boundary, resolved in original action.

SUMMARY

In 1787, the states of Georgia and South Carolina signed the Treaty of Beaufort, which fixed the boundary between them as the "most northern branch or stream of the river Savannah" and reserved "all the islands in [the river] to Georgia." In Georgia v South Carolina (1922) 257 US 516, 66 L Ed 347, 42 S Ct 173, the United States Supreme Court interpreted the Treaty to mean that (1) where there is no island in the Savannah River, the boundary between Georgia and South Carolina is midway between the banks when the water is at ordinary stage, and (2) where an island is present, the boundary is midway between the island bank and the South Carolina shore, with the water at ordinary stage. In 1977, the state of Georgia presented to the Supreme Court a motion for leave to file a complaint against the state of South Carolina to resolve a prolonged dispute between the two states over the location of their boundary along the lower reaches of the Savannah River (downstream from the city of Savannah) and at the river's mouth, as well as the lateral seaward boundary. The motion was granted (434 US 917, 54 L Ed 2d 273, 98 S Ct 388), and a Special Master was appointed (434 US 1057, 55 L Ed 2d 758, 98 S Ct 1226). The Special Master made two reports containing several recommendations.

On exceptions to the reports of the Special Master, the Supreme Court sustained the exceptions in part, overruled the exceptions in part, adopted the recommendations of the Special Master as to which no exceptions had been taken and as to which exceptions had been advanced but overruled, and directed the parties to prepare a proposed decree in accordance with its

Briefs of Counsel, p 875, infra.

conclusions. In an opinion by Blackmun, J., expressing the unanimous view of the court with respect to holdings 1, 4, and 7 below, and joined by Brennan, White, Marshall, Stevens, O'Connor, and Scalia, JJ., with respect to holdings 2 and 3 below, by Rehnquist, Ch. J., and Brennan, Stevens, O'Connor, Scalia, and Kennedy, JJ., with respect to holding 5 below, by Rehnquist, Ch. J., and Brennan, White, Marshall, Stevens, and O'Connor, JJ., with respect to holding 6 below, and by Rehnquist, Ch. J., and Brennan, White, Marshall, O'Connor, and Kennedy, JJ., with respect to holding 8 below, it was held that (1) the Barnwell Islands are in South Carolina; (2) the islands which emerged in the Savannah River between Georgia and South Carolina after 1787 do not affect the boundary line established by the Treaty of Beaufort; (3) Oyster Bed Island is in South Carolina; (4) the southern side of the mouth of the Savannah River is Tybee Island, while the northern side of the mouth is an underwater shoal; (5) in drawing the boundary around islands in the Savannah River, when the midline of the river encounters an island and must move northward to qualify as the line midway between the island bank and the South Carolina shore, the boundary is to be marked by the use of a point which is "triequidistant" from the South Carolina shore, the island shore, and the Georgia shore, resulting in a boundary which passes through this point and otherwise is equidistant from the South Carolina shore and the Georgia shore, or island, as the case may be; (6) land formed, after narrowing of the Savannah River by the United States Corps of Engineers, in the areas of Denwill and Horseshoe Shoal on the South Carolina side of the Savannah River and connected to the South Carolina shore is to be awarded to Georgia; (7) South Carolina's initial exception to the Special Master's recommendation as to the position of the boundary line with respect to Bird Island would be overruled, inasmuch as South Carolina essentially agreed with the clarified recommendation contained in the Special Master's Second Report; and (8) the lateral seaward boundary continues down the mouth of the Savannah River until the boundary intersects a line, from Tybee Island's most northern point to Hilton Head Island's most southern point, where the boundary then proceeds out to sea perpendicularly to that line.

White, J., joined by Marshall, J., dissented in part, expressing the view that the proper method of drawing the boundary line around islands in the Savannah River is the "right angle" principle, under which the boundary at an island belonging to Georgia is the center line between the island shore and the South Carolina shore as long as some part of the island is opposite the shore, but when that is not the case, the boundary reverts at right angles to the center line between the Georgia and South Carolina shores.

Stevens, J., joined by Scalia, J., dissenting in part, expressed the view that the lateral seaward boundary should be drawn in reference to the full coastlines of the respective states, rather than with reference to the line connecting Hilton Head and Tybee Islands.

Scalia, J., joined by Kennedy, J., dissenting in part, expressed the view that the facts did not support the award to Georgia of the land formed in the areas of Denwill and Horseshoe Shoal.

Kennedy, J., joined by Rehnquist, Ch. J., dissenting in part, expressed the view that (1) the islands in the Savannah River that came into existence after the signing of the Treaty of Beaufort in 1787 belong to Georgia unless acquired by South Carolina by prescription; and (2) Oyster Bed Island lies within Georgia's territory.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

32A Am Jur 2d, Federal Practice and Procedure § 554; 72 Am Jur 2d, States, Territories, and Dependencies §§ 24-29, 32

8 Federal Procedure, L Ed, Courts and Judicial System § 20:217

2 Federal Procedural Forms, L Ed, Appeal, Certiorari, and Review §§ 3:721-3:742

US L Ed Digest, Boundaries §§ 4, 5, 8-12; Reference §§ 19, 26; Supreme Court of the United States §§ 64, 71

Index to Annotations, Boundaries; Masters; Original Jurisdiction; Rivers and Streams; States; Supreme Court of United States

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Original jurisdiction of United States Supreme Court in suits between states. 68 L Ed 2d 969.

The Supreme Court and the post-Erie federal common law. 31 L Ed 2d 1006.

Riparian owner's right to new land created by reliction or by accretion influenced by artificial condition not produced by such owner. 63 ALR3d 249.

Rights to land created at water's edge by filling or dredging. 91 ALR2d 857.

Apportionment and division of area of river as between riparian tracts fronting on same bank, in absence of agreement or specification. 65 ALR2d 143.

Applicability of rules of accretion and reliction so as to confer upon owner of island or bar in navigable stream title to additions. 54 ALR2d 643.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Boundaries §§ 4, 5, 10, 11, 12; Reference §§ 19, 26; Supreme Court of the United States §§ 64, 71 — original action between states — reports of Special Master — review — prescription and acquiescence — compact — islands — middle of river — withdrawal of exception — lateral seaward boundary

1a-1p. On exceptions to the reports of a Special Master appointed by the United States Supreme Court in an original action between Georgia and South Carolina as to the location of their boundary along the Savannah River, the mouth of the river, and their lateral seaward boundary, the Supreme Court will sustain the exceptions in part, overrule the exceptions in part, adopt the recommendations of the Special Master as to which no exceptions have been taken and as to which exceptions have been advanced but overruled, and direct the parties to prepare a proposed decree for submission to the Supreme Court in accordance with its conclusions, where the Supreme Court rules that (1) the Barnwell Islands are in South Carolina, having been acquired by that state by prescription and acquiescence; (2) the clause of the Treaty of Beaufort, signed by the two states in 1787, which fixes the boundary between them as the "most northern branch or stream of the river Savannah," and reserves "all the islands in [the river] to Georgia," refers to only islands in existence in 1787, and the islands which emerged after 1787 do not affect the boundary line established by the Treaty; (3) Oyster Bed Island is in South Carolina; (4) the southern side of the mouth of the Savannah River is Tybee Island, while the northern side of the mouth is an underwater shoal; (5) when the boundary between Georgia and South Carolina, which under the Treaty of Beaufort is the midline of the Savannah River where there is no island in the river, encounters an island and must under the Treaty move north so as to place the island in Georgia, the boundary is to be marked by the use of a point which is "triequidistant" from the South Carolina shore, the island shore, and the Georgia shore, resulting in a boundary which passes through this point and otherwise is equidistant from the South Carolina shore and the Georgia shore, or island, as the case may be; (6) land formed, as a result of the narrowing of the Savannah River by the United States Corps of Engineers, in the areas of Denwill and Horseshoe Shoal on the South Carolina side of the Savannah River and connected to the South Carolina shore is to be awarded to Georgia; (7) South Carolina's initial exception to the Special Master's recommendation as to the position of the boundary line with respect to Bird Island will be overruled, inasmuch as South Carolina essentially agreed with the clarified recommendation contained in the Special Master's Second Report; and (8) the lateral seaward boundary continues down the mouth of the Savannah River until the boundary intersects a line, from Tybee Island's most northern point to Hilton Head Island's most southern point, where the boundary then proceeds out to sea perpendicularly to that line. (White, Marshall, Stevens, Scalia, Kennedy, JJ., and Rehnquist, Ch. J., dissented in part from this holding.)

Reference § 26; Supreme Court of the United States § 71 — original action — abandonment of claims

2. In an original action between Georgia and South Carolina for the resolution of boundary disputes, where the United States Supreme Court has referred the case to a Special Master, and some of the claims pressed by Georgia before the Special Master are not presented to the Supreme Court on exceptions to the reports of the Special Master, the Supreme Court will treat those claims as abandoned.

Boundaries §§ 10, 11, 12 — islands — interstate compact — prescription and acquiescence

3a-3d. Although the Treaty of Beaufort, signed by Georgia and South Carolina in 1787, fixed the boundary between the two states as the "most northern branch or stream of the river Savannah" and reserved "all the islands in [the river] to Georgia," the Barnwell Islands, a group of islands in the Savannah River between Georgia and South Carolina, are in South Carolina, because (1) South Carolina has—by conduct including taxation, policing and prosecutorial activities, and patrolling by state wildlife officers—established sovereignty over the islands by prescription and acquiescence; and (2) the record contains substantial evidence of events, such as cultivation and the presence of dikes on the islands, that put Georgia on notice of South Carolina's exercise of sovereignty.

Boundaries § 16 — states — prescription and acquiescence

4a, 4b. In determining the boundary between two states, possession and dominion are essential elements of a state's claim of sovereignty by prescription and acquiescence; inaction alone may constitute acquiescence when it continues for a sufficiently long period.

Judgment §§ 109, 179, 209; Supreme Court of the United States § 64 — original action — boundary between states — prior resolution by Court of Appeals — stranger to action

5. In an original action between Georgia and South Carolina for the resolution of boundary disputes, on the issue whether certain islands situated between the two states in the Savannah River are in Georgia or South Carolina, the United States Supreme Court will not regard a prior decision of a United States Court of Appeals in a condemnation proceeding, in which the Court of Appeals declared one of the islands in question to be in Georgia, as fixing the boundary between the states, because (1) although some local South Carolina officials, and a person whose name appeared in the chain of title to the land in question, were served with process in the condemnation proceeding, South Carolina itself was never served and made no appearance; (2) the United States Supreme Court, not a Court of Appeals, is the place where an interstate boundary dispute usually is to be resolved; and (3) the incidental effects of the Court of Appeals case have not transformed the judgment into one that binds South Carolina, inasmuch as South Carolina has twice sought to have the boundary question with respect to the islands resolved by the Supreme Court.

Notice § 16 — open and notorious possession

6. Open and notorious possession is evidence of notice, not of the adverse holding only, but of title under which the possession is held.

Boundaries §§ 10, 12; Supreme Court of the United States § 67 — original action between states — prior decision — decree — islands — compact

7a, 7b. Although the Treaty of Beaufort, signed by Georgia and South Carolina in 1787, fixed the boundary between the two states as the "most northern branch or stream of the river Savannah" and reserved "all the islands in [the river] to Georgia," the clause reserving the islands refers to only islands in existence in 1787, and islands which emerged between the states after 1787 do not affect the boundary line established by the Treaty, because (1) the contention that under the Treaty each emerging island not only is newly reserved to Georgia, but also creates a new "northern branch or stream" by which the boundary between the states must be drawn, would create a regime of continually shifting jurisdiction; (2) a construction of the Treaty that avoids sudden changes in the boundary is more consistent with the goal of the Treaty to fix the boundary "forever hereafter," and also comports with (a) the principles of simplicity and finality that animated the Supreme Court's reading of the Treaty in a prior original action between the two states, and (b) the respect for settled expectations that generally attends the drawing of interstate boundaries; and (3) a statement of the Supreme Court in the decree entered in that prior case—which statement was to the effect that all islands "formed by nature" in the Chattooga River, like the islands in the Savannah and the Tugaloo, were reserved by the Treaty to Georgia—does not necessarily imply that the Treaty's reservation clause includes after-emerging islands, inasmuch as no issue of after-emerging islands was before the Supreme Court in the prior case, and the decree entered in that case simply described the river as it then was. (Kennedy, J., and Rehnquist, Ch. J., dissented from this holding.)

Boundaries §§ 5, 12; Reference § 23; Supreme Court of the United States § 64 — original action between states — conclusion of Special Master — review — middle of stream — compact

8a-8c. For the purposes of determining the middle of the Savannah River—established by the Treaty of Beaufort in 1787 as the boundary between Georgia and South Carolina where there are no islands in the river—the southern side of the mouth of the Savannah River is Tybee Island, and the northern side of the mouth is an underwater shoal, because (1) although the mouth of a river is usually marked and constituted by two opposing "headlands," Tybee Island, the most seaward point of land on the southern side of the Savannah River, has no counterpart of high land on the northern side; (2) the geographical feature taking the place of the customarily present opposing headland is, instead, a shoal, long recognized as confining the river; (3) given this somewhat uncommon type of river mouth, the conclusion of the Special Master—to whom the question was referred by the United States Supreme Court in an original action between the two states—that the northern side of the Savannah's mouth is the underwater shoal is not unreasonable; and (4) acceptance of Georgia's contention that the boundary between the states at the mouth of the river must be the geographic middle between Tybee Island and the closest points of land in South Carolina, almost 6 miles north of Tybee, would result in having Georgia waters lie directly seaward of South Carolina's coast and waters.

Boundaries § 29 — mouth of river

9. Under the "headland-to-headland" principle of defining boundaries, there are usually two opposing "headlands" marking and constituting the mouth of a river.

Boundaries §§ 5, 10, 12; Supreme Court of the United States § 64 — original action between states — midline of river — islands — compact

10a, 10b. When the boundary between Georgia and South Carolina—which under the Treaty of Beaufort, signed by the two states in 1787, is the midline of the Savannah River where there is no island in the river—encounters an island and must under the Treaty move north to a point midway between the island bank and the South Carolina shore so as to place the island in Georgia, the boundary will not be fixed by (1) drawing the midline of the river to touch the island shore, (2) moving it at a right angle until it reaches a point midway between the island bank and the South Carolina shore, (3) proceeding accordingly until the island is bypassed and the middle of the stream is to be met and followed, and (4) moving the boundary at a right angle to the midpoint of the river; rather, when an island is encountered, the boundary is to be marked by the use of a point which is "triequidistant" from the South Carolina shore, the island shore, and the Georgia shore, resulting in a boundary which passes through this point and otherwise is equidistant from the South Carolina shore and the Georgia shore, or island, as the case may be; this boundary is sensible, is less artificial than other lines, is fair to both states, and comports generally with what was said concerning the Treaty of Beaufort by the United States Supreme Court in a prior original action between the two states. (White and Marshall, JJ., dissented from this holding.)

Boundaries §§ 8, 9; Reference § 23; Supreme Court of the United States § 64 — original action between states — conclusion of Special Master — review — accretion and avulsion

11a-11c. Land added, as a result of the narrowing of the Savannah River north of Elba Island by the United States Corps of Engineers, to the areas of Denwill and Horseshoe Shoal on the South Carolina side of the Savannah River and connected to the South Carolina shore is to be awarded to Georgia, where the boundary between the two states was established by the Treaty of Beaufort in 1787 as the middle of the Savannah River where there are no islands in the river and as midway between the island bank and the South Carolina shore where there is an island, because (1) under general principles concerning the formation of riparian land, if a boundary stream leaves its old bed and forms a new one by the process known as avulsion, the result works no change of boundary; (2) although some of the changes in Denwill and

Horseshoe Shoal were caused gradually by the deposit of sediment by river waters, others were caused by the deposit of fill through dredging by the Corps; and (3) the rapidity of some aspects of the dredging and other processes supports the conclusion of the Special Master—to whom the matter was referred by the United States Supreme Court in an original action between the two states—that the changes in the river were primarily avulsive in nature. (Scalia and Kennedy, JJ., dissented from this holding.)

Boundaries §§ 8, 9 — states — erosion and accretion — avulsion

12. When the bed of a river is changed by the natural and gradual processes known as erosion and accretion, the boundary between two states defined by the river follows the varying course of the stream, but if the stream leaves its old bed and forms a new one by the process known as avulsion, the result works no change of boundary.

Boundaries § 29 — water — landfill

13. For the purposes of a boundary determination, one cannot extend one's own property into the water by landfilling or purposefully causing accretion.

Boundaries §§ 8, 9 — states — avulsion and accretion

14. For purposes of determining a state boundary, avulsive action ordinarily calls to mind something somewhat sudden or, at least, of short duration, whereas accretion has as its essence the gradual deposit of material over a period by action of water flow; this is so even though it may have been caused partly or wholly by placed obstructions.

Boundaries § 4; Courts § 775; Reference § 19; Supreme Court of the United States § 64 — original action between states — recommendation of Special Master — lateral seaward boundary — principle of prior decision

15a-15d. The United States Supreme Court, in an original action between Georgia and South Carolina, will adopt the recommendation of a Special Master that the lateral seaward boundary between Georgia and South Carolina continue down the mouth of the Savannah River until the boundary intersects a line, from Tybee Island's most northern point to Hilton Head Island's most southern point, where the boundary then proceeds out to sea perpendicularly to that line; although South Carolina argues that this line runs at an angle about 6 degrees north of the most favorable line Georgia could expect to receive, that is, a line running perpendicular to Georgia's coast, and Georgia contends that the geographic middle of the mouth of the Savannah River should be used as the starting point of the maritime boundary, the boundary recommended by the Special Master (1) gives equitable balance and recognition to the "equidistant principle" referred to in Texas v Louisiana (1976) 426 US 465, 48 L Ed 2d 775, 96 S Ct 2155, and to the inland boundary between the two states, and (2) does so with the least possible offense to any claimed parallel between offshore territory and the coast itself. (Stevens and Scalia, JJ., dissented from this holding.)

Reference § 19; Supreme Court of the United States § 71 — adoption of recommendation — issue not addressed

16a-16d. In an original action in

the United States Supreme Court between Georgia and South Carolina to determine, among other issues, the lateral seaward boundary between those states, the Supreme Court, in adopting a Special Master's recommendation that the lateral seaward boundary be along a line drawn at right angles to a baseline between two islands near the mouth of the Savannah River, will refrain from adopting any portion of the Special Master's discussion in which the Special Master may have assumed that the United States utilized "straight baselines" in constructing the coast near the mouth of the Savannah River, and will not decide the question of the propriety of that assumption where, although such baseline use would have been authorized by Article 4 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, (1) such use is provided by Article 4 as an option only; (2) the Supreme Court is not aware of any instance in which the Article 4 provision has been employed in the determination of the United States coastline; and (3) any such straight-baseline assumption is not necessary for a decision in the present litigation.

SYLLABUS BY REPORTER OF DECISIONS

This suit involves a dispute between Georgia and South Carolina over the location of their boundary along the Savannah River, downstream from the city of Savannah and at the river's mouth, and their lateral seaward boundary. In 1787, the parties agreed in the Treaty of Beaufort (hereinafter Treaty) that the boundary along the river was the river's "most northern branch or stream," "reserving all islands in [the river] to Georgia . . . ." In 1922, the Treaty was interpreted to mean, inter alia, that where there is no island in the river, the boundary is midway between the banks, and where there is an island, the boundary is midway between the island and the South Carolina shore. Georgia v South Carolina, 259 US 572, 66 L Ed 1069, 42 S Ct 597. The Special Master has submitted two reports, making several boundary recommendations. Both States have filed exceptions.

Held:

1. The Special Master's determination that the Barnwell Islands are in South Carolina is adopted. Georgia's exception is overruled. South Carolina has established sovereignty over the islands by prescription and acquiescence, as evidenced by its grant of the islands in 1813, and its taxation, policing, and patrolling of the property. Georgia cannot avoid this evidence's effect by contending that it had no reasonable notice of South Carolina's actions. Inaction alone may constitute acquiescence when it continues for a sufficiently long period, see Rhode Island v Massachusetts, 15 Pet 233, 274, 10 L Ed 721, and there has been more than inaction on Georgia's part. It was charged with knowing that the Treaty placed all of the Savannah River islands in Georgia, yet, despite the fact that cultivation was readily discernible, there is virtually no record of its taxation of, or other sovereign action over, these lands. A 1955 Court of Appeals decision in a condemnation proceeding by the Federal Government, which recognized Georgia's sovereignty over the islands, cannot be regarded as fixing the boundary between the States.

2. The Special Master's determina-

tion that the islands emerging in the river after the 1787 Treaty do not affect the boundary line between the States is adopted, and Georgia's exception is overruled. Georgia's suggestion that the boundary in the vicinity of each new island runs between that island and the South Carolina shore would create a regime of continually shifting jurisdiction, by creating a new "northern branch or stream" for even the smallest emerging island no matter how near the South Carolina shoreline, and would frustrate the purpose of the Treaty, which purports to fix the boundary "forever hereafter." Construing the Treaty to avoid sudden boundary changes would be more consistent with this language, and also comports with the simplicity and finality of the Court's 1922 reading of the Treaty and with the respect for settled expectations that generally attends the drawing of interstate boundaries, cf. Virginia v Tennessee, 148 US 503, 522-525, 37 L Ed 537, 13 S Ct 728.

3. The Special Master's conclusion that Oyster Bed Island is in South Carolina and that the southern side of the Savannah's mouth is Tybee Island while the northern side is an underwater shoal is adopted. Georgia's exception is overruled. Customarily a boundary would be drawn to an opposing headland. However, due to the uncommon type of river mouth here, Tybee Island has no counterpart of high land on the northern side. Rather, the geographical feature taking its place is the shoal, long recognized as confining the river. To accept Georgia's proposition that the northern side should be the closest South Carolina headlands—islands that are so distant that they cannot even be said to touch the river—would result in having Georgia's waters lie directly seaward of South Carolina's coast and waters.

4. In drawing the boundary line around islands on the South Carolina side of the river's thread, when the midline of the stream encounters an island and must move northward to become the line midway between the island bank and the South Carolina shore, the Special Master erred in invoking a right-angle principle—i.e., using the line midway between the island and the shore until the island ends and the boundary reverts to the middle of the river, and then using right-angle lines to connect the island-to-bank center line with the bank-to-bank center line by the shortest distance. Georgia's exception is sustained. Georgia's approach—to use a point "triequidistant" from the South Carolina shore, the island shore, and the Georgia shore, resulting in a boundary that would pass through this point and otherwise be equidistant from the South Carolina shore and the Georgia shore, or island—is sensible, less artificial, fair to both States, and generally in line with what the Court said in 1922.

5. The Special Master's determination that additions to Denwill Plantation and Horseshoe Shoal be awarded to Georgia is adopted, and South Carolina's exception is overruled. The rapidity of some aspects of dredging and other processes used by the Army Corps of Engineers to improve the river's navigation channel support the Master's recommendation that the changes in the Savannah River were caused primarily by avulsion rather than the natural and gradual process of erosion and accretion.

6. Since the Special Master's Sec-

ond Report clarified any confusion that may have existed with regard to how the recommended boundary line affects Bird Island, the boundary dispute as to this island has been eliminated and South Carolina's exception, initially made, is overruled.

7. The Special Master's determination of the lateral seaward boundary between the States is adopted. His line continues down the river's mouth until it intersects a line, from Tybee Island's most northern point to Hilton Head Island's most southern point, where it proceeds out to sea perpendicularly to that line. His recommendation gives equitable balance and recognition to the so-called equidistant principle, Texas v Louisiana, 426 US 465, 48 L Ed 2d 775, 96 S Ct 2155, and to the inland boundary between the States, and does so with the least possible offense to any claimed parallel between offshore territory and the coast itself. The States' respective exceptions are overruled.

Exceptions of South Carolina overruled; Exception of Georgia to Special Master's use of right-angle principle sustained; Other exceptions of Georgia overruled; Special Master's recommendations, as to which no exceptions have been taken or as to which exceptions have been advanced but overruled, are adopted.

Blackmun, J., delivered the opinion for a unanimous Court with respect to Parts I, II, III, and VIII, and the opinion of the Court with respect to Part IV, in which Brennan, White, Marshall, Stevens, O'Connor, and Scalia, JJ., joined; with respect to Part V, in which Brennan, White, Marshall, Stevens, O'Connor, and Scalia, JJ., joined, and in which Rehnquist, C. J., and Kennedy, J., joined except for a portion thereof; with respect to Part VI, in which Rehnquist, C. J., and Brennan, Stevens, O'Connor, Scalia, and Kennedy, JJ., joined; with respect to Part VII, in which Rehnquist, C. J., and Brennan, White, Marshall, Stevens, and O'Connor, JJ., joined; and with respect to Part IX, in which Rehnquist, C. J., and Brennan, White, Marshall, O'Connor, and Kennedy, JJ., joined. White, J., filed an opinion dissenting in part, in which Marshall, J., joined. Stevens, J., filed an opinion dissenting in part, in which Scalia, J., joined. Scalia, J., filed an opinion dissenting in part, in which Kennedy, J., joined. Kennedy, J., filed an opinion dissenting in part, in which Rehnquist, C. J., joined.

APPEARANCES OF COUNSEL

Patricia T. Barmeyer argued the cause for plaintiff.
Thomas E. McCutchen argued the cause for defendant.
Briefs of Counsel, p 875, infra.

OPINION OF THE COURT

Justice **Blackmun** delivered the opinion of the Court.†

[1a] This litigation was instituted in August 1977, pursuant to Art III,

---

† All Members of the Court join in Parts I, II, III, and VIII of the opinion. Part IV is joined by all except The **Chief Justice** and Justice **Kennedy.** Part V is joined by all, except that The **Chief Justice** and Justice **Kennedy** do not join a portion of that Part. Part VI is joined by all except Justice **White** and Justice **Marshall.** Part VII is joined by all except Justice **Scalia** and Justice **Kennedy.** Part IX is joined by all except Justice **Stevens** and Justice **Scalia.**

§ 2, cl 2, of the United States Constitution and 28 USC § 1251(a)(1) (1976 ed) [28 USCS § 1251(a)(1)], by the presentation to this Court of a motion by the State of Georgia for leave to file a complaint against the State of South Carolina. The suit was the culmination of a prolonged dispute between the two States over the location of their boundary along the lower reaches of the Savannah River (that is, downstream from the city of Savannah) and at the river's mouth. The two States also are in disagreement as to their lateral seaward boundary.

We granted leave to Georgia to file its complaint. 434 US 917, 54 L Ed 2d 273, 98 S Ct 388 (1977). The Honorable Walter E. Hoffman, Senior Judge of the United States District Court for the Eastern District of Virginia, was appointed Special Master with the authority customarily granted in litigation of this kind. 434 US 1057, 55 L Ed 2d 758, 98 S Ct 1226 (1978). South Carolina, in due course, filed its answer and counterclaims.

The Special Master submitted his First Report (1 Rep) to this Court eight years later on March 20, 1986. That report dealt with the issues other than the lateral seaward boundary. The Master and the parties moved that we defer action on the First Report until he had ruled on the seaward boundary. We complied with that request. The Special Master's Second and Final Report (2 Rep) was filed April 24, 1989. The Court fixed the time for the filing of exceptions. See 490 US 1033, 104 L Ed 2d 401, 109 S Ct 1928 (1989). Each State filed exceptions and each responded to the exceptions of the other. Briefs were submitted and oral argument followed.

I

Background

On June 9, 1732, nearly 260 years ago, King George II, describing himself as King of Great Britain, France, and Ireland, issued letters patent constituting the Charter of the Colony of Georgia. These letters described the boundary between that colony and the existing Colony of South Carolina as "the most northern part of a stream or river there, commonly called the Savannah." See F. Van Zandt, Boundaries of the United States and the Several States (Geological Survey Professional Paper 909) 100 (1976).

The precise location of segments of the boundary, however, proved to be a matter of continuing dispute between South Carolina and Georgia. Much of the controversy originally concerned navigation rights on the river. Shortly after the United States emerged as a Nation, commissioners appointed by each of the States met at Beaufort, SC, and produced a Convention known as the Treaty of Beaufort of April 28, 1787 (hereinafter Treaty). See Van Zandt, supra, at 99; see also Georgia v South Carolina, 257 US 516, 518, 66 L Ed 347, 42 S Ct 173 (1922). The Treaty stated that the boundary was the "most northern branch or stream of the river Savannah . . . , reserving all the islands in the said rive[r] Savannah . . . to

Georgia . . . ."[1] The Treaty was ratified in

---

[1] The first two Articles of the Treaty read:

"*Article the first.*

"The most northern branch or stream of the river Savannah from the sea or mouth of such stream to the fork or confluence of the rivers now called Tugoloo and Keowee, and from thence the most northern branch or stream of the said river Tugoloo till it inter-due course by the legislature of each State and by the Continental Congress. See 33 Journals of the Continental Congress 467 (1936).[2]

---

sects the northern boundary line of South Carolina if the said branch or stream of Tugoloo extends so far north, reserving all the islands in the said rivers Savannah and Tugoloo to Georgia; but if the head spring or source of any branch or stream of the said river Tugoloo does not extend to the north boundary line of South Carolina, then a west line to the Mississippi, to be drawn from the head spring or source of the said branch or stream of Tugoloo river which extends to the highest northern latitude—shall forever hereafter form the separation limit and boundary between the States of South Carolina and Georgia.

"*Article the second.*

"The navigation of the river Savannah at and from the bar, and mouth, along the north east side of Cockspur Island and up the direct course of the main northern channel, along the northern side of Hutchinson's Island, opposite the town of Savannah to the upper end of the said island, and from thence up the bed, or principal stream of the said river, to the confluence of the rivers Tugoloo and Keowee, and from the confluence up the channel of the most northern stream of Tugoloo river to its source and back again by the same channel to the Atlantic ocean: Is hereby declared to be henceforth equally free to the citizens of both States, and exempt from all duties, tolls, hindrance, interruption or molestation whatsoever, attempted to be enforced by one State on the citizens of the other, and all the rest of the river Savannah to the southward of the foregoing description is acknowledged to be the exclusive right of the State of Georgia." Reprinted in App A to Ga. Exceptions

It is to be noted that the Treaty did not state whether the boundary was the middle of the northern branch or stream of the Savannah River, or whether it was on the South Carolina bank, or whether the bed was held jointly.

2. The 1798 Constitution of Georgia reflected the same theme. It provided:

"The limits, boundaries, jurisdictions, and authority of the State of Georgia do, and did, and of right ought to, extend from the sea or mouth of the river Savannah, along the northern branch or stream thereof, to the fork or confluence of the rivers now called Tugalo and Keowee, . . . reserving all the islands in said rivers Savannah and Tugalo to Georgia . . . ." Art I, § 23. See HR Doc No. 357, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws, 59th Cong, 2d Sess, vol 2, p 794 (1909).

Georgia's present Constitution of 1983, as amended, contains no provision relating to the State's boundaries. Georgia statutes, however, provide:

"The boundaries of Georgia, as deduced from the Constitution of Georgia, the Convention of Beaufort, the Articles of Cession and Agreement with the United States of America entered into on April 24, 1802, the Resolution of the General Assembly dated December 8, 1826, and the adjudications and compromises affecting Alabama and Florida, are as follows:

"From the sea, or the mouth of the River Savannah, along the stream thereof to the fork or confluence made by the Rivers Keowee and Tugalo, and thence along said River Tugalo until the fork or confluence made by said Tugalo and the River Chattooga, and up and along the same to the point where it touches the northern boundary line of South Carolina, and the southern boundary line of North Carolina, which is at a point on the thirty-fifth parallel of north latitude, reserving all the islands in said Rivers Savannah, Tugalo, and Chattooga, to Georgia . . . ." Ga Code Ann § 50-2-1 (1986).

"The boundary between Georgia and South Carolina shall be the line described as running from the mouth of the River Savannah, up said river and the Rivers Tugalo and Chattooga, to the point where the last-named river intersects with the thirty-fifth parallel of north latitude, conforming as much as possible to the line agreed on by the commissioners of said states at Beaufort on April 28, 1787." § 50-2-2.

Similarly, South Carolina's present Constitution of 1895, as amended, has no provision as to that State's boundaries. The State has a statute which reads:

"From the State of Georgia, this State is divided by the Savannah River, from its entrance into the ocean to the confluence of the Toogaloo and Seneca Rivers; thence up the Toogaloo River to the confluence of the Tallulah and the Chattooga Rivers; thence up the Chattooga River to the 35th parallel of north latitude, which is the boundary of North Carolina, the line being midway between the banks of said respective rivers when the water is at ordinary stage. And when the rivers

Past Litigation

The very existence of the present suit, of course, demonstrates that the Treaty of Beaufort did not resolve all river-boundary questions between South Carolina and Georgia. Indeed, this is not the first, but the third, occasion that some issue concerning that boundary has come before this Court.

The first case is South Carolina v Georgia, 93 US 4, 23 L Ed 782 (1876). South Carolina filed a bill in equity for an injunction restraining Georgia and certain federal officials from "obstructing or interrupting" navigation on the Savannah River. This Court dismissed the bill. It ruled that the 1787 Treaty had no effect upon the power of Congress to regulate commerce among the several States. Congress' power over the river was the same as it possessed over other navigable waters. Thus, Congress could close one of the several channels in the river if, in its judgment, navigation thereby would be improved.

The second case is Georgia v South Carolina, 257 US 516, 66 L Ed 347, 42 S Ct 173, decided in 1922. There, the Treaty of Beaufort was central to the controversy. The Court held, among other things, that (1) where there is no island in the Savannah River, the boundary is midway between the banks when the water is at ordinary stage, (2) where an island is present, the boundary is midway between the island bank and the South Carolina shore, with the water at ordinary stage, (3) where a navigable or nonnavigable river is the boundary between the two States, and the navigable channel is not involved, then, in the absence of contrary agreement, each State takes to the middle of the stream, and (4) the location of the boundary under the Treaty was unaffected by the thalweg doctrine because of the Treaty's provision that each State shall have equal rights of navigation. The ensuing decree is set forth at 259 US 572, 66 L Ed 1069, 42 S Ct 597 (1922).[3]

It is to be noted that this Court did not discuss the problem of emerging islands, that navigability was not itself a factor in determining the boundary, and that no map or chart illuminated the Court's reported opinion.

Neither of these cases bears directly upon the specific issues presently before us. The 1876 case, however, illustrates the type of boundary problem the Savannah River is capable of producing, and the 1922 case reveals generally this Court's approach to the Treaty of Beaufort.

The decision in United States v 450 Acres of Land, More or Less in Chatham County, 220 F2d 353 (CA5), cert denied, 350 US 826, 100 L Ed 737, 76 S Ct 54 (1955), must be

---

are broken by islands of natural formation which, under the treaty of Beaufort, are reserved to the state of Georgia, the line is midway between the island banks and the South Carolina banks when the water is at ordinary stage." SC Code § 1-1-10 (1986).

[3] The relevant provisions of the 1922 decree read:

"1st. Where there are no islands in the boundary rivers the location of the line between the two States is on the water midway between the main banks of the river when water is at ordinary stage;

"2nd. Where there are islands, the line is midway between the island bank and the South Carolina shore when the water is at ordinary stage;

"3rd. That all islands formed by nature in the Chattooga river are reserved to Georgia as completely as are those in the Savannah and Tugaloo rivers."

mentioned. This was a condemnation proceeding instituted by the Federal Government in the United States District Court for the Southern District of Georgia to acquire an easement to enter upon "Barnwell Island," one of the islands of a group discussed in Part III hereof, for the deposit of spoil excavated from Savannah Harbor. The complaint was served upon E. B. Pinckney, who claimed ownership of the island, and upon certain Beaufort County, S.C., officials. Only Pinckney made an appearance. He moved to dismiss the complaint for lack of jurisdiction on the ground that the land was in South Carolina. The motion was granted, and the Government's complaint was dismissed. Georgia then was allowed to intervene. The Court of Appeals for the Fifth Circuit reversed. It observed:

> "The boundary line between Georgia and South Carolina is not in dispute as between these sovereigns. . . .
>
> "There is, there can be, no doubt that the land here involved is in the State of Georgia. Article I of the Beaufort Convention specifically reserved to Georgia all the islands in the Savannah River and the Supreme Court by its decision and decree in State of Georgia v South Carolina, 257 US 516 [66 L Ed 347, 42 S Ct 173] . . . confirmed that reservation." 220 F2d, at 356.

Although South Carolina did not participate in that case, it sought leave to file an original-jurisdiction complaint in this Court to confirm its claimed sovereignty over the Barnwell Islands. Leave to file was denied. South Carolina v Georgia, 350 US 812, 100 L Ed 728, 76 S Ct 43 (1955). This took place while Pinckney's petition for certiorari, noted above, in the Fifth Circuit case was pending in this Court. Later, another application by South Carolina for leave to file also was denied. South Carolina v Georgia, 352 US 1030, 1 L Ed 2d 598, 77 S Ct 593 (1957).

II

The Special Master's Reports and the Exceptions

The Special Master's two reports concern, as he listed them, (1) a small unnamed island upstream, or west, or Pennyworth Island, (2) an unnamed island east of Pennyworth, referred to as "Tidegate," (3) the Barnwell Islands, that is, Rabbit Island, Hog Island, Long Island, and Barnwell No. 3, (4) Southeastern Denwill, (5) Jones Island, (6) Horseshoe Shoal and Oyster Bed Island, (7) the mouth of the river, and (8) the lateral seaward boundary.

The Special Master himself, "[f]or the convenience of the Court and counsel," described the "major legal issues" covered by his First Report in this way:

> "1. Did the Treaty of 1787, in reserving all islands in the Savannah River to Georgia, intend to include not only the then existing islands, but also all islands thereafter emerging by natural processes on the South Carolina side of the river? If the answer is in the affirmative, how can the 1922 decision of this Court be reconciled?
>
> "2. Is the Special Master correct in determining that the right-angle principle should be invoked by the demarcator in drawing the boundary line around islands on the South Carolina side of the

'thread' of the Savannah River, because of the 'special circumstances' existing by reason of the preclusive effect of the 1922 Supreme Court decision as it interpreted the Treaty of 1787?

"3. Has the Special Master correctly ruled that Rabbit Island accreted to the State of South Carolina, and whether the 'Island Rule' is applicable?

"4. Has the Special Master correctly decided that Hog Island and Long Island have been acquired by the State of South Carolina under the doctrine of prescription and acquiescence? The Special Master notes that, even though Hog Island (in existence in 1787) was acquired by South Carolina under the doctrine of prescription and acquiescence, there remained at that time a creek separating Hog Island from the mainland and it was not until the spoilage had been dumped by avulsive processes that Hog Island became a part of the South Carolina mainland.

"5. Has the Special Master correctly ruled that the area known as Southeastern Denwill, if it presently encroaches on the southern side of the mid-point of the Savannah River as it existed in 1787, now belongs to Georgia?

"6. Has the Special Master correctly ruled that Jones Island, at all pertinent times, was in the State of South Carolina?

"7. Did the Special Master err in diverting from the doctrine of medium filum acquae as established by the 1922 decision of this Court, in proceeding eastwardly **[497 US 387]** after leaving the southern tip of Turtle Island?" 1 Rep 112-113.

[2] Georgia's exceptions to both reports are directed to the Special Master's recommendations concerning (a) the Barnwell Islands (other than Rabbit Island, as to which Georgia does not now except), (b) Oyster Bed Island and the mouth of the Savannah River, (c) the "use of a right-angle line to connect the boundary in stream around an island in the Savannah River with the boundary in the mainstream of the river," see Ga Exceptions ii, (d) the Master's ruling that islands of natural formation emerging after the Treaty of Beaufort are not in Georgia if they emerged "on the South Carolina side of the river," ibid., and (e) the Master's use of the navigation channel, rather than the geographic middle of the "mouth" of the Savannah River, as the starting point for his delineation of the lateral seaward boundary. Georgia's exceptions, so far as the First Report is concerned, thus are directed only to the first, second, fourth, and seventh of the issues listed by the Master. Some of the claims Georgia pressed before the Master, e. g., the one relating to Jones Island, are not presented for review here; we treat those claims as now abandoned.

South Carolina takes exception to the Master's recommendations concerning (a) the lateral seaward boundary, (b) "two narrow strips of land well downstream from the City of Savannah," (c) the "downstream area known as Horseshoe Shoal," and (d) "the line which resulted from the placement of Horseshoe Shoal in Georgia." See SC Exceptions 2. So far as the First Report is concerned, these exceptions thus are directed only to the first, fifth, and seventh of the issues listed by the Master.

Before we consider these several exceptions specifically, we note that Georgia's reaction to the First Report is straightforward. It asserts that under the 1787 Treaty *all* islands in the Savannah River are in Georgia; that, despite this treaty provision, the Master would place certain islands

in South Carolina; and that his First Report "reflects his fundamental dissatisfaction with the boundary line as established by the framers of the Treaty of Beaufort and as construed by this Court in 1922." Ga Exceptions 7. This has led the Master "to diverge, at virtually every opportunity, from the boundary which has been established since 1787, in order to place his recommended boundary in or near the mainstream or the navigation channel of the river." Id., at 8. South Carolina, of course, disavows this characterization of the Special Master's decision.

We turn to the exceptions in an order we select.

III

The Barnwell Islands

[3a] These islands were four in number and were named by the Barnwell family, in downstream order, Rabbit Island, Hog Island (referred to as "Barnwell Island" on some older United States Coast Survey maps), Long Island (referred to as Barnwell Island No. 2 on some maps), and Barnwell Island No. 3 (actually the fourth island and not present when the family named the others). As has been noted, Georgia takes no exception to the Special Master's recommendation that Rabbit Island, although in the Savannah River in 1787, now be adjudged to be in South Carolina. This leaves us with Hog Island, Long Island, and Barnwell Island No. 3.

Georgia states that the Barnwell Islands remained as islands in the Savannah River and discernible as such well into the 20th century, when, because of the activity of the United States Army Corps of Engineers, they became affixed to the South Carolina shore. Ga Exceptions 13. South Carolina opines that the Barnwell Islands area is the most valuable land in the present dispute. It consists of at least 450 acres of high ground only a short distance downstream from the city of Savannah. It is "clearly capable of future economic development." Response for South Carolina 1-2.

[4a] Georgia's argument is essentially this: Long acquiescence in the practical location of an interstate boundary, and possession in accordance therewith, often has been used as an aid in resolving boundary disputes. See, e.g., Rhode Island v Massachusetts, 4 How 591, 638-639, 11 L Ed 1116 (1846); Louisiana v Mississippi, 202 US 1, 53, 50 L Ed 913, 26 S Ct 408 (1906). Possession and dominion are essential elements of a claim of sovereignty by prescription and acquiescence. Virginia v Tennessee, 148 US 503, 524, 37 L Ed 537, 13 S Ct 728 (1893). The duration of any purported dominion by South Carolina was judicially terminated by the above-cited Fifth Circuit decision in 1955. In line with that decision, and at all times since, Georgia has exercised dominion, sovereignty, and ownership of the Barnwell Islands. The Corps of Engineers has possessed and occupied Barnwell pursuant to a deed granted by Georgia for a spoilage easement. The doctrine of prescription and acquiescence may not be used aggressively to acquire territory; it may be used only to confirm the current status. In any event, proof adduced by South Carolina falls short of what is required to change the boundary solemnly accepted by the two States in 1787.

Georgia further maintains that the State asserting the claim must make a showing of acquiescence by the neighboring State. New Jersey v Delaware, 291 US 361, 376, 377, 78 L Ed 847, 54 S Ct 407 (1934). Inaction, in and of itself, is of no great importance; what is legally significant is silence in the face of circumstances that warrant a response. Here, it is said, there is little evidence either of prescription by South Carolina or of actual or constructive notice to Georgia sufficient to imply acquiescence by Georgia. Except for the activity by the Corps of Engineers, the islands received scant attention from anyone except members of the Barnwell family. And, apart from some rice planting, there is little evidence of activity on the islands other than illegal whiskey production and the raising

[497 US 390]

of hogs fed with the mash. The fact that moonshining could be carried on successfully shows how little attention was paid to the islands by Georgia authorities and the public generally. Except for the placement of a battery on the islands by Confederate forces during the War Between the States, there never was any resident on the islands and no schools, roads, or other public improvements.

Georgia acknowledges two grants by South Carolina, one in 1795 and the other in 1813. The grants and accompanying plats, however, identify the property only as "islands." These, says Georgia, were invalid because the 1787 Treaty reserved all islands in the river to Georgia. Thus, South Carolina cannot build its case on those grants. To be sure, there were 1868 deeds describing the property as in South Carolina, but these were intrafamily conveyances by the Barnwells and, in any event, provided no notice to anyone until they were recorded in 1930. There also were a marriage settlement in 1832 and a mortgage in 1871 but these, too, were intrafamily transactions. Anyway, their descriptions were insufficient to constitute notice of claim by South Carolina. The same is true of a deed in 1896 whereby the Barnwell brothers conveyed their interests in the islands and other family property to their sisters. A sheriff's deed in 1940 was insufficient to convey title, because of inadequate description of the property, and did not constitute notice to Georgia of any South Carolina claim of jurisdiction. The same is true of a 1942 deed from the Forfeited Land Commission of South Carolina to E. B. Pinckney.

There were taxes paid to Beaufort County, S. C., by the Barnwell family and later by Pinckney, but the tax records contain no information identifying the property, and even after 1930 there was no correlation between the acreage reported for taxes and the acreage conveyed by the deeds. The claim of South Carolina prescription and Georgia acquiescence

[497 US 391]

is contradicted "by considerable evidence" that Georgia and United States officials understood the islands to be in Georgia. Ga Exceptions 34. There was a Georgia grant in 1760. In 1825, 1830, and 1831, taxes were paid to Chatham County, Ga. Many maps show the Barnwell Islands (other than Rabbit) to be on the Georgia side of the boundary line between the two States.

Thus, the short duration of actual possession, the limited South Carolina official Acts, and the paucity of published or recorded documents referring to the islands as in South Carolina fall far short, Georgia claims, of establishing the open and continuous possession required to confirm a boundary by prescription. This is especially so since the islands remained as islands in the river until well into the 20th century, and since South Carolina continued to recognize officially the Treaty of Beaufort with its provision that all islands in the river are in Georgia. This is not a situation where Georgia can be held to have acquiesced.

South Carolina, in its turn, first takes the position that the 1955 Fifth Circuit case has no effect whatsoever, directly or indirectly, on the present litigation. South Carolina was not a party in that case, and the case did not fix the boundary between the States. It further argues that Georgia asserted no act of dominion or control over the Barnwell Islands from 1787 until the 1950's, and acquiesced in South Carolina's jurisdiction through long inaction in the face of the latter's continuing and obvious exercise of dominion since 1795.

[1b, 3b, 5] With all this before us, and recognizing that each side advances some facts favorable to its position, we decide this issue in favor of South Carolina. We agree that the 1955 case in the Fifth Circuit cannot be regarded as fixing the boundary between the States. Although some South Carolinians were served with process, they were local officials and a person whose name appeared in the chain of title. South

Carolina itself was never served and made no appearance. See Martin v Wilks, 490 US 755, 761-762, 104 L Ed 2d 835, 109 S Ct 2180 (1989). In any event, this Court, not a Court of Appeals, is the place where an interstate boundary dispute usually is to be resolved. See Durfee v Duke, 375 US 106, 115-116, 11 L Ed 2d 186, 84 S Ct 242 (1963). The judgment in the 1955 case, therefore, does not control the issue of South Carolina's sovereignty. Nor do the incidental effects of that case transform the judgment into one that binds South Carolina. This conclusion needs no additional fortification, but, if it did, we would note that South Carolina twice, in 1955 and again in 1957, asked this Court to have the Barnwell area boundary question resolved. Georgia opposed those applications, and leave to file was denied each time by this Court. South Carolina attempted to get the issue here, but until the present litigation was instituted and allowed to proceed, this aspect of the boundary issue was not before this Court.[4]

[3c] We need not here repeat in detail the extensive record evidence and the tax and conveyancing documents relied upon by the Special Master in reaching his conclusion. It suffices to say that the entire area in the late 18th and early 19th centuries was low marshy ground. The islands were separated from Georgia by the wide and deep waters of the Savannah River, but were separated from South Carolina only by streams so shallow that they were described as "sometimes dry." Record, SC Exh B-8. See Handly's Lessee v Anthony, 5 Wheat 374, 381, 5 L Ed 113 (1820). The South Carolina grant in 1813, the almost-uniform taxation of the property, the South Carolina seizure and subsequent sale for unpaid taxes, policing and prosecutorial activities by South Carolina authorities,

---

[4] It also seems to us, for what it may be worth, that there is no qualitative difference in the type of proof offered by South Carolina for Rabbit Island and the rest of the Barnwell cluster. The islands were granted together, often conveyed together, and taxed in the same manner. Rabbit and Hog were both diked and cultivated for rice. Yet Georgia has not pursued its claim to Rabbit Island.

patrolling by South Carolina wildlife officers, and other factors, all support the Special Master's conclusion that, in any event, South Carolina established sovereignty by prescription and acquiescence.

[3d, 4b, 6] Georgia seeks to avoid the effect of this evidence on the ground that it had no reasonable notice of South Carolina's actions and therefore cannot be said to have acquiesced in them. But inaction alone may constitute acquiescence when it continues for a sufficiently long period. See Rhode Island v Massachusetts, 15 Pet 233, 274, 10 L Ed 721 (1841); Vermont v New Hampshire, 289 US 593, 616, 77 L Ed 1392, 53 S Ct 708 (1933). And there is more than mere inaction on the part of Georgia. The record contains substantial evidence of events that put Georgia on notice of South Carolina's exercise of sovereignty. Parts of the islands were cultivated, as the Master found, for more than 30 years prior to 1880. This was readily discernible, for rice cultivation requires dikes, and the presence of dikes on the islands appeared on maps of the area as early as 1855. Ga Exh 156, App B to 1 Rep. Georgia was chargeable with knowledge that the Treaty of Beaufort placed all the Savannah River islands in Georgia. Yet Georgia authorities could have discovered there was no record of taxation or other sovereign action over these lands by Georgia except, possibly, for three isolated instances in the early part of the 19th century. Some documents recorded in Georgia, because they also involved Georgia property, describe the islands as in South Carolina. There is evidence, too, that Savannah residents were aware of cultivation on the islands. "It is conclusively settled in England, that open and notorious adverse possession is evidence of notice; not of the adverse holding only, but of the title under which the possession is held . . . . And in the United States we deem it to be equally settled." Landes v Brant, 10 How 348, 375, 13 L Ed 449 (1851).

[1c] South Carolina must prevail as to the Barnwell Islands issue, and we overrule Georgia's exception with respect thereto.

IV

Islands Emerging After the Treaty of Beaufort

[7a] The unnamed island west of Pennyworth, the island east of Pennyworth called "Tidegate," and Oyster Bed Island all emerged after the Treaty of Beaufort was signed in 1787.[5] Georgia claims these islands and argues that, by the terms of the Treaty, the boundary in the vicinity of each island runs between that island and the South Carolina shore. The first Article of the Treaty, see n 1, supra, provides:

---

[5] Some of the Barnwell Islands also may have emerged after the Treaty, but our conclusion that they belong to South Carolina by prescription, see Part III, supra, makes the time of their emergence immaterial.

> "The most northern branch or stream of the river Savannah from the sea or mouth of such stream to the fork or confluence of the rivers now called Tugoloo and Keowee, . . . reserving all the islands in the said rivers Savannah and Tugoloo to Georgia . . . shall forever hereafter form the separation limit and boundary between the States of South Carolina and Georgia."

This Court considered this provision in 1922 in Georgia v South Carolina, 257 US 516, 66 L Ed 347, 42 S Ct 173. Both States agreed that the presence of an island on the South Carolina side of the river altered the boundary so as to bring the island within the jurisdiction of Georgia. In its decision on the merits, the Court resolved two contested issues relevant here.

First it held, ruling in Georgia's favor, that "where, in any of the boundary rivers here involved, there are no islands the location of the boundary line between the two States is the thread of the river—the middle line of the stream—regardless of the channel of navigation . . . ." Id., at 521, 66 L Ed 347, 42 S Ct 173. It rejected South Carolina's alternative position, which would have placed the boundary at the low water mark on the Georgia side of the river: "The express reservation of the islands to Georgia and the placing of the boundary line in the most northerly branch of the Savannah and then of the Tugaloo

river up to the 'northern boundary of South Carolina,' makes it clear that where there are islands in the river the line must be between them and the South Carolina shore, for otherwise the Georgia islands would be within the State of South Carolina." Id., at 520-521, 66 L Ed 347, 42 S Ct 173. Because the "northern branch or stream" clause by definition would bring the boundary north of the low water mark on the Georgia side, the Court thought it unlikely that the parties intended the low water mark to be the benchmark where no islands were present. The more logical reading of the Treaty was that each State would take to "the middle of the stream." Id., at 521, 66 L Ed 347, 42 S Ct 173.

Second, the Court held that, where there was an island in the river, the boundary would be midway between the island and the South Carolina shore. This conclusion followed from the determination that the "northern branch or stream" of the river, where an island was present in the northern half of the river, would be the "branch or stream" that ran between the island and the northern shore, and from the Court's first holding that the midpoint of the relevant body of water was the appropriate place to draw the boundary.

Two principles established by the 1922 decision are pertinent here. First, although it is by no means self-evident on the face of the Treaty that the "northern branch or stream" refers to the "stream" that each island—however small and however close to the northern shore—creates between itself and the shore to the north of it, that was the construction of the Treaty agreed upon by the parties in 1922 and adopted by this Court. Apparently it was thought that a contrary rule, whereby the "northern branch or stream" referred only to a "branch or stream" that made a major departure from the main body of the river, would create an unmanageable boundary, because then the Treaty's additional reservation of the islands to Georgia would create pockets of Georgia territory within South Carolina wherever islands existed on the South Carolina side of the "northern branch or stream" defined in this larger sense. Second, under the principle that

each island in the river created a new "northern branch or stream," each island was not only reserved to Georgia under the reservation clause of Article I, but also formed a point of reference, by which the boundary would be drawn.

The Court, in its 1922 decision, did not expressly determine the treatment to be given islands that emerged after the Treaty of Beaufort was signed, so that decision is not controlling on this issue. The Special Master found, and South Carolina agrees, that the better reading of the Treaty in light of the 1922 decision is that the clause "reserving all islands . . . to Georgia" refers only to islands in existence in 1787 and that the "most northern branch or stream," as applied to a "branch or stream" going to the north of an island, similarly refers only to islands in existence when the Treaty was signed. The Treaty's establishment of the boundary "forever hereafter" would thus be unaffected by after-emerging islands. Georgia argues that the provision of Article I "reserving all islands . . . to Georgia" includes such after-emerging islands and that, accordingly, the reference in the Treaty to the "most northern branch or stream of the river Savannah" means the stream flowing to the north of any island currently in the river. We think South Carolina and the Special Master have the better argument.

Georgia's solution, whereby each emerging island not only is newly "reserv[ed] . . . to Georgia" but also creates a new "northern branch or stream" by which the boundary between the States must be drawn, would create a regime of continually shifting jurisdiction. Even the smallest emerging island, no matter how near the South Carolina shore, would cause the entire boundary between the States to shift northward, depriving South Carolina not only of the land that constitutes the island but also any river bed between the island and the center line that previously formed the boundary. We doubt that the parties, in drafting the Treaty, meant to create a boundary that shifted so radically each time a new island emerged in the river. To the contrary, Article I of the

Treaty purports to fix the boundary "forever hereafter," a goal that would be frustrated were the boundary to jump northward each time a new island appeared on the South Carolina side of the river. A construction of the Treaty that avoids sudden changes in the boundary would be more consistent with this language, and also comports with the principles of simplicity and finality that animated the Court's reading of the Treaty in 1922, and with the respect for settled expectations that generally attends the drawing of interstate boundaries. Cf. Virginia v Tennessee, 148 US 503, 522-525, 37 L Ed 537, 13 S Ct 728 (1893).

We recognize, of course, that the normal rules relating to accretion and erosion may cause the boundary line between the States to shift over time, so that the line will not necessarily be fixed as of any particular point. But it is one thing to say that the parties meant that gradual shifts in the path of the river would shift the boundary gradually, to the extent of the accretion; this rule is consistent with settled expectations and with the parties' interest in maintaining their riparian rights. See Nebraska v Iowa, 143 US 359, 36 L Ed 186, 12 S Ct 396 (1892). It is quite another thing to infer that the parties meant that each new island, however formed, would alter the boundary line to a degree that could be dramatically out of proportion to the physical change brought about by the formation of the island itself.

Finally, Georgia points to the statement in the 1922 decree that all islands "formed by nature" in the Chattooga River, like the islands in the Savannah and the Tugaloo, were reserved by the Treaty to Georgia. Georgia v South Carolina, 259 US, at 572, 66 L Ed 1069, 42 S Ct 597. This reference, Georgia contends, necessarily implies that the reservation clause in the Treaty includes after-emerging islands, since man-made islands did not exist in the river in 1787. There is no indication, however, that the Court knew of this fact in 1922. No issue of after-emerging islands was even before the Court, and the decree simply described the river as it then was.

[497 US 398]

[1d, 7b] In light of the foregoing, we agree with the Special Master that islands that emerged after 1787 do not affect the boundary line between the two States. Georgia's exception with respect to that issue is overruled.

V

Oyster Bed Island and the Mouth of the River

[8a] Oyster Bed Island, which was not in existence in 1787 and which emerged in the 1870's or 1880's, is one of the most easterly or downstream islands in the Savannah River. It lies north of Cockspur Island and southeast of Turtle Island. Both Turtle Island and its westerly neighbor, Jones Island, are now conceded by the parties to be in South Carolina. Georgia accepts the Special Master's location of the boundary between the two States immediately upstream and west of Oyster Bed as midway between Jones Island and certain Georgia islands in the river. Ga Exceptions 38-39.

[1e] Georgia complains, however, that west of Oyster Bed, opposite the southern point of Turtle Island, the Special Master's recommended boundary departs from the middle of the stream and, going east, makes an "abrupt jog [to the southeast] to reach the navigation channel of the river." Id., at 38. The result is that Oyster Bed Island is placed in South Carolina, a consequence, Georgia says, that is contrary to this Court's 1922 ruling in Georgia v South Carolina, supra.

Georgia fortifies this argument by asserting that in the 1870's a major navigation channel of the river flowed north of Oyster Bed, but that the Corps of Engineers blocked this northern channel by a training wall and later by deposit of hydraulic fill in order to force the water into the channel south of Oyster Bed. It stresses that only Georgia has exercised dominion and control over Oyster Bed and, indeed, ceded it to the United States in 1820.

[1f, 8b, 9] It seems to us that this portion of the controversy between the two States centers on the determination of the "mouth" of

[497 US 399]

the Savannah River and encounters no inconsistency with what this Court said in Georgia v South Carolina. The Savannah River's "mouth" was not defined in the Treaty of Beaufort. Georgia argues that the mouth, as referred to in the Treaty, must be located in the vicinity of Tybee Island, rather than somewhat upstream. Tybee lies south and east of Cockspur. We accept that submission and regard Tybee as forming the south side of the river's mouth. Usually, there are two opposing "headlands" marking and constituting the mouth of a river. See Knight v United States Land Assn. 142 US 161, 207, 35 L Ed 974, 12 S Ct 258 (1891) (Field, J., concurring). This is the "headland-to-headland" principle used in defining the limits of bays and rivers. 2 A. Shalowitz, Shore and Sea Boundaries § 141, p 367 (1964). It is not always that simple, however. Sometimes the mouth of a river is difficult to delineate. See S. Jones, Boundary-Making: A Handbook 130 (1945). Because of the absence of a reasonably close headland to the north, Georgia is driven to argue that the boundary at the mouth of the Savannah River must be the geographical middle between Tybee and the closest points of land in South Carolina, that is, Daufuskie Island, lying north and northeastward of Turtle Island, and Hilton Head Island, almost six miles north of Tybee.

[1g, 8c] We conclude that this is not a realistic determination of the Savannah River's mouth, and we agree with the Special Master in rejecting the argument.

The difficulty lies in the fact that Tybee Island, the most seaward point of land on the southern side of the river, has no counterpart of high land on the northern side. The geographical feature taking the place of the customarily present opposing headland is, instead, a shoal, long recognized as confining the river. It is true, of course, that the Corps of Engineers affected the flow by its training wall and hydraulic fill. But the shoal which directed that flow has been recognized for many years. Furthermore, Hilton Head Island and

[497 US 400]

Daufuskie Island are so far distant that it is impossible to say that they even touch the Savannah River.

Given this somewhat uncommon type of river mouth, the Special Master's conclusion that the northern side of the Savannah's mouth is the underwater shoal is not unreasonable. To accept Georgia's proposition here would result in having Georgia waters lie directly seaward of South Carolina's coast and waters.

[1h] Georgia's exception with respect to Oyster Bed Island and the mouth of the Savannah River is overruled.

VI

The "Right-Angle" Principle

[10a] This Court in its 1922 decision in Georgia v South Carolina ruled that (1) at any point where there is no island in the Savannah River, the boundary "is on the water midway between the main banks of the river when the water is at ordinary stage," and (2) where there is an island the boundary "is midway between the island bank and the South Carolina shore when the water is at ordinary stage." 257 US, at 523, 66 L Ed 347, 42 S Ct 173. This seemingly simple and routine resolution, however, results in a problem, not decided in the 1922 case, when the midline of the stream encounters an island and must move northward to qualify as the line midway between the island bank and the South Carolina shore. Where and how does this boundary movement to the north take place? Is it when the midline touches the island, if it does touch it at all, and does it then move at right angles until it reaches a point midway between the island bank and the South Carolina shore? Does it then proceed accordingly until the island is bypassed and the midline of the stream is to be met and followed, and is a right angle to be applied there as well?

A line midway between the banks of a river, known as the medium filum acquae, Shalowitz, supra, at 374, is easily established,

[497 US 401]

for every point of the midline is equidistant from the nearest points on the opposite shores. See New Hampshire v Maine, 426 US 363, 371, 48 L Ed 2d 701, 96 S Ct 2113 (1976) (White, J., dissenting). But, as noted, the ease of ascertainment disappears when an island and the Treaty of Beaufort are encountered. Such is the case here, particularly with respect to the Special Master's treatment of the line around Pennyworth Island north of the city of Savannah.

This issue clearly was not determined, and perhaps was not even contemplated, by the framers of the Treaty. What the Special Master did in the absence of authority—and we have found none—was to use the line midway between an island and the South Carolina shore (as the parties agree is proper) until the island ended and ceased to lie opposite the shore. There the boundary was to revert to the middle of the river. The Master then used a right-angle line connecting the island-to-bank center line with the bank-to-bank center line by the shortest distance. South Carolina urges that this is the most reasonable approach to this unique problem and that the Master's recommended device should be adopted.

[1i, 10b] Georgia's position, also apparently unsupported by decisional authority, but see S. Boggs, International Boundaries: A Study of Boundary Functions and Problems 183 (1966), is that the use of the right angle is simply wrong. Instead, Georgia argues, that, with an island's presence, the boundary is to be marked by the use of a point which is "tri-equidistant" from the South Carolina shore, the island shore, and the Georgia shore. The boundary then would pass through this point and otherwise be equidistant from the South Carolina shore and the Georgia shore, or island, as the case may be. See Ga Exceptions 50-51.

We think that Georgia has the better of this argument. Its submission, it seems to us, is sensible, is less artificial than other lines, is fair to both States, and is generally in line with what was said in Georgia v South Carolina.

[497 US 402]

Georgia's exception to the right-angle principle used by the Special Master is therefore sustained, and Georgia's approach, not that of the right angle, is to be utilized wherever this fact situation is encountered in the stretch of the Savannah River under consideration.

VII

Southeastern Denwill and Horseshoe Shoal

[11a] Elba Island is downstream

from the city of Savannah and upstream from Jones and Oyster Bed Islands. Denwill is a plantation on the South Carolina side of the river; it is opposite Elba but extends eastward beyond that island. Horseshoe Shoal is slightly downstream from there. See App D of 2 Rep.

Prior to the performance of work in the area by the Army Corps of Engineers, the navigation channel north of Elba was a broad expanse which, in the Corps' estimation, was excessively wide. In the 1880's, the Corps undertook to improve the navigation channel by restricting the river's width. This was effected by the construction of a training wall north of Elba Island during 1891-1895, by sedimentation that took place, and by deposits of dredge material behind the wall. Land in the area of southeastern Denwill formed initially as marsh islands adjacent to the wall and then grew to be connected to the South Carolina shore.

Similar changes took place at Horseshoe Shoal, an area that now connects Jones Island and Oyster Bed Island.

The Special Master recommended that the additions to Denwill and Horseshoe Shoal be awarded to Georgia. South Carolina takes exception to this. Referring to App D of 2 Rep, South Carolina asserts: "Approximately 1 mile of riverfront land on the South Carolina side of the river would be placed in Georgia." SC Exceptions 6. It emphasizes that the additions to Denwill took more than 40 years to form, that is, between the time the first diversion wing-dam

structures were built, and 1924 when the old bed appeared above water. Id., at 7. The training wall, two miles long, was permeable, and permitted sedimentation behind it before the dredging and filling occurred. South Carolina observes that the Special Master nowhere specifically states that the process in fact was avulsive, but it asserts, pointing to several references by the Master to avulsive procedures, that "it is clear that he considered the process to be avulsive." Id., at 9. South Carolina also notes that all those activities worked to the benefit of the city of Savannah, and that "Georgia's port was the only beneficiary of the dredging." Brief in Rebuttal for South Carolina 5.

Georgia, in its turn, notes the Corps' relocation of the northern bank of the river at southeastern Denwill over a half mile south of its original location. See App C of 1 Rep. It asserts that the land in dispute did not form as gradual accretion from the South Carolina shore toward the river but, instead, rose in the river immediately behind the training wall and was the result of the construction of the wall and the deposit of dredge spoil behind it.

South Carolina's exception as to Horseshoe Shoal is like its Denwill exception. It asserts that, as was the case with Denwill, training works and dredging by the Corps led to sedimentation and filling. As a result, the Shoal is now a long isthmus of high ground connecting Jones Island and Oyster Bed Island. It was formed "in the same way, and over a comparable period, as the additional land on Denwill." SC Exceptions 13-14. The major training work in this area, too, was between 1890 and 1894. Wing dams were placed and then hydraulic fill. But "even before large-scale dredging and filling began, the area was close to becoming a dry elevation solely as a result of the 30 years of sedimentation caused by training works." Id., at 14-15.

[11b, 12] General rules concerning the formation of riparian land are well developed and are simply expressed and well accepted.

[497 US 404]

When the bed is changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream. But if the stream leaves its old bed and forms a new one by the process known as avulsion, the result works no change of boundary. Arkansas v Tennessee, 246 US 158, 173, 62 L Ed 638, 38 S Ct 301 (1918). Sometimes, the problem is to distinguish between the two.

[13] Here we have a situation where interference in the river's flow was not caused by either of the adjoining States, but by the United States Army Corps of Engineers. It is generally held, of course, that one cannot extend one's own property into the water by landfilling or purposefully causing accretion. See, e. g., Seacoast Real Estate Co. v American Timber Co. 92 NJ Eq 219, 221, 113 A 489, 490 (1920).

[14] We conclude, not without some difficulty, that Georgia has the better of the argument as to these two areas. It is true, of course, that avulsive action ordinarily calls to mind something somewhat sudden or, at least, of short duration, whereas accretion has as its essence the gradual deposit of material over a period by action of water flow. This is so even though it may have been caused partly or wholly by placed obstructions. See County of St. Clair v Lovingston, 23 Wall 46, 23 L Ed 59 (1874).

[1j, 11c] Some of the changes here were caused gradually by the deposit of sediment by river waters. Others were caused by the deposit of fill through the use of a hydraulic-pipeline dredge employed by the Corps pursuant to the paramount right of the United States Government to improve navigation. See South Carolina v Georgia, 93 US 4, 23 L Ed 782 (1876). The rapidity of some aspects of the dredging and other processes led the Special Master to conclude that the changes in the Savannah River were primarily avulsive in nature. Although the question is close, on balance, we think this particular record as to this particular river supports the recommendation made by the Master. We therefore overrule

[497 US 405]

South Carolina's exceptions as to southeastern Denwill and Horseshoe Shoal.

VIII

Addition to Bird Island

[1k] Bird Island, as described by South Carolina, "is now part of an elongated island several miles long, in the middle of the river across from Jones Island." SC Exceptions 16. It has merged with Long Island. See Apps C and D of 2 Rep South Carolina initially took exception to the Special Master's conclusion that a sliver of land on Bird Island was in Georgia rather than in South Carolina. The latter State's position was that, in line with its accretion argument with respect to Denwill and Horseshoe Shoal, the boundary for like reasons should run through part of Bird Island. SC Exceptions 17.

The Special Master's Second Report, on Georgia's motion, clarified any confusion that may have existed with respect to Bird Island. His recommended boundary line is now carefully described as passing north of the island, so that Bird Island in its entirety would be in Georgia. See App D of 2 Rep, modifying App F of 1 Rep. And South Carolina "responded by essentially agreeing." 2 Rep 19. This serves to eliminate the dispute over the island, and South Carolina's exception, initially made, is overruled.

IX

The Lateral Seaward Boundary.

[15a] Each side has noted an exception to the Special Master's recommendation concerning the lateral seaward boundary between the States. What the Master has done here begins with his resolution of the issue concerning the river's mouth, a recommendation we have approved in Part V hereof. He accepted, as do we, that Tybee Island is to be regarded as the "headland" for the south side of the mouth of the Savannah River, and that the long-existing shoal forms the north side of the mouth.

[497 US 406]

A seemingly complicating factor is that the Georgia coast and the South Carolina coast, where they meet at the river, do not run at exactly the same angle from due north. While each extends southwest-northeast, Georgia's coast is roughly 20 degrees from north-south and South Carolina's roughly 47 degrees. Thus, lines drawn perpendicularly from each coast overlap off the coast, and overlap more as the distance from the shoreline increases. This wedge-shaped overlap is the primary focus of the two States' respective exceptions.

[1*l*, 15b, 16a] The Master's recommended line continues down the river's mouth until it intersects a line, from Tybee Island's most northern point to Hilton Head Island's most southern point, where it then proceeds out to sea perpendicularly to that line.

[15c] South Carolina claims that the described overlap is the only area reasonably in dispute, but that the Master's line runs at an angle about six degrees north of the most favorable line Georgia could expect to receive, i. e., a line perpendicular to Georgia's coast. Thus, says South Carolina, the Master's line is wholly outside the area of overlap. South Carolina urges that the area of overlap be split "more or less equally." SC Exceptions 22.

Georgia's exception relates "only to the starting point of the proposed lateral seaward boundary." Reply Brief for Georgia 17. It submits that "the geographic middle of the mouth of the Savannah River should be used as the starting point of the maritime boundary," ibid., but that if this argument fails, the boundary as recommended by the Master should be upheld.

The Master observed that neither Georgia's Charter of 1732 nor the 1787 Treaty of Beaufort made any reference to the lateral seaward boundary between the States. 2 Rep 1. He noted that in 1969 the States reached a tentative agreement upon a boundary projecting due east from the mouth of the river, but that this agreement was not ratified by Congress and never was effective. Id., at 2. The two States have entered into a stipulation, approved by the Solicitor

[497 US 407]

General of the United States, whereby they agree that no interest of the United States is affected by this Court's ultimate determination as to the location of the lateral seaward boundary between the States.

The Master accordingly concluded that the Federal Government was not a necessary party. Id., at 3. He then proceeded to apply principles of international law, citing Wisconsin v Michigan, 295 US 455, 79 L Ed 1541, 55 S Ct 786 (1935), and Texas v Louisiana, 426 US 465, 48 L Ed 2d 775, 96 S Ct 2155 (1976).

The Master reviewed the States' respective contentions. He noted that Georgia cited the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958 [1964] 15 UST 1607, TIAS No. 5639, and particularly the first paragraph of Article 12 thereof, id., at 1610, which recites that neither of two adjacent states is entitled "to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines." The Baseline Committee, operating in the 1970's, drew its line between Hilton Head Island and Tybee Island. The Master noted that he had determined the mouth of the river to be only approximately a mile north of the southern end of the baseline at Tybee Island. Nevertheless, in drawing the lateral seaward boundary the Master felt controlled by international law. "[T]herefore, it does not follow that the starting point of the lateral seaward boundary must merely be an extension of the land boundary between the states, although such a factor must be considered as highly persuasive." 2 Rep 5. Georgia's claimed starting point for the lateral seaward boundary was at a point halfway between Hilton Head Island and Tybee Island, and thus about two miles north of where the land boundary met the baseline.

The Special Master noted that South Carolina contended that the boundary line must start at the point where the inland boundary, if extended, intersected the baseline. This would result in the boundary's being delimited seaward in a southeasterly direction running substantially parallel to the channel providing the entrance to the river. The Master

then turned to the "equidistant principle" referred to in Texas v Louisiana, supra. He observed, however, that while the equidistant principle "may be a slightly preferred method of delimitation, it does not reach the stature of a rule of law." 2 Rep 16. Instead, "it is the principles of equity which should guide the conclusion in each particular case." Ibid.

The Special Master recommended that the lateral seaward boundary between the two States be along a line drawn at right-angles to the baseline beginning at a point marked "X" on App A to 2 Rep until that line reached the outer limit of the territorial sea as that outer limit existed on December 27, 1988.[6] He felt that this was a proper utilization of equitable principles. 2 Rep 18. He further recommended that Georgia and South Carolina "be required to suitably mark the lateral seaward boundary in the water area at the joint expense of the two states." Ibid.

---

[6] This date is utilized because on December 27, 1988, the President issued a Proclamation that the territorial sea of the United States thenceforth extended to 12 nautical miles. See Proclamation 5928, 54 Fed Reg 777 (filed Jan. 6, 1989). The Special Master specifically concluded his determination of the lateral seaward boundary at the outer limit of the theretofore existing 3-mile territorial sea. He felt that there were legal problems confronting the coastal States with respect to the extended portion of the territorial sea and, further, that consideration of an extended boundary line would exceed this Court's reference to him. 2 Rep 27-28.

[1m, 15d, 16b] We adopt the recommendation of the Special Master as to the lateral seaward boundary between South Carolina and Georgia. We conclude that it gives equitable balance and recognition to the so-called equidistant principle and to the inland boundary between the two States, and does so with the least possible offense to any claimed parallel between offshore territory and the coast itself. The States' respective exceptions as to the lateral seaward boundary are overruled.

X

In summary:

[1n] 1. Each exception advanced by South Carolina is overruled.

2. Georgia's exception to the Special Master's use of the right-angle principle, discussed in Part VI hereof, is sustained.

3. Each other exception advanced by Georgia is overruled.

4. Each recommendation made by the Special Master in his two reports, and as to which no exception has been taken, is adopted (subject to the reservation expressed in n 7, infra).

[1o, 16c] 5. Each recommendation made by the Special Master, and as to which an exception has been advanced but overruled, is adopted.[7]

[1p] The parties are directed promptly to prepare an appropriate proposed decree in line with these conclusions. Because the Special Master has been discharged, see 493 US 1053, 107 L Ed 2d 945, 110 S Ct 860 (1990), the proposed decree shall be submitted directly to this Court for its review and consideration. The Court assumes that the parties will be able to agree upon the form of the decree. If they are unable to agree, each State shall submit to the Court its own formulation with any supportive comment deemed necessary. The Court will then draft the decree and enter it.

No costs are allowed.

The Court retains jurisdiction to entertain such further proceedings as from time to time may be necessary or advisable to effectuate the forthcoming decree and the rights of the respective parties.

It is so ordered.

---

[7] **[16d]** One might suggest, perhaps, that the Special Master in his Second Report *assumed* that the United States had utilized "straight baselines" in constructing the coast near the mouth of the Savannah River. See 2 Rep 12-14. Such baseline use would have been authorized by Article 4 of the Geneva Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958 [1964] 15 UST 1606, 1608, TIAS No. 5639. Article 4, however, provides this only as an option. We are not aware of any instance where that provision has been employed in the determination of the United States coastline. See e. g., United States v California, 381 US 139, 167-169, 14 L Ed 2d 296, 85 S Ct 1401 (1965); United States v Louisiana (Louisiana Boundary Case), 394 US 11, 68-73, 22 L Ed 2d 44, 89 S Ct 773 (1969); United States v Louisiana (Alabama and Mississippi Boundary Case), 470 US 93, 99, 84 L Ed 2d 73, 105 S Ct 1074 (1985). If the Special Master in fact made the assumption, we refrain from adopting that portion of his discussion. The assumption is not necessary for a decision in the present litigation, and we leave the question of its propriety for another day.

SEPARATE OPINIONS

Justice **White**, with whom Justice **Marshall** joins, dissenting in part.

I join all but Part VI of the Court's opinion. In that Part, the Court sustains Georgia's exception to the Special Master's use of the "right-angle" principle to delimit the boundary between the two States where there is an island in the river belonging to Georgia. Where this is the case, the boundary line is not a line equidistant from the mainland shores of the two States as it otherwise would be, but a line equidistant from the island bank and the South Carolina shore. In particular dispute is Pennyworth Island, an island belonging to Georgia just north of the city of Savannah and in existence when the Treaty of Beaufort was signed. The Special Master recommends that the boundary at Pennyworth be the island-South Carolina shore center line only so long as some part of Pennyworth is opposite the shore, but when that is not the case, the boundary reverts, at right angles to the shore-to-shore center line.

This is an eminently reasonable approach, it seems to me. Furthermore, it is faithful to the Court's decision in 1922. There the Court ruled as follows: "(1) Where there are no islands in the boundary rivers the location of the line between the two States is on the water midway between the main banks of the river when the water is at ordinary stage; (2) Where there are islands the line is midway between the island bank and the South Carolina shore when the water is at ordinary

stage . . . ." Georgia v South Carolina, 257 US 516, 523, 66 L Ed 347, 42 S Ct 173. Thus the boundary line at any point is determined by reference to just two banks, either the two main banks or the island and South Carolina banks. This cannot be carried out by any method other than the Master's right-angle approach.

Georgia's approach, which the Court adopts, would deviate from the main bank-to-bank center line far short of where any part of the island is opposite the South Carolina shore. This point, it is said, is a point "triequidistant" from the South Carolina shore, the island shore, and the Georgia shore—thus referring to three banks rather than two. It is true that from that point onward the boundary line as it circumscribes the island would at any point be equidistant from the island and South Carolina banks, but the point at which the shore-to-shore center line ceases to be the boundary at either end of the island requires reference to the two mainlands and the island. Using Georgia's approach, the boundary is no longer exclusively determined by either the two mainlands or the island and the South Carolina banks.

Georgia complains that the Master had no authority for his position but he did his best to follow the 1922 decision, noting that in that case Georgia pressed the position that it now urges—that when the island-South Carolina bank center line passes the ends of the island it "deflects" and continues until at some point it meets the center line between the two main banks. The Court, as the Master noted, did not endorse this position, for it made no mention of "deflection." Rather, as I have said, it defined the boundary everywhere with reference either to the two main banks or the island-South Carolina banks.

Furthermore, the Master was convinced that Georgia's position would unfairly deprive South Carolina of the ownership of some riverbed that does not lie between the island and the South Carolina shore. The Court concedes that there is no precedent for Georgia's position, fails to give any deference to the Master's view of what is a "fair" resolution of the issue,

[497 US 412]

and, as I see it, misreads Georgia v South Carolina, supra. With all due respect, I dissent.

Justice **Stevens,** with whom Justice **Scalia** joins, dissenting in part.

With respect to Part IX of the Court's opinion, I would sustain South Carolina's exception to the Special Master's determination of the angle of the lateral seaward boundary. I am persuaded that a boundary drawn in reference to the full coastlines of the respective States, rather than one drawn perpendicular to the line connecting Hilton Head and Tybee Islands, is more equitable and consistent with the equidistant principle of Texas v Louisiana, 426 US 465, 48 L Ed 2d 775, 96 S Ct 2155 (1976).* The

[497 US 413]

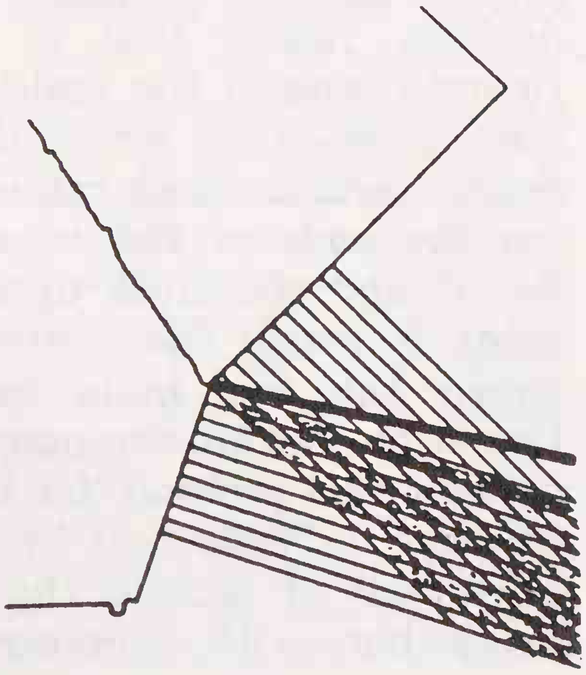
difference between this boundary and that recommended by the Special Master becomes particularly clear if one assumes that the boundary line would not change angles when it crosses the outer limits of the 3-mile and 12-mile territorial seas.

Justice **Scalia,** with whom Justice **Kennedy** joins, dissenting in part.

I would sustain South Carolina's exceptions with respect to southeastern Denwill and Horseshoe Shoal, and I accordingly dissent from Part

---

* South Carolina's coast runs northeast to southwest at approximately a 47° angle, and Georgia's at a 20° angle. Ante, at 406, 111 L Ed 2d, at 336. Lines perpendicular to these coastal fronts, at approximately 137° and 110°, respectively, define the overlapping area in the illustrations on the next page. The Hilton Head-to-Tybee closing line lies at a 14° angle. SC Rebuttal Brief 8. The Special Master and the Court set the boundary east of this closing line at an angle perpendicular to it, at the azimuth 104°, completely outside of the overlap of the States' coastal fronts:



S. C. Exceptions 21.

VII of the Court's opinion. The Court does not purport to alter settled principles of law regarding accretion and avulsion but, applying those principles to the specifics of this record and acknowledging the question to be close, approves the determination of the Master. In my view, the facts do not support the Court's holding.

Justice **Kennedy,** with whom The **Chief Justice** joins, dissenting in part.

Georgia's fourth exception concerns the islands in the Savannah River that came into existence after the States signed the Treaty of Beaufort in 1787. Agreeing with the Special Master, the Court finds these islands in South Carolina if they emerged on a portion of the river bed belonging to

[497 US 414]

South Carolina. Georgia contends that all islands formed by natural processes lie within its territory unless South Carolina has acquired them through prescription. I would sustain Georgia's fourth exception and I therefore dissent from Part IV of the Court's opinion and that portion of Part V concerning Oyster Bed Island.

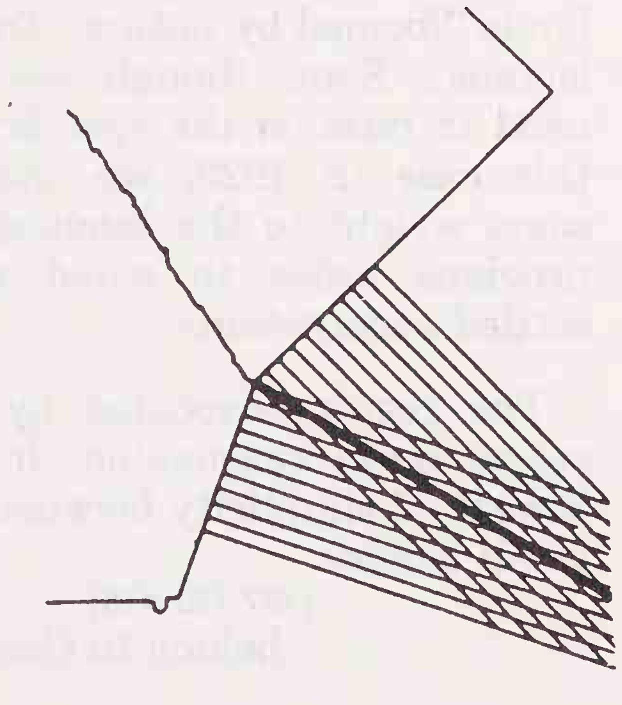
The Treaty of Beaufort, in pertinent part, provides:

> "'The most northern branch or stream of the river Savannah from the sea or mouth of such stream to the fork or confluence of the rivers now called Tugoloo and Keowee, and from thence the most northern branch or stream of the said river Tugoloo till it intersects the northern boundary line of South Carolina . . . *reserving all the islands in the said rivers Savannah and Tugoloo to Georgia* . . . shall forever hereafter form the separation limit and boundary between the States of South Carolina and Georgia.'" Ante, at 381, n 1, 111 L Ed 2d, at 320-321 (emphasis added).

Georgia reasons that the clause reserving all islands to Georgia gives it sovereignty over all islands regardless of when or where they emerged. South Carolina maintains that the treaty placed the islands existing in

---

I would extend the boundary eastward from the same starting point, but at an angle perpendicular to the average angle of the States' coastal fronts. Assuming that the above-reported measures of the coastal fronts are correct, the azimuth of this boundary would be approximately 123½°:



S. C. Exceptions 22.

1787 in Georgia and then vested the rights of the two States with respect to the river beds. It contends that, under ordinary principles of property law, it has jurisdiction over any island that arose from its portion of the river bed after that time. See St. Louis v Rutz, 138 US 226, 247, 34 L Ed 941, 11 S Ct 337 (1891). I agree with Georgia.

South Carolina's view would render superfluous the clause "reserving all islands" to Georgia. The clause cannot give Georgia only the islands existing in 1787 because the treaty would give these islands to Georgia even in the absence of the clause. South Carolina lies to the north of Georgia. As a result, wherever the Savannah River contains islands, its northernmost streams flow between the islands and the South Carolina shore. All islands existing in 1787, therefore, lay on Georgia's side of the dividing line and would belong to Georgia even if the treaty said nothing about islands.

This is the principle of our decision in Georgia v South Carolina, 257 US 516, 66 L Ed 347, 42 S Ct 173 (1922). We ruled there that "the location of the boundary line 'where the most northern branch or stream' flows between an island or islands and the South Carolina shore" is midway "between the island bank on the one side and the South Carolina bank on the other." Id., at 521-522, 66 L Ed 347, 42 S Ct 173. Consistent with this earlier holding, by interpreting the island reservation clause to address all islands regardless of when or where they arose, Georgia's view gives effect to the language of the treaty.

Georgia's rule also seems in keeping with what I think that the parties to such a treaty must have intended. When two States define their boundary according to a river, they may expect natural processes such as erosion and accretion to alter their borders. Louisiana v Mississippi, 466 US 96, 100, 80 L Ed 2d 74, 104 S Ct 1645 (1984); Arkansas v Tennessee, 246 US 158, 173, 62 L Ed 638, 38 S Ct 301 (1918). South Carolina takes the position that, although the boundary between the States moves when accretion and erosion change the river banks, the boundary does not change when these processes produce or alter an island within the river. Because the treaty defines the dividing line according to the most northern stream of the river, I do not think that those who signed it contemplated this uneven result.

Georgia's position, in addition, comports better with our 1922 interpretation of the Treaty of Beaufort. In ruling on the status of islands in the Chattooga River (i. e., the most northerly branch of the Tugaloo River), our decree states that all of the islands belong to Georgia. See Georgia v South Carolina, 259 US 572, 66 L Ed 1069, 42 S Ct 597 (1922). We saw no need, at that time, to distinguish islands that arose after 1787 from any other islands. See ibid. (distinguishing only those islands "formed by nature" from other islands). Even though we did not need to pass on the specific issue in this case in 1922, we should give some weight to the language of our previous order to avoid upsetting settled expectations.

The result advocated by Georgia seems quite reasonable. It has the benefit of simplicity because, so long as all islands

belong to Georgia, one

may discern the boundaries between the two States without knowing when the islands arose, how much they have eroded, or where the middle point of the river lay at the time of their emergence. Although the rule will favor Georgia in some instances, at other times it may work to the benefit of South Carolina. As Georgia explains in its brief:

> "Either state stands to lose river bed as a result of natural changes in the river; likewise, each state has the potential of acquiring additional river bed as a result of accretion and erosion. For example, if an island existed in 1787 but was subsequently eliminated by gradual erosion, the boundary would be moved to the advantage of South Carolina, and river bed previously owned by Georgia would then be owned by South Carolina." Ga. Exceptions 56 (footnote omitted).

For these reasons, I would sustain Georgia's fourth exception.

Several consequences follow from my view. First, Oyster Bed Island would lie within Georgia's territory, and the boundary would run north of the location adopted by the Court at this point in the river. See First Report of Special Master 88, n 68 (noting that, if the treaty does place all islands in Georgia, "then the boundary line would definitely be north of Oyster Bed Island, and the Special Master is in error"). This conclusion prevents me from joining Part V of the Court's opinion on this question.

Second, the small unnamed islands upstream and downstream from Pennyworth Island would belong to Georgia. My conclusion with respect to these islands prevents me from joining Part IV of the Court's opinion.

Third, my interpretation of the treaty also implies that the Barnwell Islands which emerged after 1787 at one time belonged to Georgia. I agree with the Court, however, that Georgia lost these islands to South Carolina by prescription. I thus dissent in part.

[497 US 417]

JANE HODGSON, et al., Petitioners
v
MINNESOTA et al. (No. 88-1125)

MINNESOTA, et al., Petitioners
v
JANE HODGSON et al. (No. 88-1309)

497 US 417, 111 L Ed 2d 344, 110 S Ct 2926

[Nos. 88-1125 and 88-1309]

Argued November 29, 1989. Decided June 25, 1990.

Decision: Minnesota's two-parent notification requirement for minor's abortion, without judicial bypass provision, held to violate Federal Constitution, but such requirement with judicial bypass held valid.

SUMMARY

A Minnesota statute provided that (1) no abortion was to be performed on an unemancipated minor until at least 48 hours after the minor's physician or an agent gave written notice to "the parent," either by delivery personally to the parent or by certified mail, and (2) such notice was mandatory unless (a) the attending physician certified that an immediate abortion was necessary to prevent the minor's death and there was insufficient time to provide the required notice, (b) the abortion was authorized in writing by the person or persons entitled to notice, or (c) the minor declared that she was a victim of parental abuse or neglect, in which event notice of her declaration had to be given to the proper authorities. The statute defined the term "parent" as both parents of the minor if both were living, but as one parent if only one was living or if the second one could not be located through reasonably diligent effort. However, the statute made no exception to the notice requirement with respect to a divorced parent, a noncustodial parent, or a biological parent who never married or lived with the minor's mother. Another provision of the statute—a so-called "judicial bypass" provision—stated that, if a court were to enjoin the enforcement of the

SUBJECT OF ANNOTATION

Beginning on page 879, infra

Supreme Court's views as to validity, under Federal Constitution, of abortion laws

Briefs of Counsel, p 876, infra.

parental notice requirement, the requirement would be enforced with the proviso that any judge of a court of competent jurisdiction would authorize the abortion if the judge determined that (1) the minor was mature and capable of giving informed consent, or (2) an abortion without parental notification would be in the minor's best interest. In 1981, 2 days before the statute was to become effective, a suit against the state of Minnesota and state officials was filed in the United States District Court for the District of Minnesota by plaintiffs including two Minnesota physicians who specialized in obstetrics and gynecology, four Minnesota clinics that provided abortion services, six pregnant minors, and the mother of a pregnant minor. The plaintiffs, alleging that the statute violated federal and state constitutional provisions, sought declaratory and injunctive relief. In 1982, the District Court issued a preliminary injunction against enforcement of the provision that required parental notification without judicial bypass. In 1986, after a 5-week trial, the District Court (1) found that the two-parent notification requirement (a) had harmful effects on both the minor and the custodial parent when the parents were divorced or separated, and (b) had adverse effects in families in which the minor lived with both parents, especially where family violence was a problem; (2) held that the judicial bypass procedure complied with federal constitutional requirements; (3) found that the state's interest in protecting pregnant minors could be served by a waiting period shorter than 48 hours; (4) held that the two-parent notification requirement and the 48-hour waiting period requirement violated the Federal Constitution, and that the two-parent notification requirement was not severable from the remainder of the statute; and (5) enjoined the enforcement of the entire statute (648 F Supp 756). The United States Supreme Court denied certiorari (479 US 1102, 94 L Ed 2d 184, 107 S Ct 1333). A panel of the United States Court of Appeals for the Eighth Circuit affirmed the District Court's judgment on appeal (827 F2d 1191), but the panel opinion was subsequently vacated (835 F2d 1546). The Court of Appeals, reversing the District Court's judgment on rehearing en banc, held that (1) the two-parent notice requirement without judicial bypass was unconstitutional, but (2) the two-parent notice requirement with judicial bypass was constitutional, and (3) the 48-hour waiting period requirement also was constitutional (853 F2d 1452).

On certiorari, the Supreme Court affirmed. A majority of the members of the court joined in an opinion holding that the two-parent notice requirement without judicial bypass was unconstitutional. Although unable to agree on an opinion as to the two-parent notice requirement with judicial bypass, five members of the court (O'CONNOR and KENNEDY, JJ., REHNQUIST, Ch. J., and WHITE and SCALIA, JJ.) agreed that this provision was constitutional.

STEVENS, J., announced the judgment of the court. In an opinion by STEVENS, J., joined in pertinent part by BRENNAN, MARSHALL, BLACKMUN, and O'CONNOR, JJ., it was held that the two-parent notice requirement without judicial bypass did not reasonably further any legitimate state interest, and therefore violated the Federal Constitution, given that (1) to the extent that a state has a legitimate interest in supporting the authority of a parent who is presumed to act in the minor's best interest and thereby assuring that the minor's decision to terminate her pregnancy is knowing, intelligent, and deliberate, such an interest would be fully served by a requirement that the minor notify one parent; (2) although both parents may well have an interest in the minor's abortion decision, full communication among all members of a family may not validly be decreed by the state; and (3) any state interest in protecting a parent's interest in shaping a child's values and lifestyle cannot overcome the liberty interests of a minor acting with the consent of a single parent, since the combined force of one parent's separate interest and the minor's privacy interest outweighs the separate interest of the second parent. Also, Stevens, J., joined in pertinent part by Brennan, J., expressed the view that a woman's decision to conceive or to bear a child is a component of her liberty that is protected by the due process clause of the Federal Constitution's Fourteenth Amendment. In addition, Stevens, J., joined in pertinent part by O'Connor, J., expressed the view that (1) the state has a strong and legitimate interest in the welfare of its young citizens, and this interest extends to a minor's decision to terminate her pregnancy, (2) parents have an interest in controlling the education and upbringing of their children, which interest may rise to the level of a protected liberty interest under certain circumstances, (3) the family has a privacy interest in the upbringing and education of children and the intimacies of the marital relationship, and (4) to the extent that the Minnesota statute required a minor to wait 48 hours after notifying one parent, the statute reasonably furthered the state interest in insuring that the minor's decision was knowing and intelligent. Finally, Stevens, J., dissenting from the holding that the constitutional objection to the two-parent notice requirement was removed by the judicial bypass option, expressed the view that the bypass procedure represented an unjustified governmental intrusion into the family's decisional process.

O'Connor, J., concurring in part and concurring in the judgment in part, expressed the view that (1) Minnesota offered no sufficient justification for its interference with the family's decisionmaking processes that was created by the two-parent notification requirement without judicial bypass, but (2) the two-parent notification requirement with judicial bypass was constitutional, because the interference with the family's internal operation required by the two-parent notification requirement without judicial bypass did not exist where the minor could avoid notifying one or both parents by using the bypass procedure.

Marshall, J., joined by Brennan and Blackmun, JJ., concurring in part, concurring in the judgment in part, and dissenting in part, expressed the view that (1) the Constitution does not permit a state to require a minor to notify or consult with a parent before obtaining an abortion, (2) the two-parent notification requirement did not pass the strict scrutiny applicable to restrictions on a woman's fundamental right to have an abortion, and (3) the judicial bypass option did not render the notification and 48-hour delay requirements constitutional, because the bypass itself was unconstitutional both on its face and as applied.

Scalia, J., concurring in the judgment in part and dissenting in part, expressed the view that (1) the Constitution does not provide the basis for argument over such legal distinctions with respect to abortion as were made in the present case, and (2) the enterprise of devising an abortion code was beyond the Supreme Court's authority.

Kennedy, J., joined by Rehnquist, Ch. J., and White and Scalia, JJ., concurring in the judgment in part and dissenting in part, expressed the view that the two-parent notice requirement, including the 48-hour waiting period requirement, represented a permissible, reasoned attempt to preserve the parents' role in a minor's decision to have an abortion without placing any absolute obstacles before a minor who was determined to have an abortion, and thus the notice requirement was constitutional either with or without the judicial bypass provision.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

1 Am Jur 2d, Abortion §§ 1.5, 37.5; 42 Am Jur 2d, Infants § 8

13A Am Jur Legal Forms 2d, Parent and Child § 191:74; 15 Am Jur Legal Forms 2d, Physicians and Surgeons § 202:130

US L Ed Digest, Abortion §§ 8, 9

Index to Annotations, Abortion; Children; Notice and Knowledge

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Supreme Court's views as to validity of laws restricting or prohibiting sale or distribution to minors of particular types of goods or services otherwise available to adults. 52 L Ed 2d 892.

Supreme Court's views as to concept of "liberty" under due process clauses of Fifth and Fourteenth Amendments. 47 L Ed 2d 975.

Validity, under Federal Constitution, of abortion laws. 35 L Ed 2d 735.

Requisites and conditions of judicial consent to minor's abortion. 23 ALR4th 1061.

Right of minor to have abortion performed without parental consent. 42 ALR3d 1406.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Abortion § 9 — two-parent notice requirement

1a-1e. A state statutory provision requiring, except under certain circumstances, that an unemancipated minor's physician or an agent give written notice to both of the minor's parents, either by delivery personally to the parents or by certified mail, before an abortion is performed on the minor—no exception being made as to a divorced parent, a noncustodial parent, or a biological parent who never married or lived with the minor's mother—does not reasonably further any legitimate state interest, given that (1) to the extent that a state has a legitimate interest in supporting the authority of a parent who is presumed to act in the minor's best interest and thereby assuring that the minor's decision to terminate her pregnancy is knowing, intelligent, and deliberate, such an interest would be fully served by a requirement that the minor notify one parent, because (a) in the ideal family setting, notice to one parent would normally constitute notice to both, (b) in families in which the notified parent would not notify the other parent, the state has no legitimate interest in (i) questioning one parent's judgment that notice to the other parent would not assist the minor, or (ii) presuming that the parent who has assumed parental duties is incompetent to make decisions regarding the minor's health and welfare, and (c) with respect to dysfunctional families, a two-parent notice requirement disserves the state interest in protecting and assisting the minor, in light of evidence that in thousands of such families, such a requirement proves harmful to the minor and her family, (2) although both parents may well have an interest in the minor's abortion decision, full communication among all members of a family may not validly be decreed by the state, and (3) any state interest in protecting a parent's interest in shaping a child's values and lifestyle cannot overcome the liberty interests of a minor acting with the consent of a single parent, since the combined force of one parent's separate interest and the minor's privacy interest outweighs the separate interest of the second parent; the fact that other state and federal consent provisions governing the health, welfare, and education of children require only one parent's consent provides testimony to the unreasonableness of the two-parent notice requirement and to the ease with which the state can adopt less burdensome means to protect the minor's welfare; thus, the two-parent notice requirement violates the Federal Constitution. (Kennedy, J., Rehnquist, Ch. J., and White and Scalia, JJ., dissented from this holding.)

[See annotation p 879, infra]

Abortion §§ 8, 9 — two-parent notice requirement — judicial bypass

2a-2d. A state may—consistent with the Federal Constitution— provide by statute that, except under certain circumstances, an unemancipated minor's physician or an agent must give written notice, either by delivery personally to the parents or by certified mail, to both of the minor's parents before an abortion is performed on the minor, but that a court of competent jurisdiction shall authorize the abortion to proceed without such notice if the court determines that (1) the minor is mature and capable of giving informed consent, or (2) an abortion without notice to both parents would be in the minor's best interest. [Per O'Connor and Kennedy, JJ., Rehnquist, Ch. J., and White and Scalia, JJ. Contra: Stevens, Brennan, Marshall, and Blackmun, JJ.]

[See annotation p 879, infra]

Abortion § 9 — notice to minor's parent

3a-3d. In furtherance of a state's interest in the welfare of a pregnant minor, the state may, without violating the Federal Constitution, require that (1) an unemancipated minor's decision to terminate her pregnancy be made only after notification to and consultation with a parent, and (2) no abortion be performed on such a minor until at least 48 hours after such notification is given. [Per Stevens, O'Connor, and Kennedy, JJ., Rehnquist, Ch. J., and White and Scalia, JJ. Dissenting: Marshall, Brennan, and Blackmun, JJ.]

[See annotation p 879, infra]

Parent and Child § 1 — state interest

4. A state has no legitimate interest in standardizing its children and adults so as to make the private realm of family life conform to some state-designed ideal.

Parent and Child § 1 — premises of legislation

5a, 5b. A state may properly legislate on the premise that parents, as a general rule, are interested in their children's welfare and will act in accord with it; however, a state may not legislate on the generalized assumptions that a parent in an intact family will not act in his or her child's best interests and will fail to involve the other parent in the child's upbringing when that involvement is appropriate.

SYLLABUS BY REPORTER OF DECISIONS

Subdivision 2 of Minn Stat § 144.343 provides that no abortion shall be performed on a woman under 18 years of age until at least 48 hours after both of her parents have been notified. The two-parent notice requirement is mandatory unless, inter alia, the woman declares that she is a victim of parental abuse or neglect, in which event notice of her declaration must be given to the proper authorities. Subdivision 6 provides that, if a court enjoins the enforcement of subdivision 2, the same two-parent notice requirement is effective unless a court of competent jurisdiction orders the abortion to proceed without notice upon proof by the minor that she is "mature and capable of giving informed consent" or that an abortion without notice to both parents would be in her best interest. Two days before the statute's effective date, a group consisting of doctors, clinics, pregnant minors, and the mother of a pregnant minor filed suit in the District Court, alleging that the statute violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The court declared the statute unconstitutional in its entirety and enjoined its enforcement. The Court of Appeals, sitting en banc, reversed. Although it rejected the State's submission that subdivision 2's two-parent notice requirement was constitutional without any bypass procedure, the court held that subdivision 6 was valid and that its bypass procedure saved the statute as a whole. The court also rejected the argument that the 48-

hour waiting period imposed a significant burden on the minor's abortion right.

Held: The judgment is affirmed.

853 F2d 1452, affirmed.

Justice Stevens delivered the opinion of the Court with respect to Parts I, II, IV, and VII, concluding that subdivision 2 of § 144.343 violates the Constitution insofar as it requires two-parent notification.

(a) Since none of this Court's abortion decisions dealing with parental consent or notification statutes focused on the possible significance of making the consent or notice applicable to both parents instead of just one, the District Court's extensive and unchallenged findings on the question are significant. On the basis of extensive trial testimony, the District Court found, inter alia, that the two-parent notification requirement had particularly harmful effects on both the minor and the custodial parent when the parents were divorced or separated, especially in the context of an abusive or dysfunctional family; that the requirement also had adverse effects in families in which the minor lives with both parents, particularly where family violence is a serious problem; that the requirement actually impairs family communication in many instances, since minors who otherwise would inform one parent were unwilling to do so when such notification would involve going to court for a bypass in any event; that few minors can take advantage of the abuse exception because of the obligation to report the information to the authorities and the attendant loss of privacy; and that the two-parent requirement did not further the State's interests in protecting pregnant minors or assuring family integrity. The court also found that, in many cases, the statutory 48-hour waiting period was extended to a week or more by scheduling considerations, thereby increasing the risk associated with the abortion to a statistically significant degree.

(b) The requirement that *both* parents be notified, whether or not both wish to be notified or have assumed responsibility for the upbringing of the child, does not reasonably further any legitimate state interest. Any such interest in supporting the authority of a parent, who is presumed to act in the minor's best interest, to assure that the abortion decision is knowing, intelligent, and deliberate, would be fully served by a one-parent notification requirement as to functioning families, where notice to either parent would normally constitute notice to both. As to the many families in which the parent notified would not notify the other parent, the State has no legitimate interest in questioning the first parent's judgment or in presuming him or her incompetent to make decisions regarding the child's health and welfare. Moreover, as the record demonstrates, the two-parent requirement actually disserves the state interest in protecting and assisting the minor with respect to the thousands of dysfunctional families affected by the statute, where the requirement proved positively harmful. There is no merit to the argument that the two-parent requirement is justified because, in the ideal family, the minor should make her decision only after consultation with both parents, who should naturally be concerned with her welfare. The State has no legitimate interest in conforming family life to a state-designed ideal by requiring family members to talk together.

Nor can the State's interest in protecting a parent's interest in shaping a child's values and lifestyle overcome the liberty interests of a minor acting with the consent of a single parent or court. The combined force of the separate interest of one parent and the minor's privacy interest outweighs the separate interest of the second parent, and the justification for any rule requiring parental involvement in the abortion decision rests entirely on the best interests of the child. The fact that the two-parent requirement is virtually an oddity among state and federal consent provisions governing childrens' health, welfare, and education further demonstrates its unreasonableness and the ease with which the State can adopt less burdensome means to protect the minor's welfare.

Justice Stevens, joined by Justice O'Connor, concluded in Parts V and VI that:

1. Three separate but related interests are relevant to the constitutionality of the 48-hour waiting period and the two-parent notification requirement. First, the State has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely. That interest justifies a state-imposed requirement that the minor notify and consult with a parent before terminating her pregnancy. See, e.g., Ohio v Akron Center for Reproductive Health, post, at 510-511, 111 L Ed 2d 405, 110 S Ct 2972. Second, parents have an interest in controlling their children's education and upbringing, and a natural parent's stake in the relationship with a child may rise to the level of a protected liberty interest if the parent has demonstrated his commitment by assuming personal, financial, or custodial responsibility for the child. Third, the family has a privacy interest in its children's upbringing and education which is constitutionally protected against undue state interference. When government intrudes on the family's choices, the governmental interests advanced and the extent to which they are served by the challenged regulation must be carefully examined.

2. To the extent that subdivision 2 of the state statute requires that a minor wait 48 hours after notifying a single parent of her intention to obtain an abortion, it reasonably furthers the legitimate state interest in ensuring that the minor's decision is knowing and intelligent. The State may properly enact laws designed to aid a parent who has assumed "primary responsibility" for a minor's well-being in discharging that responsibility, and the 48-hour delay provides the parent the opportunity to consult with his or her spouse and a family physician, to inquire into the competency of the abortion doctor, and to discuss the decision's religious and moral implications with the minor and provide needed guidance and counsel as to how the decision will affect her future. The delay imposes only a minimal burden on the minor's rights. The statute does not impose any period of delay if the parents or a court, acting in loco parentis, provide consent to the procedure. Moreover, the record reveals that the waiting period may run concurrently with the time necessary to make an appointment for the abortion.

Justice O'Connor concluded that subdivision 6 of the state statute—

two-parent notification plus judicial bypass—passes constitutional muster because the interference with the family's internal operation required by subdivision 2's two-parent notice requirement simply does not exist where the minor can avoid notifying one or both parents by using the bypass procedure. See, e.g., Planned Parenthood of Central Mo. v Danforth, 428 US 52, 90-91, 49 L Ed 2d 788, 96 S Ct 2831.

Justice Kennedy, joined by The Chief Justice, Justice White, and Justice Scalia, concluded:

1. The state statute's 48-hour waiting period is necessary to enable notified parents to consult with their daughter or her physician, if they so wish, results in little or no delay, and is therefore constitutional.

2. Subdivision 6 of the statute—which requires two-parent notification unless the pregnant minor obtains a judicial bypass—is constitutional. By creating a judicial mechanism to identify, and exempt from the strictures of the law, those cases in which the minor is mature or in which parental notification is not in her best interest, subdivision 6 precisely addresses the concern underlying the Court's invalidation of subdivision 2: the possibility that, in some cases, two-parent notification would not work to the benefit of minors or their parents. In providing for the bypass, moreover, Minnesota has simply attempted to fit its legislation into the framework supplied by this Court's previous cases, particularly Bellotti v Baird, 443 US 622, 61 L Ed 2d 797, 99 S Ct 3035, which stands for the proposition that a two-parent consent law is constitutional if it provides for a sufficient judicial bypass alternative. See id., at 643, 61 L Ed 2d 797, 99 S Ct 3035 (opinion of Powell, J.); id., at 656-657, 61 L Ed 2d 797, 99 S Ct 3035 (White, J., dissenting). The conclusion that subdivision 6 must be sustained is compelled not only by Bellotti, but also by H. L. v Matheson, 450 US 398, 67 L Ed 2d 388, 101 S Ct 1164, in which the Court held that a two-parent notice statute without a bypass was constitutional as applied to immature minors whose best interests would be served by notice. If that is the case, but if such a law is not constitutional as applied to minors who are mature or whose best interest are not so served, a judicial bypass is an expeditious and efficient means by which to separate the applications of the law which are constitutional from those which are not.

Stevens, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, IV, and VII, in which Brennan, Marshall, Blackmun, and O'Connor, JJ., joined, an opinion with respect to Part III, in which Brennan, J., joined, an opinion with respect to Parts V and VI, in which O'Connor, J., joined, and a dissenting opinion with respect to Part VIII. O'Connor, J., filed an opinion concurring in part and concurring in the judgment. Marshall, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which Brennan and Blackmun, JJ., joined. Scalia, J., filed an opinion concurring in the judgment in part and dissenting in part. Kennedy, J., filed an opinion concurring in the judgment in part and dissenting in part, in which Rehnquist, C. J., and White and Scalia, JJ., joined.

APPEARANCES OF COUNSEL

Janet Benshoof argued the cause for petitioners in No. 88-1125 and respondents in No. 88-1309.

John R. Tunheim argued the cause for respondents in No. 88-1125 and petitioners in No. 88-1309.

Briefs of Counsel, p 876, infra.

OPINION OF THE COURT

[497 US 422]

Justice **Stevens** announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, IV, and VII, an opinion with respect to Part III in which Justice **Brennan** joins, an opinion with respect to Parts V and VI in which Justice **O'Connor** joins, and a dissenting opinion with respect to Part VIII.

A Minnesota statute, Minn Stat §§ 144.343(2)-(7) (1988), provides, with certain exceptions, that no abortion shall be performed on a woman under 18 years of age until at least 48 hours after both of her parents have been notified. In subdivisions 2-4 of the statute the notice is mandatory unless (1) the attending physician certifies that an immediate abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice; (2) both of her parents have consented in writing; or (3) the woman declares that she is a victim of parental abuse or neglect, in which event notice of her declaration must be given to the proper authorities. The United States Court of Appeals for the

[497 US 423]

Eighth Circuit, sitting en banc, unanimously held this provision unconstitutional. In No. 88-1309, we granted the State's petition to review that holding. Subdivision 6 of the same statute provides that if a court enjoins the enforcement of subdivision 2, the same notice requirement shall be effective unless the pregnant woman obtains a court order permitting the abortion to proceed. By a vote of 7 to 3, the Court of Appeals upheld the constitutionality of subdivision 6. In No. 88-1125, we granted the plaintiffs' petition to review that holding.

[1a, 2a] For reasons that follow, we now conclude that the requirement of notice to both of the pregnant minor's parents is not reasonably related to legitimate state interests and that subdivision 2 is unconstitutional. A different majority of the Court, for reasons stated in separate opinions, concludes that subdivision 6 is constitutional. Accordingly, the judgment of the Court of Appeals in its entirety is affirmed.

I

The parental notice statute was enacted in 1981 as an amendment to the Minors' Consent to Health Services Act. The earlier statute, which remains in effect as subdivision 1 of § 144.343 and as § 144.346, had modified the common-law requirement of parental consent for any medical procedure performed on minors. It authorized "[a]ny minor" to give effective consent without any parental involvement for the treatment of "pregnancy and conditions associated therewith, venereal disease, alcohol and other drug abuse."[1]

The statute, unlike others of its age,[2] applied to abortion services.

The 1981 amendment qualified the authority of an "unemancipated minor"[3] to give effective consent to an abortion by requiring that either her physician or an agent notify "the parent" personally or by certified mail at least 48 hours before the procedure is performed.[4] The term "parent" is defined in subdivision 3 to mean "both parents of the pregnant woman if they are both living." No exception is made for

a divorced parent, a noncustodial parent, or a biological parent who never married or lived with the pregnant woman's mother.[5] The statute does provide, however, that if only one parent is living, or "if the second one cannot be located through reasonably diligent effort," notice to one parent is

---

[1] Subdivision 1 of § 144.343 presently provides:

"Any minor may give effective consent for medical, mental and other health services to determine the presence of or to treat pregnancy and conditions associated therewith, venereal disease, alcohol and other drug abuse, and the consent of no other person is required."

The statute permits the health professional treating the minor to notify parents only when a failure to do so would jeopardize the minor's health. Minn Stat § 144.346 (1988).

[2] See Haw Rev Stat § 577A-2 (1976); Mo Rev Stat § 431.062 (Supp 1971). See generally Pilpel & Zuckerman, Abortion and the Rights of Minors, in Abortion, Society and the Law 275, 279-280 (D. Walbert & J. Butler eds 1973).

[3] Although there is no statutory definition of emancipation in Minnesota, see Streitz v Streitz, 363 NW2d 135, 137 (Minn App 1985), we have no reason to question the State's representation that Minn Stat §§ 144.341 and 144.342 (1988) apply to the minor's decision to terminate her pregnancy. Brief for Respondents in No. 88-1125, p 2, n 2. Those sections provide that a minor who is living separate and apart from her parents or who is either married or has borne a child may give effective consent to medical services without the consent of any other person.

The notification statute also applies to a woman for whom a guardian or conservator has been appointed because of a finding of incompetency. § 144.343(2). This portion of the statute is not challenged in this case.

[4] Subdivision 2 provides:

"Notwithstanding the provisions of section 13.02, subdivision 8, no abortion operation shall be performed upon an unemancipated minor . . . . until at least 48 hours after written notice of the pending operation has been delivered in the manner specified in subdivisions 2 to 4.

"(a) The notice shall be addressed to the parent at the usual place of abode of the parent and delivered personally to the parent by the physician or an agent.

"(b) In lieu of the delivery required by clause (a), notice shall be made by certified mail addressed to the parent at the usual place of abode of the parent with return receipt requested and restricted delivery to the addressee which means postal employee can only deliver the mail to the authorized addressee. Time of delivery shall be deemed to occur at 12 o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing."

[5] The Minnesota statute is the most intrusive in the Nation. Of the 38 States that require parental participation in the minor's decision to terminate her pregnancy, 27 make express that the participation of only one parent is required. An additional three States, Idaho, Tennessee, and Utah, require an unmarried minor to notify "the parents or guardian" but do not specify whether "parents" refers to either member of the parental unit or whether notice to one parent constitutes constructive notice to both. See Idaho Code § 18-609(6) (1987); Tenn Code Ann § 39-15-202(f) (Supp 1989); Utah Code Ann § 76-7-304(2) (1990). In contrast, Arkansas does require an unmarried minor to notify both parents but provides exceptions where the second parent "cannot be located through reasonably diligent effort," or a parent's "whereabouts are unknown," the parent has not been in contact with the minor's custodial parent or the minor for at least one year, or the parent is guilty of sexual abuse. Ark Code Ann §§ 20-16-802, 20-16-808 (Supp 1989). Delaware requires the consent only of parents who are residing in the same household; if the minor is not living with both of her parents, the consent of one parent is sufficient. Del Code Ann, Tit 24, § 1790(b)(3) (1987). Illinois law does not require the consent of a parent who

sufficient.[6] It also makes exceptions for cases in which emergency treatment prior to notice "is necessary to prevent the woman's death," both parents have already given their consent in writing, or the proper authorities are advised that the minor is a victim of sexual or physical abuse.[7] The statute subjects a person performing an abortion in violation of its terms to criminal sanctions and to civil liability in an action brought by any person "wrongfully denied notification."[8]

Subdivision 6 authorizes a judicial bypass of the two-parent notice requirement if subdivision 2 is ever "temporarily or permanently" enjoined by judicial order. If the preg-

---

has deserted the family or is not available. Ill Rev Stat, ch 38, ¶ 81-54(3) (1989). Kentucky requires an unmarried minor to obtain the consent of a legal guardian or "both parents, if available," but provides that if both parents are not available, the consent of the available parent shall suffice. Ky Rev Stat Ann §§ 311.732(2)(a), (b) (Michie 1990). Under Massachusetts law, an unmarried minor need obtain the consent of only one parent if the other parent "is unavailable to the physician within a reasonable time and in a reasonable manner," or if the parents are divorced and the other parent does not have custody. Mass Gen Laws § 112:12S (1988). Mississippi law requires only the consent of the parent with primary custody, care, and control of the minor if the parents are divorced or unmarried and living apart and, in all other cases, the consent of only one parent if the other parent is not available in a reasonable time or manner. Miss Code Ann § 41-41-53(2) (Supp 1989). Finally, North Dakota requires only the consent of the custodial parent if the parents are separated and divorced, or the legal guardian if the minor is subject to guardianship. ND Cent Code § 14-02.1-03.1 (1981).

[6] Subdivision 3 provides, in part:

"For purposes of this section, 'parent' means both parents of the pregnant woman if they are both living, one parent of the pregnant woman if only one is living or if the second one cannot be located through reasonably diligent effort, or the guardian or conservator if the pregnant woman has one."

[7] Subdivision 4 provides:

"No notice shall be required under this section if:

"(a) The attending physician certifies in the pregnant woman's medical record that the abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice; or

"(b) The abortion is authorized in writing by the person or persons who are entitled to notice; or

"(c) The pregnant minor woman declares that she is a victim of sexual abuse, neglect, or physical abuse as defined in section 626.556. Notice of that declaration shall be made to the proper authorities as provided in section 626.556, subdivision 3."

Under Minn Stat § 626.556 (1988), if the minor declares that she is the victim of abuse, the notified physician or physician's agent must report the abuse to the local welfare or law enforcement agency within 24 hours, §§ 626.556(3)(a), (3)(e), whereupon the welfare agency "shall immediately conduct an assessment and offer protective social services for purposes of preventing further abuses, safeguarding and enhancing the welfare of the abused or neglected minor, and preserving family life whenever possible." § 626.556(10)(a). If the agency interviews the victim, it must notify the parent of the fact of the interview at the conclusion of the investigation unless it obtains a court order. § 626.556(10)(c). Individuals who are subjects of the investigation have a right of access to the record of the investigation. § 626.556(11).

[8] Subdivision 5 provides:

"Performance of an abortion in violation of this section shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification. A person shall not be held liable under this section if the person establishes by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that the representations of the pregnant woman regarding information necessary to comply with this section are bona fide and true, or if the person has attempted with reasonable diligence to deliver notice, but has been unable to do so."

nant minor can convince "any judge of a court of competent jurisdiction" that she is "mature and capable of giving informed consent to the proposed abortion," or that an abortion without notice to both parents would be in her best interest, the court can authorize the physician to proceed without notice. The statute provides that the bypass procedure shall be confidential, that it shall be expedited, that the minor has a right to court-appointed counsel, and that she shall be afforded free access to the court "24 hours a day, seven days a week." An order denying an abortion can be appealed on an expedited basis, but an order authorizing an abortion without notification is not subject to appeal.[9]

The statute contains a severability provision, but it does not include a statement of its purposes. The Minnesota Attorney General has advised us that those purposes are apparent from the statutory text and that they "include the recognition and fostering of parent-child relationships, promoting counsel to a child in a difficult and traumatic choice, and providing for notice to those who are naturally most concerned for the child's welfare."[10] The District Court found that the primary purpose of the legislation was to protect the well-being of minors by encouraging them to discuss with their parents the decision whether to terminate their pregnancies.[11] It also found that the legislature was motivated by a

---

[9] Subdivision 6 provides:

"If subdivision 2 of this law is ever temporarily or permanently restrained or enjoined by judicial order, subdivision 2 shall be enforced as though the following paragraph were incorporated as paragraph (c) of that subdivision; provided, however, that if such temporary or permanent restraining order or injunction is ever stayed or dissolved, or otherwise ceases to have effect, subdivision 2 shall have full force and effect, without being modified by the addition to the following substitute paragraph which shall have no force or effect until or unless an injunction or restraining order is again in effect.

"(c)(i) If such a pregnant woman elects not to allow the notification of one or both of her parents or guardian or conservator, any judge of a court of competent jurisdiction shall, upon petition, or motion, and after an appropriate hearing, authorize a physician to perform the abortion if said judge determines that the pregnant women is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the pregnant woman is not mature, or if the pregnant woman does not claim to be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parents, guardian, or conservator would be in her best interests and shall authorize a physician to perform the abortion without such notification if said judge concludes that the pregnant woman's best interests would be served thereby.

"(ii) Such a pregnant woman may participate in proceedings in the court on her own behalf, and the court may appoint a guardian ad litem for her. The court shall, however, advise her that she has a right to court appointed counsel, and shall, upon her request, provide her with such counsel.

"(iii) Proceedings in the court under this section shall be confidential and shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant woman. A judge of the court who conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting the decision and shall order a record of the evidence to be maintained including the judge's own findings and conclusions.

"(iv) An expedited confidential appeal shall be available to any such pregnant woman for whom the court denies an order authorizing an abortion without notification. An order authorizing an abortion without notification shall not be subject to appeal. No filing fees shall be required of any such pregnant woman at either the trial or the appellate level. Access to the trial court for the purposes of such a petition or motion, and access to the appellate courts for purposes of making an appeal from denial of the same, shall be afforded such a pregnant woman 24 hours a day, seven days a week."

[10] Brief for Petitioner in No. 88-1309, p 4 (hereinafter Minn Br); see also id., at 8-9.

desire to deter and dissuade minors from choosing to terminate their pregnancies.[12] The Attorney General, however, disclaims any reliance on this purpose.[13]

II

This litigation was commenced on July 30, 1981, two days before the effective date of the parental notification statute. The plaintiffs include two Minnesota doctors who specialize in obstetrics and gynecology, four clinics providing abortion and contraceptive services in metropolitan areas in Minnesota, six pregnant minors representing a class of pregnant minors, and the mother of a pregnant minor. Plaintiffs alleged that the statute violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment and various provisions of the Minnesota Constitution.

Based on the allegations in their verified complaint, the District Court entered a temporary restraining order enjoining

the enforcement of subdivision 2 of the statute. After a hearing, the court entered a preliminary injunction which still remains in effect. App 31. The District Court refused, however, to rule on the validity of the judicial bypass procedure in advance of trial.[14]

In 1986, after a 5-week trial, the District Court concluded that both the two-parent notification requirement and the 48-hour waiting period were invalid. It further concluded that the definition of the term "parent," which is carried over into the notification requirement, was not severable from the remainder of the statute. The court declared the entire statute unconstitutional and enjoined the defendants from enforcing it.

A three-judge panel of the Court of Appeals affirmed. The court first held that a compulsory notification requirement is invalid if it does not provide the pregnant minor with the option of an alternative court procedure in which she can demonstrate either her maturity or that performance of an abortion without notification would be in her best interests. App to Pet for Cert in No. 88-1125, p 62a. Second, relying heavily on the findings of the District Court concerning the impact of a two-parent notice requirement on families in which the parents are divorced, separated, or unmarried, the panel also concluded that the unconstitutional notification requirement could not be saved by the judicial bypass. The court reasoned that a mature minor and her custodial parent are in a better position than a court to determine whether notifying the noncustodial parent would be in the child's best interests and that they should not be forced to submit to a "Hobson's choice" between an unconstitutional notice requirement and a burdensome court bypass.[15] The panel further

---

[11] "The Minnesota legislature had several purposes in mind when it amended Minn Stat § 144.343 in 1981. The primary purpose was to protect the well-being of minors by encouraging minors to discuss with their parents the decision whether to terminate their pregnancies. Encouraging such discussion was intended to achieve several salutory results. Parents can provide emotional support and guidance and thus forestall irrational and emotional decision-making. Parents can also provide information concerning the minor's medical history of which the minor may not be aware. Parents can also supervise post-abortion care. In addition, parents can support the minor's psychological well-being and thus mitigate adverse psychological sequelae that may attend the abortion procedure." 648 F Supp 756, 765-766 (Minn 1986).

[12] The District Court's finding 59 reads as follows:
"The court finds that a desire to deter and dissuade minors from choosing to terminate their pregnancies also motivated the legislature. Testimony before a legislative committee considering the proposed notification requirement indicated that influential supporters of the measure hoped it 'would save lives' by influencing minors to carry their pregnancies to term rather than aborting." Id., at 766.

[13] "The court also found that a desire to dissuade minors from choosing to terminate their pregnancies also motivated the legislature. Finding 59, Hodgson Appendix 25a. This finding was based on no more than the testimony before a legislative committee of some supporters of the act who hoped it 'would save lives.' There is no direct evidence, however, that this was the motive of any legislator." Minn Br 4, n 2.

[14] On January 23, 1985, the court granted partial summary judgment in favor of defendants on several of the plaintiffs' claims, but reserved ruling on the constitutionality of subdivision 6 as applied until after trial.

held that the two-parent notice requirement was not severable.[16]

The panel opinion was vacated, and the Court of Appeals reheard the case en banc. 853 F2d 1452 (CA8 1988). The court unanimously and summarily rejected the State's submission that the two-parent notice requirement was constitutional without any bypass procedure. Id., at 1456-1457. The majority concluded, however, that subdivision 6 of the statute was valid. It agreed with the District Court that the development of a full factual record may demonstrate that a facially valid statute is "unconstitutional in operation," id., at 1459, and that "the . . . detailed factual findings concerning the general difficulties of obtaining an abortion in Minnesota and the trauma of the bypass procedure, compared to its effectiveness, raise considerable questions about the practical

wisdom of this statute." Ibid. In the majority's opinion, however, those questions were for the legislature to consider because the statute served valid state interests: the interest in " 'encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child,' "[17] as well as the independent interest of the parents in the upbringing of their children.[18]

---

[15] "Where the underlying notification provision is unconstitutional because with respect to children of broken families it fails to further the state's significant interests, however, a mature minor or minor whose best interests are contrary to notifying the non-custodial parent is forced to either suffer the unconstitutional requirement or submit to the burdensome court bypass procedure. Such a Hobson's choice fails to further any significant interest. Just as there must be a constitutional judicial alternative to a notice requirement, so there must be a constitutional notice or consent alternative to the court bypass.

"The second reason for our conclusion that the court bypass procedure does not save the two-parent notification requirement is that where the parents are divorced, the minor and/or custodial parent, and not a court, is in the best position to determine whether notifying the non-custodial parent would be in the child's best interests. In situations where the minor has a good relationship with the non-custodial parent but the custodial parent does not, there is nothing to prevent the minor from consulting with the non-custodial parent if she so desires. The minor and custodial parent, however, by virtue of their major interest and superior position, should alone have the opportunity to decide to whom, if anyone, notice of the minor's abortion decision should be given." App to Pet for Cert in No. 88-1125, pp 68a-69a (citations omitted).

[16] The panel did not reach the question of the constitutionality or severability of the mandatory 48-hour waiting period. A concurring judge agreed with the panel that a requirement that a pregnant minor seeking an abortion notify a noncustodial parent could not withstand constitutional scrutiny and was not saved by a court bypass procedure. Id., at 72a.

After noting that the State did not challenge the District Court's findings, id., at 1462, the court concluded that these findings placed undue emphasis on one-parent and no-parent households. For even though the two-parent notice requirement may not further the interests of the pregnant minor in such cases, the rights of "best-interest" and mature minors were nevertheless protected by the bypass procedure. More importantly, "as applied to all pregnant minors, regardless of their family circumstances, the district court did not consider whether parental and family interests (as distinguished from the interests of the minor alone) justified the two-parent notice requirement." Id., at 1463. The court wrote:

> "The district court enjoined the entire statute because of the impact of the two-parent notice requirement primarily upon one group of pregnant minors, without considering the effect of the bypass, or the parental and family interests which have been recognized by the Supreme Court. In concentrating upon the impact of the statute on the pregnant minor not living with both parents, and on the mature or non best-interest pregnant
>
>
>
> minor, the district court gave only limited consideration to the 50% or more pregnant minors who live with both parents and to pregnant minors who are immature and whose best interests may require parental involvement. The district court's determination that an undue burden on the one group renders the statute unconstitutional for all is contrary to the Supreme Court's decision that a notice-consent/bypass procedure plainly serves important state interests and is narrowly drawn to protect only those interests. . . . Considering the statute as a whole and as applied to all pregnant minors, the two-parent notice requirement does not unconstitutionally burden the minor's abortion right." Id., at 1464-1465 (citation omitted).

The Court of Appeals also rejected the argument that the 48-hour waiting period imposed a significant burden on the minor's abortion right, finding that the waiting period could run concurrently with the scheduling of an appointment for the procedure. Accordingly, the court reversed the judgment of the District Court without reaching the question of severability.[19]

In dissent, two members of the court criticized the majority for ignoring "the evidence amassed in a five-week trial," for relying on the judicial bypass procedure "to uphold an unconstitutional two-parent notification requirement," and for creating "a new right, apparently of constitutional dimension, for non-custodial parents to receive notice of their minor children's activities." Id., at 1466. One of the dissenters joined a third dissenter in expressing the opinion that "a single-parent notification requirement would withstand constitutional challenge." Id., at 1472. We granted certiorari, 492 US 917, 106 L Ed 2d 587, 109 S Ct 3240 (1989).

---

[17] 853 F2d, at 1460, quoting from Justice Powell's opinion in Bellotti v Baird, 443 US 622, 640-641, 61 L Ed 2d 797, 99 S Ct 3035 (1979) (Bellotti II).

[18] The court also suggested that the statute furthered the "state interest in providing an opportunity for parents to supply essential medical and other information to a physician," 853 F2d, at 1461, but the State has not argued here that that interest provides an additional basis for upholding the statute.

[19] The court also rejected the argument that the statute violated the Equal Protection Clause by singling out abortion as the only pregnancy-related medical procedure requiring notification. Id., at 1466. The equal protection challenge is not renewed here.

III

There is a natural difference between men and women: Only women have the capacity to bear children. A woman's decision to conceive or to bear a child is a component of her liberty that is protected by the Due Process Clause of the Fourteenth Amendment to the Constitution. See Harris v McRae, 448 US 297, 316-318, 65 L Ed 2d 784, 100 S Ct 2671 (1980); Carey v Population Services International, 431 US 678, 685, 687, 52 L Ed 2d 675, 97 S Ct 2010 (1977); Cleveland Bd. of Education v LaFleur, 414 US 632, 639-640, 39 L Ed 2d 52, 94 S Ct 791 (1974); Roe v Wade, 410 US 113, 152-153, 35 L Ed 2d 147, 93 S Ct 705 (1973); id., at 168-170, 35 L Ed 2d 147, 93 S Ct 705 (Stewart, J., concurring); Eisenstadt v Baird, 405 US 438, 453, 31 L Ed 2d 349, 92 S Ct 1029 (1972); Griswold v Connecticut, 381 US 479, 502-503, 14 L Ed 2d 510, 85 S Ct 1678 (1965) (White, J., concurring in judgment). That Clause, as interpreted in those cases, protects the woman's right to make such decisions independently and privately, see Whalen v Roe, 429 US 589, 598-600, and n 23, 51 L Ed 2d 64, 97 S Ct 869 (1977), free of unwarranted governmental intrusion.

> "Moreover, the potentially severe detriment facing a pregnant woman, see Roe v Wade, 410 US, at 153 [35 L Ed 2d 147, 93 S Ct 705], is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. In addition, the fact of having a child brings with it adult legal responsibility, for parenthood, like attainment of the age of majority, is one of the traditional criteria for the termination of the legal disabilities of minority. In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible." Bellotti v Baird, 443 US 622, 642, 61 L Ed 2d 797, 99 S Ct 3035 (1979) (Bellotti II) (opinion of Powell, J.).

As we stated in Planned Parenthood of Central Mo. v Danforth, 428 US 52, 74, 49 L Ed 2d 788, 96 S Ct 2831 (1976), the right to make this decision "do[es] not mature and come into being magically only when

one attains the state-defined age of majority." Thus, the constitutional protection against unjustified state intrusion into the process of deciding whether or not to bear a child extends to pregnant minors as well as adult women.

In cases involving abortion, as in cases involving the right to travel or the right to marry, the identification of the constitutionally protected interest is merely the beginning of the analysis. State regulation of travel and of marriage is obviously permissible even though a State may not categorically exclude nonresidents from its borders, Shapiro v Thompson, 394 US 618, 631, 22 L Ed 2d 600, 89 S Ct 1322 (1969), or deny prisoners the right to marry, Turner v Safley, 482 US 78, 94-99, 96 L Ed 2d 64, 107 S Ct 2254 (1987). But the regulation of constitutionally protected decisions, such as where a person shall reside or whom he or she shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made. Cf. Turner v Safley, supra; Loving v Virginia, 388 US 1, 12, 18 L Ed 2d 1010, 87 S Ct 1817 (1967). In the abortion area, a State may have no obligation to spend its own money, or use its own facilities, to subsidize nontherapeutic abortions for minors or adults. See, e.g., Maher v Roe, 432 US 464, 53 L Ed 2d 484, 97 S Ct 2376 (1977); cf. Webster v Reproductive Health Services, 492 US 490, 508-511, 106 L Ed 2d 410, 109 S Ct 3040 (1989); id., at 523-524, 106 L Ed 2d 410, 109 S Ct 3040 (O'Connor, J., concurring in part and concurring in judgment). A State's value judgment favoring childbirth over abortion may provide adequate support for decisions involving such allocation of public funds, but not for simply substituting a state decision for an individual decision that a woman has a right to make for herself. Otherwise, the interest in liberty protected by the Due Process Clause would be a nullity. A state policy favoring childbirth over abortion is not in itself a sufficient justification for overriding the woman's decision or for placing "obstacles—absolute or otherwise—in the pregnant woman's path to an abortion." Maher, 432 US, at 474, 53 L Ed 2d 484, 97 S Ct 2376; see also Harris v McRae, 448 US, at 315-316, 65 L Ed 2d 784, 100 S Ct 2671.

In these cases the State of Minnesota does not rest its defense of this statute on any such value judgment. Indeed, it affirmatively disavows that state interest as a basis for upholding this law.[20] Moreover, it is clear that the state judges who have interpreted the statute in over 3,000 decisions implementing its bypass procedures have found no legislative intent to disfavor the decision to terminate a pregnancy. On the contrary, in all but a handful of cases they have approved such decisions.[21] Because the Minnesota statute unquestionably places obstacles in the pregnant minor's path to an abortion, the State has the burden of establishing its constitutionality. Under any analysis, the Minnesota statute cannot be sustained if the obstacles it imposes are not reasonably related to legitimate state interests. Cf. Turner v Safley, 482 US, at 97, 96 L Ed 2d 64, 107 S Ct 2254; Carey v Population Services International, 431 US, at 704, 52 L Ed 2d 675, 97 S Ct 2010 (opinion of Powell, J.); Doe v Bolton, 410 US 179, 194-195, 199, 35 L Ed 2d 201, 93 S Ct 739 (1973).

IV

The Court has considered the constitutionality of statutes providing for parental consent or parental notification in six abortion cases decided during the last 14 years.[22] Although the Massachusetts statute reviewed in Bellotti v Baird, 428 US 132, 49 L Ed 2d 844, 96 S Ct 2857 (1976) (Bellotti I), and Bellotti II required the consent of both parents, and the Utah statute reviewed in H. L.

---

[20] See n 14, supra.

[21] The District Court found:
"During the period for which statistics have been compiled, 3,573 bypass petitions were filed in Minnesota courts. Six petitions were withdrawn before decision. Nine petitions were denied and 3,558 were granted." Finding No. 55, 648 F Supp, at 765.

v Matheson, 450 US 398, 67 L Ed 2d 388, 101 S Ct 1164 (1981), required notice to "the parents,"[23] none of the opinions in any of those cases focused on the possible significance of making the consent or the notice requirement applicable to both parents instead of just one. In contrast, the arguments in these cases, as well as the extensive findings of the District Court, are directed primarily at that distinction. It is therefore appropriate to summarize these findings before addressing the constitutionality of the 48-hour waiting period or the two-parent notification requirement, particularly since none of the findings has been challenged in either this Court or the Court of Appeals.

Approximately one out of every two marriages ends in divorce. 648 F Supp 756, 768 (Minn 1986). Unrebutted evidence indicates that only 50% of minors in the State of Minnesota reside with both biological parents. Ibid.; App 125-126. This conclusion is substantially corroborated by a study indicating that 9% of the minors in Minnesota live with neither parent and 33% live with only one parent. 648 F Supp, at 768.[24]

The District Court found—on the basis of extensive testimony at trial—that the two-parent notification requirement had particularly harmful effects on both the minor and the custodial parent when the parents were divorced or separated. Relations between the minor and absent parent were not reestablished as a result of the forced notification, thereby often producing disappointment in the minor "when an anticipated reestablishment of her relationship with the absent parent d[id] not occur." Moreover, "[t]he reaction of the custodial parent to the requirement of forced notification is often one of anger, resentment and frustration at the intrusion of the absent parent," and fear that notification will threaten the custody rights of the parent or otherwise promote intrafamily violence. Tragically, those fears were often realized:

---

[22] Planned Parenthood of Central Mo. v Danforth, 428 US 52, 72-75, 49 L Ed 2d 788, 96 S Ct 2831 (1976); Bellotti v Baird, 428 US 132, 49 L Ed 2d 844, 96 S Ct 2857 (1976) (Bellotti I); Bellotti II, 443 US 622, 61 L Ed 2d 797, 99 S Ct 3035 (1979); H. L. v Matheson, 450 US 398, 67 L Ed 2d 388, 101 S Ct 1164 (1981); Akron v Akron Center for Reproductive Health, Inc. 462 US 416, 439-442, 76 L Ed 2d 687, 103 S Ct 2481 (1983); and Planned Parenthood Assn of Kansas City, Mo., Inc. v Ashcroft, 462 US 476, 490-493, 76 L Ed 2d 733, 103 S Ct 2517 (1983); id., at 505, 76 L Ed 2d 733, 103 S Ct 2517 (O'Connor, J., concurring in judgment in part and dissenting in part).

[23] The Utah statute reviewed in Matheson required the physician to "[n]otify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed." Utah Code Ann § 76-7-304(2)(1990). Unlike the Minnesota statute under review today, the Utah statute did not define the term "parents." The statute is ambiguous as to whether the term refers to each parent individually or rather to the parental unit, which could be represented by either the mother or the father, and neither the argument nor the discussion in Matheson indicated that notice to both parents was required. State law, to the extent it addresses the issue, is to the contrary: Although Utah law provides that a noncustodial parent retains the right to consent to marriage, enlistment, and the performance of major medical or surgical treatment, the right to notice of the minor's abortion is not among the parent's specific residual rights and duties. Utah Code Ann § 78-3a-2(13)(Supp 1989).

[24] The figures are not dissimilar to those throughout the Nation. See, e.g., Brief for American Psychological Association et al. as Amici Curiae 12-13 ("It is estimated that by age 17, 70 percent of white children born in 1980 will have spent at least some time with only one parent, and 94 percent of black children will have lived in one-parent homes") (citing Hofferth, Updating Children's Life Course, 47 J. Marriage and Fam. 93 (1985)).

> "Involuntary involvement of the second biological parent is especially detrimental when the minor comes from an abusive, dysfunctional family. Notification of the minor's pregnancy and abortion decision can provoke violence, even where the parents are divorced or separated. Studies have shown that violence and harassment may continue well beyond the divorce, especially when children are involved.
>
> ". . . Furthermore, a mother's perception in a dysfunctional family that there will be violence if the father learns of the daughter's pregnancy is likely to be an accurate perception." Id., at 769.

The District Court further found:

> "Twenty to twenty-five percent of the minors who go to court either are accompanied by one parent who knows and consents to the abortion or have already told one parent of their intent to terminate their pregnancy. The vast majority of these voluntarily informed parents
>
>
>
> are women who are divorced or separated from spouses whom they have not seen in years. Going to court to avoid notifying the other parent burdens the privacy of both the minor and the accompanying parent. The custodial parents are angry that their consent is not sufficient and fear that notification will bring the absent parent back into the family in an intrusive and abusive way." Ibid.

The District Court also found that the two-parent notification requirement had adverse effects in families in which the minor lives with both parents. These effects were particularly pronounced in the distressingly large number of cases in which family violence is a serious problem. The court found that many minors in Minnesota "live in fear of violence by family members" and "are, in fact, victims of rape, incest, neglect and violence."[25] The District Court found that few minors can take advantage of the exception for a minor who declares that she is a victim of sexual or physical abuse because of the obligation to report the information to the authorities and the attendant loss of privacy. See Findings 46 and 47,

---

[25] "Studies indicating that family violence occurs in two million families in the United States substantially underestimate the actual number of such families. In Minnesota alone, reports indicate that there are an average of 31,200 incidents of assault on women by their partners each year. Based on these statistics, state officials suggest that the 'battering' of women by their partners 'has come to be recognized as perhaps the most frequently committed violent crime in the state' of Minnesota. These numbers do not include incidents of psychological or sexual abuse, low-level physical abuse, abuse of any sort of the child of a batterer, or those incidents which are not reported. Many minors in Minnesota live in fear of violence by family members; many of them are, in fact, victims of rape, incest, neglect and violence. It is impossible to accurately assess the magnitude of the problem of family violence in Minnesota because members of dysfunctional families are characteristically secretive about such matters and minors are particularly reluctant to reveal violence or abuse in their families. Thus the incidence of such family violence is dramatically underreported." 648 F Supp, at 768-769.

[497 US 440]

648 F Supp, at 764.[26] This concern about family violence helps to explain why the District Court found that in many instances the requirement that both parents be notified actually impairs family communication. Minors who otherwise would inform one parent were unwilling to do so when such notification likely would also involve the parent in the torturous ordeal of explaining to a court why the second parent should not be notified. The court found:

> "Minors who ordinarily would notify one parent may be dissuaded from doing so by the two-parent requirement. A minor who must go to court for authorization in any event may elect not to tell either parent. In these instances, the requirement that minors notify both biological parents actually reduces parent-child communication." Id., at 769.[27]

The great majority of bypass petitions are filed in the three metropolitan counties in Minnesota, where courts schedule bypass hearings on a regular basis and have in place procedures for hearing emergency petitions. Id., at 762. Courts in the nonmetropolitan areas are acquainted with the statute and, for the most part, apply it conscientiously, but a number of counties are served by judges who are unwilling to hear bypass petitions. Id., at 763. Aside from the unavoidable

[497 US 441]

notification of court officials, the confidentiality of minors has been maintained. Ibid.

During the period between August 1, 1981, and March 1, 1986, 3,573 judicial bypass petitions were filed in Minnesota courts. All but 15 were granted.[28] The judges who adjudicated over 90% of these petitions testified; none of them identified any positive effects of the law.[29] The court experience produced fear, ten-

---

[26] "Minors who are victims of sexual or physical abuse often are reluctant to reveal the existence of the abuse to those outside the home. More importantly, notification to government authorities creates a substantial risk that the confidentiality of the minor's decision to terminate her pregnancy will be lost. Thus, few minors choose to declare they are victims of sexual or physical abuse despite the prevalence of such abuse in Minnesota, as elsewhere." Id., at 764.

[27] As one of the guardians ad litem testified, "We have had situations reported to me by my other guardians as well as teenagers that I talked to myself who have said that they will consider telling one parent, usually mom, sometimes dad, but since they would have to go to court anyway, because they are absolutely sure they don't want the other parent to know, they don't tell either one." App 239 (Testimony of Susanne Smith).

[28] See n 21, supra.

[29] One testified that minors found the bypass procedure "'a very nerve-racking experience,'" Finding 60, 648 F Supp, at 766; another testified that the minor's "'level of apprehension is twice what I normally see in court.'" Ibid. A Massachusetts judge who heard similar petitions in that State expressed the opinion that "going to court was 'absolutely' traumatic for minors . . . 'at a very, very difficult time in their lives.'" Ibid. One judge stated that he did not "perceive any useful public purpose to what I am doing in these cases" and that he did not "see anything that is being accomplished that is useful to anybody." Testimony of Gerald C. Martin, App in No. 86-5423 (CA8), pp A-488—A-489.

The public defenders and guardians ad litem gave similar testimony. See Testimony of Cynthia Daly (public defender), App 187 (bypass "was another hoop to jump through and a very damaging and stress-producing procedure that didn't do any good"); Testimony of Susanne Smith (guardian ad litem), id., at 234 ("The teenagers that we see in the guardian's office are very nervous, very scared. Some of them are terrified about court processes. They are often exhausted. . . . They are upset about and tell us that they are upset about the fact that they have to explain very intision, anxiety, and shame among minors,

[497 US 442]

causing some who were mature, and some whose best interests would have been served by an abortion, to "forego the bypass option and either notify their parents or carry to term." Finding 44, 648 F Supp, at 763. Among parents who supported their daughters in the bypass proceedings, the court experience evoked similar reactions.[30]

Scheduling petitions in the Minnesota court typically required minors to wait only two or three days for hearings. The District Court found, however, that the statutory waiting period of 48 hours was frequently compounded by a number of other factors that "commonly" created a delay of 72 hours, id., at 764-765, and, "in many cases" a delay of a week or more in effecting a decision to terminate a pregnancy. Id., at 765. A delay of that magnitude increased the medical risk associated with the abortion procedure to "a statistically significant degree." Finding 43, 648 F Supp, at 763. While recognizing that a mandatory delay following the notice to a minor's parent served the State's interest in protecting pregnant minors, the court found that that interest could be served by a shorter waiting period. Id., at 779-780.

At least 37 witnesses testified to the issue whether the statute furthered the State's interest in protecting pregnant minors. Only two witnesses testified that a two-parent notification statute did minors more good than harm; neither of these witnesses had direct experience with the Minnesota statute. Summarizing its findings on the question whether the statute as a whole furthered the State's interests, the District Court wrote:

> "Of the remaining witnesses who spoke to the issue whether Minn Stat § 144.343 effectuates the State's interest in protecting pregnant minors, all but four of
>
> [497 US 443]
>
> these are personally involved in the statute's implementation in Minnesota. They are judges, public defenders, guardians ad litem, and clinic counselors. None of these witnesses testified that the statute has a beneficial effect upon the minors whom it affects. Some testified the law has a negligible [e]ffect upon intra-family communication and upon the minors' decision-making process. Others testified the statute has a deleterious effect on the well-being of the minors to whom it applies because it increases the stress attendant to the abortion decision without creating any corresponding benefit.

---

mate details of their personal lives to strangers. They talk about feeling that they don't belong in the court system, that they are ashamed, embarrassed and somehow that they are being punished for the situation they are in"); Testimony of Heather Sweetland (public defender), App in No. 86-5423 (CA8), p A-585 ("Most of the women that are my clients in these hearings are scared . . . . Some of them will relax slightly but the majority of them are very nervous").

Doctor Hodgson, one of the plaintiffs in this case, testified that when her minor patients returned from the court process, "some of them are wringing wet with perspiration. They're markedly relieved, many of them. They—they dread the court procedure often more than the actual abortion procedure. And it—it's frequently necessary to give them a sedative of some kind beforehand." App 468.

[30] **30.** According to the testimony at trial, parents who participated in the bypass procedure—many of whom had never before been in court—were "real upset" about having to appear in court, id., at 167, and were "angry, they were worried about their kid and they were nervous too." Id., at 186.

Thus five weeks of trial have produced no factual basis upon which this court can find that Minn Stat § 144.343(2)-(7) on the whole furthers in any meaningful way the state's interest in protecting pregnant minors or assuring family integrity." Id., at 775.

Focusing specifically on the statutory requirement that both parents be notified, the District Court concluded:

> "The court finds that this requirement places a significant burden upon pregnant minors who do not live with both parents. Particularly in these cases, notification of an abusive, or even a disinterested, absent parent has the effect of reintroducing that parent's disruptive or unhelpful participation into the family at a time of acute stress. Similarly, the two-parent notification requirement places a significant obstacle in the path of minors in two parent homes who voluntarily have consulted with one parent but not with the other out of fear of psychological, sexual, or physical abuse toward either the minor or the notified parent. In either case, the alternative of going to court to seek authorization to proceed without notifying the second parent introduces a traumatic distraction into her relationship with the parent whom the minor has notified. The anxiety attending either option tends to interfere with and burden the parent-child communication
>
> **[497 US 444]**
>
> the minor voluntarily initiated with the custodial parent.
>
> . . . . .
>
> ". . . Indeed, 20 to 25% of minors seeking judicial authorization to proceed with an abortion without parental notification are accompanied to court by one parent, or at least have obtained the approval of one parent. In these cases the necessity either to notify the second parent despite the agreement of both the minor and the notified parent that such notification is undesirable, or to obtain a judicial waiver of the notification requirement, distracts the minor and her parent and disrupts their communication. Thus the need to notify the second parent or to make a burdensome court appearance actively interferes with the parent-child communication voluntarily initiated by the child, communication assertedly at the heart of the State's purpose in requiring notification of both parents. In these cases, requiring notification of both parents affirmatively discourages parent-child communication." Id., at 777-778.

V

Three separate but related interests—the interest in the welfare of the pregnant minor, the interest of the parents, and the interest of the family unit—are relevant to our consideration of the constitutionality of the 48-hour waiting period and the two-parent notification requirement.

[3a] The State has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely. See Bellotti II, 443 US, at 634-639, 61 L Ed 2d 797, 99 S Ct 3035 (opinion of Powell, J.); Prince v Massachusetts, 321 US 158, 166-167, 88 L Ed 645, 64 S Ct 438 (1944).[31] That interest, which justifies [497 US 445] state-imposed requirements that a minor obtain his or her parent's consent before undergoing an operation, marrying, or entering military service, see Parham v J. R., 442 US 584, 603-604, 61 L Ed 2d 101, 99 S Ct 2493 (1979); Planned Parenthood of Central Mo. v Danforth, 428 US, at 95, 49 L Ed 2d 788, 96 S Ct 2831 (White, J., concurring in part and dissenting in part); id., at 102-103, 49 L Ed 2d 788, 96 S Ct 2831 (Stevens, J., concurring in part and dissenting in part), extends also to the minor's decision to terminate her pregnancy. Although the Court has held that parents may not exercise "an absolute, and possibly arbitrary, veto" over that decision, Danforth, 428 US, at 74, 49 L Ed 2d 788, 96 S Ct 2831, it has never challenged a State's reasonable judgment that the decision should be made after notification to and consultation with a parent. See Ohio v Akron Center for Reproductive Health, post, at 510-511, 111 L Ed 2d 405, 110 S Ct 2972; Akron v Akron Center for Reproductive Health, Inc. 462 US 416, 428, n 10, 439, 76 L Ed 2d 687, 103 S Ct 2481 (1983); H. L. v Matheson, 450 US, at 409-410, 67 L Ed 2d 388, 101 S Ct 1164; Bellotti II, 443 US, at 640-641, 61 L Ed 2d 797, 99 S Ct 3035 (opinion of Powell, J.); Danforth, 428 US, at 75, 49 L Ed 2d 788, 96 S Ct 2831. As Justice Stewart, joined by Justice Powell, pointed out in his concurrence in Danforth:

> "There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child." Id., at 91, 49 L Ed 2d 788, 96 S Ct 2831.

Parents have an interest in controlling the education and upbringing of their children but that interest is "a counterpart of the responsibilities they have assumed." Lehr v Robertson, 463 US 248, 257, 77 L Ed 2d 614, 103 S Ct 2985 (1983); see also Parham, 442 US, at 602, 61 L Ed 2d 101, 99 S Ct 2493 (citing 1 W. Blackstone, Commentaries *447; [497 US 446] 2 J. Kent, Commentaries on American Law *190); Pierce v Society of Sisters, 268 US 510, 535, 69 L Ed 1070, 45 S Ct 571, 39 ALR 468 (1925). The fact of biological parentage generally offers a person only "an opportunity . . . to develop a relationship with his offspring." Lehr, 463 US, at 262, 77 L Ed 2d 614, 103 S Ct 2985; see also Caban v Mohammed, 441 US 380, 397, 60 L Ed 2d 297, 99 S Ct 1760 (1979) (Stewart, J., dissenting). But the demonstration of commitment to the child through the assumption of personal, financial, or custodial responsibility may give the natural parent a stake in the relationship with the child rising to the level of a liberty interest. See Stanley v Illinois, 405 US 645, 651, 31 L Ed 2d 551, 92 S Ct 1208 (1972); Lehr,

---

[31] "Properly understood . . . the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding." Bellotti II, 443 US, at 638-639, 61 L Ed 2d 797, 99 S Ct 3035 (opinion of Powell, J.).

See also Stanford v Kentucky, 492 US 361, 394-396, 106 L Ed 2d 306, 109 S Ct 2969 (1989) (Brennan, J., dissenting); Thompson v Oklahoma, 487 US 815, 825-826, n 23, 101 L Ed 2d 702, 108 S Ct 2687 (1988) (plurality opinion).

463 US, at 261, 77 L Ed 2d 614, 103 S Ct 2985; Michael H. v Gerald D., 491 US 110, 157-160, 105 L Ed 2d 91, 109 S Ct 2333 (1989) (White, J., dissenting); cf. Caban, 441 US, at 393, n 14, 60 L Ed 2d 297, 99 S Ct 1760. But see Michael H., 491 US, at 123-127, 105 L Ed 2d 91, 109 S Ct 2333 (plurality opinion).

While the State has a legitimate interest in the creation and dissolution of the marriage contract, see Sosna v Iowa, 419 US 393, 404, 42 L Ed 2d 532, 95 S Ct 553 (1975); Maynard v Hill, 125 US 190, 205, 31 L Ed 654, 8 S Ct 723 (1888), the family has a privacy interest in the upbringing and education of children and the intimacies of the marital relationship which is protected by the Constitution against undue state interference. See Wisconsin v Yoder, 406 US 205, 233-234, 32 L Ed 2d 15, 92 S Ct 1526 (1972); Griswold v Connecticut, 381 US, at 495-496, 14 L Ed 2d 510, 85 S Ct 1678 (Goldberg, J., concurring); Poe v Ullman, 367 US 497, 551-552, 6 L Ed 2d 989, 81 S Ct 1752 (1961) (Harlan, J., dissenting); Gilbert v Minnesota, 254 US 325, 335-336, 65 L Ed 287, 41 S Ct 125 (1920) (Brandeis, J., dissenting); see also Michael H., 491 US, at 132, 105 L Ed 2d 91, 109 S Ct 2333 (O'Connor, J., concurring in part); Roberts v United States Jaycees, 468 US 609, 618-620, 82 L Ed 2d 462, 104 S Ct 3244 (1984); Cleveland Bd. of Education v LaFleur, 414 US, at 639-640, 39 L Ed 2d 52, 94 S Ct 791. The family may assign one parent to guide the children's education and the other to look after their health.[32] "The statist notion that governmental power should supersede parental authority in

all cases because *some* parents abuse and neglect children is repugnant to American tradition." Parham, 442 US, at 603, 61 L Ed 2d 101, 99 S Ct 2493. We have long held that there exists a "private realm of family life which the state cannot enter." Prince v Massachusetts, 321 US, at 166, 88 L Ed 645, 64 S Ct 438. Thus, when the government intrudes on choices concerning the arrangement of the household, this Court has carefully examined the "governmental interests advanced and the extent to which they are served by the challenged regulation." Moore v East Cleveland, 431 US 494, 499, 52 L Ed 2d 531, 97 S Ct 1932 (1977) (plurality opinion); id., at 507, 510-511, 52 L Ed 2d 531, 97 S Ct 1932 (Brennan, J., concurring); see also Meyer v Nebraska, 262 US 390, 399-400, 67 L Ed 1042, 43 S Ct 625, 29 ALR 1446 (1923).

A natural parent who has demonstrated sufficient commitment to his or her children is thereafter entitled to raise the children free from undue state interference. As Justice White explained in his opinion for the Court in Stanley v Illinois, 405 US 645, 31 L Ed 2d 551, 92 S Ct 1208 (1972):

> "The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' Meyer v Nebraska, 262 US 390, 399 [67 L Ed 1042, 43 S Ct 625, 29 ALR 1446] (1923), 'basic civil rights of man,' Skinner v Oklahoma, 316 US 535, 541 [86 L Ed 1655, 62 S Ct 1110]

---

[32] Under common-law principles, one parent has authority to act as agent for the other in matters of their child's upbringing and education. See E. Spencer, Law of Domestic Relations 432 (1911); T. Reeve, Law of Baron and Femme 295 (1816).

(1942), and '[r]ights far more precious . . . than property rights,' May v Anderson, 345 US 528, 533 [97 L Ed 1221, 73 S Ct 840] (1953). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' Prince v Massachusetts, 321 US 158, 166 [88 L Ed 645, 64 S Ct 438] (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v Nebraska, supra, at 399 [67 L Ed 1042, 43 S Ct 625, 29 ALR 1446], the Equal Protection Clause of the Fourteenth Amendment, Skinner v Oklahoma, supra, at 541 [86 L Ed 1655, 62 S Ct 1110], and the Ninth Amendment, Griswold v **[497 US 448]** Connecticut, 381 US 479, 496 [14 L Ed 2d 510, 85 S Ct 1678] (1965) (Goldberg, J., concurring)." Id., at 651, 31 L Ed 2d 551, 92 S Ct 1208.[33]

VI

[3b] We think it is clear that a requirement that a minor wait 48 hours after notifying a single parent of her intention to get an abortion would reasonably further the legitimate state interest in ensuring that the minor's decision is knowing and intelligent. We have held that when a parent or another person has assumed "primary responsibility" for a minor's well-being, the State may properly enact "laws designed to aid discharge of that responsibility." Ginsberg v New York, 390 US 629, 639, 20 L Ed 2d 195, 88 S Ct 1274 (1968). To the extent that subdivision 2 of the Minnesota statute requires notification of only one parent, it does just that. The brief waiting period provides the parent the opportunity to consult with his or her spouse and a family physician, and it permits the parent to inquire into the competency of the doctor performing the abortion, discuss the religious or moral implications of the abortion decision, and provide the daughter needed guidance and counsel in **[497 US 449]** evaluating the impact of the decision on her future. See Zbaraz v Hartigan, 763 F2d 1532, 1552 (CA7 1985) (Coffey, J., dissenting), aff'd by an equally divided Court, 484 US 171, 98 L Ed 2d 478, 108 S Ct 479 (1987).

The 48-hour delay imposes only a minimal burden on the right of the minor to decide whether or not to terminate her pregnancy. Although the District Court found that scheduling factors, weather, and the minor's school and work commitments may combine, in many cases, to create a delay of a week or longer between the initiation of notification and the abortion, 648 F Supp, at 765, there is no evidence that the 48-hour period itself is unreasonable or longer than appropriate for adequate consultation between parent and child. The statute does not impose any period of delay once a court, acting in loco parentis, or the parents express their agreement that the minor is mature or that the procedure would be in her best interest. Indeed, as the Court of Appeals noted and the record reveals,[34] the 48-hour waiting period may run concurrently with the time necessary to make an appointment for the procedure, thus resulting in little or no delay.[35]

---

[33] "Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right." Poe v Ullman, 367 US 497, 551-552, 6 L Ed 2d 989, 81 S Ct 1752 (1961) (Harlan, J., dissenting).

Far more than contraceptives, at issue in Poe and Griswold v Connecticut, 381 US 479, 14 L Ed 2d 510, 85 S Ct 1678 (1965), the married couple has a well-recognized interest in protecting the sanctity of their communications from undue interference by the State. See, e.g., Stein v Bowman, 13 Pet 209, 223, 10 L Ed 129 (1839) ("This rule is founded upon the deepest and soundest principles of our nature. Principles which have grown out of those domestic relations, that constitute the basis of civil society; and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To break down or impair the great principles which protect the sanctities of husband and wife, would be to destroy the best solace of human existence"); 2 W. Best, Principles of Law of Evidence 994-995 (1st Am ed 1876); 1 S. Greenleaf, Law of Evidence 286-287 (12th ed 1866); 1 M. Phillips, Law of Evidence 69-80 (3d ed 1849).

VII

[1b] It is equally clear that the requirement that *both* parents be notified, whether or not both wish to be notified or have assumed responsibility for the upbringing of the child, does not reasonably further any legitimate state interest. The usual justification for a parental consent or notification provision is that it supports the authority of a parent who is presumed to act in the minor's best interest and thereby assures that the minor's decision to terminate her pregnancy is knowing, intelligent, and deliberate. To the extent that such an interest is legitimate, it would be fully served by a requirement that the minor notify one parent who can then seek the counsel of his or her mate or any other party, when such advice and support is deemed necessary to help the child make a difficult decision. In the ideal family setting, of course, notice to either parent would normally constitute notice to both. A statute requiring two-parent notification would not further any state interest in those instances. In many families, however, the parent notified by the child would not notify the other parent. In those cases the State has no legitimate interest in questioning one parent's judgment that notice to the other parent would not assist the minor or in presuming that the parent who has assumed parental duties is incompetent to make decisions regarding the health and welfare of the child.

---

[34] The record contains the telephone training manual of one clinic which contemplates that notification will be made on the date the patient contacts the clinic to arrange an abortion so that the appointment can be scheduled for a few days later. Since that clinic typically has a 1-to 2-day backlog, App 146-147, the statutory waiting period creates little delay.

[35] Akron v Akron Center for Reproductive Health, Inc., 462 US, at 449, 76 L Ed 2d 687, 103 S Ct 2481, upon which the plaintiffs rely, is not to the contrary. There we invalidated a provision that required that mature women, capable of consenting to an abortion, wait 24 hours after giving consent before undergoing an abortion. The only legitimate state interest asserted was that the "woman's decision be informed." Id., at 450, 76 L Ed 2d 687, 103 S Ct 2481. We decided that "if a woman, after appropriate counseling, is prepared to give her written informed consent and proceed with the abortion, a State may not demand that she delay the effectuation of that decision." Id., at 450-451, 76 L Ed 2d 687, 103 S Ct 2481. By contrast, in this case, the State asserts a legitimate interest in protecting minor women from their own immaturity. As we explain in the text, the right of the minor to make an informed decision to terminate her pregnancy is not defeated by the 48-hour waiting period. It is significant that the statute does not impose a waiting period if a substitute *competent* decisionmaker—a parent or court—gives affirmative consent to the abortion.

Not only does two-parent notification fail to serve any state interest with respect to functioning families, it disserves the state interest in protecting and assisting the minor with respect to dysfunctional families. The record reveals that in the thousands of dysfunctional families affected by this statute, the two-parent notice requirement proved positively harmful to the minor and her family. The testimony

at trial established that this requirement, ostensibly designed for the benefit of the minor, resulted in major trauma to the child, and often to a parent as well. In some cases, the parents were divorced and the second parent did not have custody or otherwise participate in the child's upbringing. App 244-245; id., at 466, id., at 115. In these circumstances, the privacy of the parent and child was violated, even when they suffered no other physical or psychological harm. In other instances, however, the second parent had either deserted or abused the child, id., at 462, 464, had died under tragic circumstances, id., at 120-121, or was not notified because of the considered judgment that notification would inflict unnecessary stress on a parent who was ill. Id., at 204, 465.[36] In these circumstances, the statute was not merely ineffectual in achieving the State's goals but actually counterproductive. The focus on notifying the second parent distracted both the parent and minor from the minor's imminent abortion decision.

[1c, 4] The State does not rely primarily on the best interests of the minor in defending this statute. Rather, it argues that, in the ideal family, the minor should make her decision only

after consultation with both parents who should naturally be concerned with the child's welfare and that the State has an interest in protecting the independent right of the parents "to determine and strive for what they believe to be best for their children." Minn Br 26. Neither of these reasons can justify the two-parent notification requirement. The second parent may well have an interest in the minor's abortion decision, making full communication among all members of a family desirable in some cases, but such communication may not be decreed by the State. The State has no more interest in requiring all family members to talk with one another than it has in requiring certain of them to live together. In Moore v East Cleveland, 431 US 494, 52 L Ed

---

[36] The most common reason for not notifying the second parent was that that parent was a child- or spouse-batterer, App 204, and notification would have provoked further abuse. For example, Judge Allen Oleisky, whose familiarity with the Minnesota statute is based on his having heard over 1,000 petitions from minors, id., at 154, testified that battering is a frequent crime in Minnesota, that parents seek an exemption from the notification requirement because they have been battered or are afraid of assault, and that notification of the father would "set the whole thing off again in some cases." Id., at 166-167. See also id., at 237, 245, 339. That testimony is confirmed by the uncontradicted testimony of one of plaintiffs' experts that notice of a daughter's pregnancy "would absolutely enrage [a batterer]. It would be much like showing a red cape to a bull. That kind of information just plays right into his worst fears and his most vulnerable spots. The sexual jealousy, his dislike of his daughter going out with anybody else, would make him very angry and would probably create severe abuse as well as long term communication difficulties." Id., at 194 (Testimony of Lenore Walker).

2d 531, 97 S Ct 1932 (1977), we invalidated a zoning ordinance which "slic[ed] deeply into the family itself," id., at 498, 52 L Ed 2d 531, 97 S Ct 1932, permitting the city to "standardiz[e] its children—and its adults—by forcing all to live in certain narrowly defined family patterns." Id., at 506, 52 L Ed 2d 531, 97 S Ct 1932. Although the ordinance was supported by state interests other than the State's interest in substituting its conception of family life for the family's own view, the ordinance's relation to those state interests was too "tenuous" to satisfy constitutional standards. By implication, a state interest in standardizing its children and adults, making the "private realm of family life" conform to some state-designed ideal, is not a legitimate state interest at all. See also Meyer v Nebraska, 262 US, at 399-400, 67 L Ed 1042, 43 S Ct 625, 29 ALR 1446 (right to establish a home and bring up children may not be interfered with by legislative action which is without "reasonable relation to some purpose within the competency of the State to effect").

[1d] Nor can any state interest in protecting a parent's interest in shaping a child's values and lifestyle overcome the liberty interests of a minor acting with the consent of a single parent or court. See Bellotti II, 443 US 622, 61 L Ed 2d 797, 99 S Ct 3035 (1979); Bellotti I, 428 US 132, 49 L Ed 2d 844, 96 S Ct 2857 (1976); Planned Parenthood of Central Mo. v Danforth, 428 US 52, 49 L Ed 2d 788, 96 S Ct 2831 (1976). In Danforth, the majority identified the only state interest in requiring parental consent

[497 US 453]

as that in "the safeguarding of the family unit and of parental authority" and held that that state interest was insufficient to support the requirement that mature minors receive parental consent. The Court summarily concluded that "[a]ny independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." Id., at 75, 49 L Ed 2d 788, 96 S Ct 2831. It follows that the combined force of the separate interest of one parent and the minor's privacy interest must outweigh the separate interest of the second parent.

[5a] In Bellotti I and Bellotti II, we also identified the difference between parental interests and the child's best interest. Although the District Court invalidated the Massachusetts statute there under review on the grounds that it permitted a parent or the court, acting in loco parentis, to refuse consent based on the parent's own interests, the state attorney general argued that the parental right consisted "'exclusively of the right to assess independently, for their minor child, what will serve that child's best interest.'" 428 US, at 144, 49 L Ed 2d 844, 96 S Ct 2857. Because we believed that the attorney general's interpretation "would avoid or substantially modify the federal constitutional challenge," id., at 148, 49 L Ed 2d 844, 96 S Ct 2857, we ordered the District Court to certify the state-law question to the Supreme Judicial Court of Massachusetts. Id., at 151-152, 49 L Ed 2d 844, 96 S Ct 2857. On review in this Court for the second time, after the Supreme Judicial Court stated unambiguously that the "good cause" standard required the judge to grant consent to an abortion found to be in the minor's best interest, 443 US, at 630, 644, 61 L Ed 2d 797, 99 S Ct 3035 (opinion of Powell, J.), we confirmed that such a construction satisfied "some of the concerns" about the statute's constitutionality, id., at 644, 61 L Ed 2d 797, 99 S Ct 3035, and thereby avoided "much of what was objectionable in the statute successfully challenged in Danforth," id., at 645, 61 L Ed 2d 797, 99 S Ct 3035. Indeed, the constitutional defects that Justice Powell identified in the statute—its failure to allow a minor who is found to be mature and fully competent to make the abortion

decision independently and its requirement of parental consultation even when an abortion without notification would be in the minor's best interests—are predicated on the assumption that the justification for any rule requiring parental involvement in the abortion decision rests entirely on the best interests of the child. Id., at 651, 61 L Ed 2d 797, 99 S Ct 3035.[37]

[1e] Unsurprisingly, the Minnesota two-parent notification requirement is an oddity among state and federal consent provisions governing the health, welfare, and education of children. A minor desiring to enlist in the armed services or the Reserve Officers' Training Corps (ROTC) need only obtain the consent of "his parent or guardian." 10 USC §§ 505(a), 2104(b)(4), 2107(b)(4) [10 USCS §§ 505(a), 2104(b)(4), 2107(b)(4)]. The consent of "a parent or guardian" is also sufficient to obtain a passport for foreign travel from the United States Department of State, 22 CFR § 51.27 (1989) (emphasis added), and to participate as a subject in most forms of medical research, 45 CFR §§ 46.404, 46.405 (1988). In virtually every State, the consent of one parent is enough to obtain a driver's license or operator's permit. The same may be said with respect to the decision to submit to any medical or surgical procedure other than an abortion.[38] Indeed, the only other Minnesota statute that the State has identified which requires two-parent consent

is that authorizing the minor to change his name. Tr of Oral Arg 30, 32; Reply Brief for Petitioner in No. 88-1309, p 5 (citing Minn Stat § 259.10 (1988)). These statutes provide testimony to the unreasonableness of the Minnesota two-parent notification requirement and to the ease with which the State can adopt less burdensome means to protect the minor's welfare. Cf. Clark v Jeter, 486 US 456, 464, 100 L Ed 2d 465, 108 S Ct 1910 (1988); Turner v Safley, 482 US, at 98, 96 L Ed 2d 64, 107 S Ct 2254. We therefore hold that this requirement violates the Constitution.

---

[37] **[5b]** Justice Kennedy recognizes that parental rights are coupled with parental responsibilities, post, at 483, 111 L Ed 2d, at 392, and that "a State [may] legislate on the premise that parents, as a general rule, are interested in their children's welfare and will act in accord with it," post, at 485, 111 L Ed 2d, at 393. That, of course, is precisely our point. What the State may not do is legislate on the generalized assumptions that a parent in an intact family will not act in his or her child's best interests and will fail to involve the other parent in the child's upbringing when that involvement is appropriate.

[38] See, e.g., Brief for American Psychological Association et al. as Amici Curiae 6, n 8 (state law typically allows a minor parent—whatever her age—to consent to the health care of her child); Brief for the American College of Obstetricians and Gynecologists et al. as Amici Curiae 25 ("In areas that do not deal with sexuality or substance abuse, states require, at most, a single parent's consent before performing medical procedures on a minor").

VIII

The Court holds that the constitutional objection to the two-parent notice requirement is removed by the judicial bypass option provided in subdivision 6 of the Minnesota statute. I respectfully dissent from that holding.

A majority of the Court has previously held that a statute requiring one parent's consent to a minor's abortion will be upheld if the State provides an "'alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests.'" Planned Parenthood Assn. of Kansas City, Mo., Inc. v Ashcroft, 462 US 476, 491, 76 L Ed 2d 733, 103 S Ct 2517 (1983) (opinion of Powell, J.); id., at 505, 76 L Ed 2d 733, 103 S Ct 2517 (opinion of O'Connor, J.). Indeed, in Bellotti II, four Members of the Court expressed the same opinion about a statute requiring the consent of both parents. See 443 US, at 643-644, 61 L Ed 2d 797, 99 S Ct 3035 (opinion of Powell, J.). Neither of those precedents should control our decision today.

In Bellotti II, eight Members of the Court joined the judgment holding the Massachusetts statute unconstitutional. Thus, the Court did not *hold* that the judicial bypass set forth in that statute was valid; it held just the opposite. Moreover, the discussion of the minimum requirements for a valid judicial bypass in Justice Powell's opinion was joined by only three other Members of the Court. Indeed, neither the arguments of the parties, nor any of the opinions in the case,

considered the significant difference between a statute requiring the involvement of *both* parents in the abortion decision and a statute that merely requires the involvement of one. Thus, the doctrine of stare decisis does not require that the standards articulated in Justice Powell's opinion be applied to a statute that mandates the involvement of both parents.

Unlike Bellotti II, the judgment in Ashcroft sustained the constitutionality of the statute containing a judicial bypass as an alternative to the requirement of *one* parent's consent to a minor's abortion. The distinctions between notice and consent and between notification of both parents rather than just one arguably constitute a sufficient response to an argument resting on stare decisis. Further analysis is necessary, however, because, at least on the surface, the consent requirement would appear to be more onerous than a requirement of mere notice.

The significance of the distinction between a statute requiring the consent of one parent and a statute requiring notice to both parents must be tested by the relationship of the respective requirements to legitimate state interests. We have concluded that the State has a strong and legitimate interest in providing a pregnant minor with the advice and support of a parent during the decisional period. A general rule requiring the minor to obtain the consent of one parent reasonably furthers that interest. An exception from the general rule is necessary to protect the minor from an arbitrary veto that is motivated by the separate concerns of the parent rather than the best interest of the child. Cf. Parham v J. R., 442 US, at 604-608, 61 L Ed 2d 101, 99 S Ct 2493.

But the need for an exception does not undermine the conclusion that the general rule is perfectly reasonable—just as a rule requiring the consent of either parent for any other medical procedure would surely be reasonable if an exception were made for those emergencies in which, for example, a parent might deny lifesaving

treatment to a child on religious grounds. See id., at 602-603, 61 L Ed 2d 101, 99 S Ct 2493.

For reasons already set forth at length, a rule requiring consent or notification of both parents is not reasonably related to the state interest in giving the pregnant minor the benefit of parental advice. The State has not called our attention to, nor am I aware of, any other medical situation in Minnesota or elsewhere in which the provision of treatment for a child has been conditioned on notice to, or consent by, both parents rather than just one. Indeed, the fact that one-parent consent is the virtually uniform rule for any other activity which affects the minor's health, safety, or welfare emphasizes the aberrant quality of the two-parent notice requirement.

A judicial bypass that is designed to handle exceptions from a reasonable general rule, and thereby preserve the constitutionality of that rule, is quite different from a requirement that a minor—or a minor and one of her parents—must apply to a court for permission to avoid the application of a rule that is not reasonably related to legitimate state goals. A requirement that a minor acting with the consent of *both* parents apply to a court for permission to effectuate her decision clearly would constitute an unjustified official interference with the privacy of the minor and her family. The requirement that the bypass procedure must be invoked when the minor and one parent agree that the other parent should not be notified represents an equally unjustified governmental intrusion into the family's decisional process. When the parents are living together and have joint custody over the child, the State has no legitimate interest in the communication between father and mother about the child. "[W]here the parents are divorced, the minor and/or custodial parent, and not a court, is in the best position to determine whether notifying the non-custodial parent would be in the child's best interests." App to Pet for Cert in No. 88-1125, p 69a. As the Court of Appeals panel originally

concluded, the "minor and custodial parent, . . . by virtue of their major interest and superior position, should alone have the opportunity to decide to whom, if anyone, notice of the minor's abortion decision should be given." Ibid. (citation omitted). I agree with that conclusion.

* * *

The judgment of the Court of Appeals in its entirety is affirmed.

It is so ordered.

SEPARATE OPINIONS

Justice **O'Connor,** concurring in part and concurring in the judgment in part.

I

I join all but Parts III and VIII of Justice Stevens' opinion. While I agree with some of the central points made in Part III, I cannot join the broader discussion. I agree that the Court has characterized "[a] woman's decision to conceive or to bear a child [as] a component of her liberty that is protected by the Due Process Clause of the Fourteenth Amendment to the Constitution." Ante, at 434, 111 L Ed 2d, at 360. See, e.g., Carey v Population Services International, 431 US 678, 685, 687, 52 L Ed 2d 675, 97 S Ct 2010 (1977); Griswold v Connecticut, 381 US 479, 502-503, 14 L Ed 2d 510, 85 S Ct 1678 (1965) (White, J., concurring in judgment). This Court extended that liberty interest to minors in Bellotti v Baird, 443 US 622, 642, 61 L Ed 2d 797, 99 S Ct 3035 (1979) (Bellotti II), and Planned Parenthood of Central Mo. v Danforth, 428 US 52, 74, 49 L Ed 2d 788, 96 S Ct 2831 (1976), albeit with some important limitations: "[P]arental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make important decisions. As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor." Bellotti II, supra, at 640-641, 61 L Ed 2d 797, 99 S Ct 3035 (opinion of Powell, J.); see also H. L. v Matheson, 450 US 398, 423, 67 L Ed 2d 388, 101 S Ct 1164 (1981) (Stevens, J., concurring in judgment); cf. Thompson v

Oklahoma, 487 US 815, 835, 101 L Ed 2d 702, 108 S Ct 2687 (1988) ("Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult"); Stanford v Kentucky, 492 US 361, 395, 106 L Ed 2d 306, 109 S Ct 2969 (1989) (Brennan, J., dissenting) ("[M]inors are treated differently from adults in our laws, which reflects the simple truth derived from communal experience, that juveniles as a class have not the level of maturation and responsibility that we presume in adults and consider desirable for full participation in the rights and duties of modern life").

It has been my understanding in this area that "[i]f the particular regulation does not 'unduly burde[n]' the fundamental right, . . . then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose." Akron v Akron Center for Reproductive Health, Inc. 462 US 416, 453, 76 L Ed 2d 687, 103 S Ct 2481 (1983) (O'Connor, J., dissenting); see also Webster v Reproductive Health Services, 492 US 490, 530, 106 L Ed 2d 410, 109 S Ct 3040 (1989) (O'Connor, J., concurring in part and concurring in judgment). It is with that understanding that I agree with Justice Stevens' statement that the "statute cannot be sustained if the obstacles it imposes are not reasonably related to legitimate state interests. Cf. Turner v Safley, 482 US, at 97 [96 L Ed 2d 64, 107 S Ct 2254]; Carey v Population Services International 431 US, at 704 [52 L Ed 2d 675, 97 S Ct 2010] (opinion of Powell, J.); Doe v Bolton, 410 US 179, 194-195, 199 [35 L Ed 2d 201, 93 S Ct 739] (1973)." Ante, at 436, 111 L Ed 2d, at 361.

I agree with Justice Stevens that Minnesota has offered no sufficient justification for its interference with the family's decisionmaking processes created by subdivision 2 of Minn Stat § 144.343 (1980)—two-parent notification. Subdivision 2 is the most stringent notification statute in the country. See ante, at 425, n 5, 111 L Ed 2d, at 354-355. The only other State that defines the generic term "parents," see, e. g., Tenn Code Ann § 36-1-201, Art III (6) (Supp 1989) (adoption statute) ("'Parents'

means either the singular or plural of the word 'parent' "); see also ante, at 437, n 23, 111 L Ed 2d, at 362, as "both parents" is Arkansas, and that statute provides for numerous exceptions to the two-parent notification requirement and permits bypassing notification where notification would not be in the best interests of the minor. See Ark Code Ann §§ 20-16-802, 20-16-804, 20-16-808 (Supp 1989).

The Minnesota exception to notification for minors who are victims of neglect or abuse is, in reality, a means of notifying the parents. As Justice Stevens points out, see ante, at 426, n 7, 111 L Ed 2d, at 355, to avail herself of the neglect or abuse exception, the minor must report the abuse. A report requires the welfare agency to immediately "conduct an assessment." Minn Stat § 626.556(10)(a) (1988). If the agency interviews the victim, it must notify the parent of the fact of the interview; if the parent is the subject of an investigation, he has a right of access to the record of the investigation. §§ 626.556(10)(c); 626.556(11); see also Tr of Oral Arg 19 ("[I]t turns out that the reporting statute in Minnesota requires that after it's reported to the welfare department, the welfare department has to do an assessment and tell the parents about the assessment. This could all be done in a time frame even before the abortion occurs"). The combination of the abused minor's reluctance to report sexual or physical abuse, see ante, at 440, n 26, 111 L Ed 2d, at 364, with the likelihood that invoking the abuse exception for the purpose of avoiding notice will result in notice, makes the abuse exception less than effectual.

Minnesota's two-parent notice requirement is all the more unreasonable when one considers that only half of the minors in the State of Minnesota reside with both biological parents. See ante, at 437, 111 L Ed 2d, at 362. A third live with only one parent. Ibid. Given its broad sweep and its failure to serve the purposes asserted by the State in too many cases, I join the Court's striking of subdivision 2.

II

[2b] In a series of cases, this Court has explicitly approved judicial bypass as a means of tailoring a parental consent provision so as to avoid unduly burdening the minor's limited right to obtain an abortion. See Bellotti v Baird, 428 US 132, 147-148, 49 L Ed 2d 844, 96 S Ct 2857 (1976); Planned Parenthood of Central Mo. v Danforth, 428 US 52, 49 L Ed 2d 788, 96 S Ct 2831 (1976); Bellotti II, 443 US, at 642-644, 61 L Ed 2d 797, 99 S Ct 3035 (opinion of Powell, J.). In Danforth, the Court stated that the

> "primary constitutional deficiency lies in [the notification statute's] imposition of an absolute limitation on the minor's right to obtain an abortion. . . . [A] materially different constitutional issue would be presented under a provision requiring parental consent or consultation in most cases but providing for prompt (i) judicial resolution of any disagreement between the parent and the minor, or (ii) judicial determination that

> the minor is mature enough to give an informed consent without parental concurrence or that abortion in any event is in the minor's best interest. Such a provision would not impose parental approval as an absolute condition upon the minor's right but would assure in most instances consultation between the parent and child." 428 US, at 90-91, 49 L Ed 2d 788, 96 S Ct 2831.

Subdivision 6 passes constitutional muster because the interference with the internal operation of the family required by subdivision 2 simply does not exist where the minor can avoid notifying one or both parents by use of the bypass procedure.

Justice **Marshall,** with whom Justice **Brennan** and Justice **Blackmun** join, concurring in part, concurring in the judgment in part, and dissenting in part.

I concur in Parts I, II, IV, and VII of Justice Stevens' opinion for the Court in No 88-1309.[1] Although I do

not believe that the Constitution permits a State to require a minor to notify or consult with a parent before obtaining an abortion, compare ante, at 445, 111 L Ed 2d, at 367, with infra, at 463-472, 111 L Ed 2d, at 379-385, I am in substantial agreement with the remainder of the reasoning in Part V of Justice Steven's opinion. For the reasons stated by the Court ante, at 450-455, 111 L Ed 2d, at 370-373, Minnesota's two-parent notification requirement is not even reasonably related to a legitimate state interest. Therefore, that requirement surely would not pass the strict scrutiny applicable to restrictions on a woman's fundamental right to have an abortion.

I dissent from the judgment of the Court in No. 89-1125, however, that the judicial bypass option renders the parental notification and 48-hour delay requirements constitutional. See ante, at 461, 111 L Ed 2d, at 377 (opinion of O'Connor, J.); post, at 497-501, 111 L Ed 2d, at 400-404 (opinion of Kennedy, J.). The bypass procedure cannot save those requirements because the bypass itself is unconstitutional both on its face and as applied. At the very least, this scheme substantially burdens a woman's right to privacy without advancing a compelling state interest. More significantly, in some instances it usurps a young woman's control over her own body by giving either a parent or a court the power effectively to veto her decision to have an abortion.

I

This Court has consistently held since Roe v Wade, 410 US 113, 35 L Ed 2d 147, 93 S Ct 705 (1973), that the constitutional right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Id., at 153, 35 L Ed 2d 147, 93 S Ct 705. We have also repeatedly stated that "[a] woman's right to make that choice freely is fundamental." Thornburgh v American College of Obstetricians and Gynecologists, 476 US 747, 772, 90 L Ed 2d 779, 106 S Ct 2169 (1986).

---

[1] I concur in Part VII on the understanding that the opinion does not dispute that a minor's liberty interest alone outweighs the interest of the second parent in shaping a child's values and lifestyles, regardless of the interest of the first parent. Cf. ante, at 452-453, 111 L Ed 2d, at 372.

Accord, Akron v Akron Center for Reproductive Health, Inc. 462 US 416, 420, n 1, 76 L Ed 2d 687, 103 S Ct 2481 (1983); Roe, supra, at 155, 35 L Ed 2d 147, 93 S Ct 705.

As we reiterated in American College of Obstetricians and Gynecologists, supra, "Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision—with the guidance of her physician and within the limits specified in Roe—whether to end her pregnancy." Id., at 772, 90 L Ed 2d 779, 106 S Ct 2169. Accordingly, we have subjected state laws limiting that right to the most exacting scrutiny, requiring a State to show that such a law is narrowly drawn to serve a compelling interest. Roe, supra, at 155, 35 L Ed 2d 147, 93 S Ct 705; Akron Center for Reproductive Health, supra, at 427, 76 L Ed 2d 687, 103 S Ct 2481. Only such strict judicial scrutiny is sufficiently protective of a woman's right to make the intensely personal decision whether to terminate her pregnancy.

Roe remains the law of the land. See Webster v Reproductive Health Services, 492 US 490, 521, 106 L Ed 2d 410, 109 S Ct 3040 (1989) (plurality opinion); id., at 525, 106 L Ed 2d 410, 109 S Ct 3040 (O'Connor, J., concurring in part and concurring in judgment); id., at 537, 560, 106 L Ed 2d 410, 109 S Ct 3040 (Blackmun, J., concurring in part and dissenting in part). Indeed, today's decision reaffirms the vitality of Roe, as five Justices have voted to strike down a state law restricting a woman's right to have an abortion. Accordingly, to be constitutional, state restrictions on abortion must meet the rigorous test set forth above.

II

I strongly disagree with the Court's conclusion that the State may constitutionally force a minor woman either to notify both parents (or in some cases only one parent[2]) and then wait 48 hours before proceeding with an abortion, or disclose her intimate affairs to a judge and ask that he grant her permission to have an abortion. See post, at 497-501, 111 L Ed 2d, at 400-404 (opinion of Kennedy, J.). Cf. ante, at 448-449, 111 L Ed 2d, at 369-370 (opinion of Stevens, J.) (finding that requiring minor to wait 48 hours after notifying *one* parent reasonably furthers legitimate state interest).

First, the parental notification and delay requirements significantly restrict a young woman's right to reproductive choice. I base my conclusion not on my intuition about the needs and attitudes of young women, but on a sizable and impressive collection of empirical data documenting the effects of parental notification statutes and of delaying an abortion. Second, the burdensome restrictions are not narrowly tailored to serve any compelling state interest. Finally, for the reasons discussed in Part III, infra, the judicial bypass procedure does not save the notice and delay requirements.

A

Neither the scope of a woman's privacy right nor the magnitude of a law's burden is diminished because a woman is a minor. Bellotti v Baird,

---

[2] The statute provides for one-parent notification where only one parent is living or where the second parent "cannot be located through reasonably diligent effort." Minn Stat § 144.343(3) (1988).

443 US 622, 642, 61 L Ed 2d 797, 99 S Ct 3035 (1979) (Bellotti II) (opinion of Powell, J.); Planned Parenthood of Central Mo. v Danforth, 428 US 52, 74, 49 L Ed 2d 788, 96 S Ct 2831 (1976). Rather, a woman's minority status affects only the nature of the State's interests. Although the Court considers the burdens that the two-parent notification requirement imposes on a minor woman's exercise of her right to privacy, ante, at 450-451, 111 L Ed 2d, at 371, and n 36, it fails to recognize that forced notification of only one parent also significantly burdens a young woman's right to have an abortion, see ante, at 459-460, 111 L Ed 2d, at 376-377 (opinion of O'Connor, J.); post, at 491-497, 111 L Ed 2d, at 397-401 (opinion of Kennedy, J.). Cf. ante, at 448-449, 111 L Ed 2d, at 369-370 (opinion of Stevens, J.).

A substantial proportion of pregnant minors voluntarily consult with a parent regardless of the existence of a notification requirement. See, e.g., Torres, Forrest, & Eisman, Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services, 12 Family Planning Perspectives 284, 287, 288, 290 (1980) (51% of minors discussed abortion with parents in the absence of a parental consent or notification requirement). Minors 15 years old or younger are even more likely voluntarily to discuss the abortion decision with their parents. Id., at 290 (69% of such minors voluntarily

discuss abortion with parents). For these women, the notification requirement by itself does not impose a significant burden. But for those young women who would choose not to inform their parents, the burden is evident: The notification requirement destroys their right to avoid disclosure of a deeply personal matter. Cf. Whalen v Roe, 429 US 589, 599-600, 51 L Ed 2d 64, 97 S Ct 869 (1977).

A notification requirement can also have severe physical and psychological effects on a young woman. First, forced notification of one parent, like forced notification of both parents, can be extremely traumatic for a young woman, depending on the nature of her relationship with her parents. Cf. ante, at 450-451, 111 L Ed 2d, at 371, and n 36. The disclosure of a daughter's intention to have an abortion often leads to a family crisis, characterized by severe parental anger and rejection. Osofsky & Osofsky, Teenage Pregnancy: Psychosocial Considerations, 21 Clinical Obstetrics and Gynecology 1161, 1164-1165 (1978). The impact of any notification requirement is especially devastating for minors who live in fear of physical, psychological, or sexual abuse. See, e. g., Clary, Minor Women Obtaining Abortions: A Study of Parental Notification in a Metropolitan Area, 72 American J of Pub Health 283, 284 (1982) (finding that many minors chose not to inform parents voluntarily because of fear of negative consequences such as physical punishment or other retaliation). See also Tr 911 (testimony of Dr. Elissa Benedek) (stating that usually minors accurately predict parental reaction to news about daughters' pregnancies). Cf. ante, at 438-440, 111 L Ed 2d, at 363, and n 25. Certainly, child abuse is not limited to families with two parents.

Second, the prospect of having to notify a parent causes many young women to delay their abortions, thereby increasing the health risks of the procedure. See Cates, Schulz,

& Grimes, The Risks Associated with Teenage Abortion, 309 New England J of Medicine 621, 623 (1983) (finding that for women 19 years old and younger, the number of deaths per 100,000 abortions was 0.2 for the first 8 weeks of pregnancy,

[497 US 466]

0.6 for weeks 9 through 12, 3.4 for weeks 13 through 16, and 7.8 for week 17 and after). See also H. L. v Matheson, 450 US 398, 439, 67 L Ed 2d 388, 101 S Ct 1164 (1981) (Marshall, J., dissenting). The risks posed by this delay are especially significant because adolescents already delay seeking medical care until relatively late in their pregnancies, when risks are higher. See 1 National Research Council, Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing 114 (C. Hayes ed 1987).

In addition, a notification requirement compels many minors seeking an abortion to travel to a State without such a requirement to avoid notifying a parent. Cartoof & Klerman, Parental Consent for Abortion: Impact of the Massachusetts Law, 76 American J of Pub Health 397, 399 (1986) (finding that one-third of minors seeking abortions traveled outside of State to avoid Massachusetts' parental notice requirement). Other women may resort to the horrors of self-abortion or illegal abortion rather than tell a parent. Torres, Forrest, & Eisman, supra, at 288 (9% of minors attending family planning clinics said they would have a self-induced or illegal abortion rather then tell a parent); H. L. v Matheson, supra, at 439 and n 26, 67 L Ed 2d 388, 101 S Ct 1164 (Marshall, J., dissenting). See also Greydanus & Railsback, Abortion in Adolescence, 1 Seminars in Adolescent Medicine 213, 214 (1985) (noting 100-times greater death rate for women who obtain illegal abortions than for those who obtain legal ones).[3] Still others would forgo an abortion entirely and carry the fetus to term, Torres, Forrest, & Eisman, supra, at 289, 291 (9% of minors in family planning clinics said they would carry fetus

[497 US 467]

to term rather than inform parents of decision to abort), subjecting themselves to the much greater health risks of pregnancy and childbirth and to the physical, psychological, and financial hardships of unwanted motherhood. See Greydanus & Railsback, supra, at 214 (noting that minor's overall risk of dying from childbirth is over nine times greater than risk of dying from legal abortion); Lewis, Minors' Competence to Consent to Abortion, 42 American Psychologist 84, 87 (1987) ("[P]regnancy continuation poses far greater psychological, physical, and economic risks to the adolescent than does abortion") (citation omitted). See also Bellotti II, 443 US, at 642, 61 L Ed 2d 797, 99 S Ct 3035 (opinion of Powell, J.) ("[C]onsidering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor"). Clearly, then, requiring notification of one parent significantly burdens a young woman's right to terminate her pregnancy.

---

[3] Dr. Jane Hodgson testified before the District Court that one 14-year-old patient, in order to keep her pregnancy private, tried to induce an abortion with the help of her friends by inserting a metallic object into her vagina, thereby tearing her body, scarring her cervix, and causing bleeding. When that attempt failed to induce an abortion, the patient, then four or five months pregnant, finally went to an abortion clinic. Because of the damage to the patient's cervix, doctors had to perform a hysterotomy, meaning that that woman must have a Cesarean section to deliver a child in the future. App 462.

B

The 48-hour delay *after* notification further aggravates the harm caused by the *pre*-notification delay that may flow from a minor's fear of notifying a parent. Moreover, the 48-hour delay burdens the rights of all minors, including those who would voluntarily consult with one or both parents.[4] Justice Stevens' assertion that the 48-hour delay "imposes only a minimal burden," ante, at 449, 111 L Ed 2d, at 369; see also post, at 496, 111 L Ed 2d, at 400-401 (opinion of Kennedy, J.), ignores the increased health risks and costs that this delay entails. The District Court specifically found as a matter of fact that "[d]elay of any length in performing an abortion increases the statistical risk of mortality and morbidity." 648 F Supp 756, 765 (Minn 1986). Even a brief delay can have a particularly detrimental impact if it pushes the abortion into the second trimester, when the operation is substantially more risky and costly. Ibid. See

also C. Tietze & S. Henshaw, Induced Abortion: A World Review 1986, pp 103-104 (6th ed 1986) (rate of major complications nearly doubles in the week following the end of the first trimester and increases significantly thereafter). Moreover, the District Court found that the 48-hour delay "frequently is compounded by scheduling factors such as clinic hours, transportation requirements, weather, a minor's school and work commitments, and sometimes a single parent's family and work commitments," often resulting in an effective delay of a week or more. 648 F Supp, at 765.[5] The increased risk caused by a delay of that magnitude, the District Court found, is statistically significant at any point in the pregnancy. Ibid. Certainly no pregnant woman facing these heightened risks to her health would dismiss them as "minimal."[6]

C

Because the parental notification

---

[4] As Justice Stevens notes, ante, at 449, and n 35, 111 L Ed 2d, at 370, the 48-hour delay does not apply if a parent or court consents to the abortion.

[5] Although these other factors would constrain a young woman's ability to schedule an abortion even in the absence of the 48-hour delay requirement, the addition of the immutable statutory delay reduces both the woman's and the clinic's scheduling flexibility and thus can exacerbate the effect of the other factors. For instance, a woman might contact a clinic on Monday and find that her schedule and the clinic's allow for only a Tuesday appointment for that week. Without the 48-hour delay requirement, the woman could be treated the next day; with the statutory delay, however, the woman would be forced to wait a week.

[6] Justice Stevens concludes that the 48-hour delay requirement actually results in "little or no delay" because the statutory period "may run concurrently with the time necessary to make an appointment for the procedure." Ante, at 449, 111 L Ed 2d, at 370. See also post, at 496, 111 L Ed 2d, at 401 (opinion of Kennedy, J.) ("48-hour waiting period . . . results in little or no delay"); 853 F2d 1452, 1465 (CA8 1988) (en banc). Justice Stevens bases this conclusion on the testimony of the coadministrator of one abortion clinic that a 1- or 2-day scheduling backlog was typical. Ante, at 449, n 34, 111 L Ed 2d, at 370. "One or two days," however, obviously means that the backlog is not necessarily 48 hours. Furthermore, that witness also stated that if "a woman says that she must be seen on a particular day our policy is we will always see her." App 147. But because of the mandated 48-hour delay, the clinic cannot honor a woman's request for an abortion until at least two full days have elapsed. The testimony therefore is hardly sufficient to justify ignoring the District Court's factual finding with regard to the effects of the delay requirement.

and delay requirements burden a young woman's right freely to decide whether to terminate her pregnancy, the State must show that these requirements are justified by a compelling state interest and are closely tailored to further that interest. The main purpose of the notification requirement is to "protect the well-being of minors by encouraging minors to discuss with their parents the decision whether to terminate their pregnancies" Id., at 766. The 48-hour delay, in turn, is designed to provide parents with adequate time to consult with their daughters. Ante, at 448-449, 111 L Ed 2d, at 369-370 (opinion of Stevens, J.); post, at 496, 111 L Ed 2d, at 400-401 (opinion of Kennedy, J.). As Justice Stevens states, such consultation is intended to ensure that the minor's decision is "knowing and intelligent." Ante, at 448, 111 L Ed 2d, at 369. I need not determine whether the State's interest ultimately outweighs young women's privacy interests, however, because the strictures here are not closely tailored to further the State's asserted goal.

For the many young women who would voluntarily consult with a parent before having an abortion, see supra, at 464-465, 111 L Ed 2d, at 379-380, the notification and delay requirements are superfluous, and so do not advance the State's interest. The requirements affect only those women who would not otherwise notify a parent. But compelled notification is unlikely to result in productive consultation in families in which a daughter does not feel comfortable consulting her parents about intimate or sexual matters. See Melton, Legal Regulation of Adolescent Abortion: Unintended Effects, 42 American Psychologist 79, 81 (1987) (stating that in many families, compelled parental notification is unlikely to result in meaningful discussion about the daughter's predicament); Tr 1357-1358 (testimony of Dr. Steven Butzer) (stating that involuntary disclosure is disruptive to family and has "almost universally negative" effects, in accord with minor's expectations).

Moreover, in those families with a history of child abuse, a pregnant minor forced to notify a parent is more likely to be greeted by physical assault or psychological harassment than open and caring conversation about her predicament. See Tr 316 (testimony of Dr. Lenore Walker) (stating that forced notification in dysfunctional families is likely to sever communication patterns and increase the risk of violence); H. L. v Matheson, 450 US, at 446, 67 L Ed 2d 388, 101 S Ct 1164 (Marshall, J., dissenting). Forced notification in such situations would amount to punishing the daughter for the lack of a stable and communicative family environment, when the blame for that situation lies principally, if not entirely, with the parents. Parental notification in the less-than-ideal family, therefore, would not lead to an informed decision by the minor.[7]

---

[7] The State also asserts that the requirements permit parents to provide doctors with relevant information about their daughters' medical history and "to assist with ensuring that proper after-care procedures are followed." Brief for Petitioners in No. 88-1309, pp 34-36. See also ante, at 448, 111 L Ed 2d, at 369 (opinion of Justice Stevens) (delay period "permits the parent to inquire into the competency of the doctor performing the abortion"). If these are actual state interests, it seems peculiar that the State does not try to facilitate similar parental involvement in minors' treatment for pregnancy and childbirth, see infra this page, 111 L Ed 2d, at 384, which pose far greater risks to the minor's

The State also claims that the statute serves the interest of protecting parents' independent right "to shape the[ir] child[ren]'s values and life style[s]" and "to determine and strive for what they believe to be best for their children." Brief for Petitioners in No. 88-1309, p 26. If this is so, the statute is surely underinclusive, as it does not require parental notification where the minor seeks medical treatment for pregnancy, venereal disease, or alcohol and other drug abuse. See Minn Stat § 144.343(1) (1988). Are we to believe that

Minnesota parents have no interest in their children's well-being in these other contexts?

In any event, parents' right to direct their children's upbringing is a right against state interference with family matters. See, e. g., Prince v Massachusetts, 321 US 158, 166, 88 L Ed 645, 64 S Ct 438 (1944) (noting that this Court's decisions "have respected the private realm of family life which the state cannot enter"). See also Wisconsin v Yoder, 406 US 205, 232, 32 L Ed 2d 15, 92 S Ct 1526 (1972); Pierce v Society of Sisters, 268 US 510, 534-535, 69 L Ed 1070, 45 S Ct 571, 39 ALR 468 (1925). Yet, ironically, the State's requirements here affirmatively interfere in family life by trying to force families to conform to the State's archetype of the ideal family. Cf. Moore v East Cleveland, 431 US 494, 506, 52 L Ed 2d 531, 97 S Ct 1932 (1977) (plurality opinion) ("[T]he Constitution prevents [the State] from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns"); ante, at 452, 111 L Ed 2d, at 372. It is a strange constitutional alchemy that would transform a limitation on state power into a justification for governmental intrusion into family interactions. Moreover, as a practical matter, "state intervention is hardly likely to resurrect parental authority that the parents themselves are unable to preserve." H. L. v Matheson, supra, at 448, 67 L Ed 2d 388, 101 S Ct 1164 (Marshall, J., dissenting). See also Planned Parenthood of Central Mo. 428 US, at 75, 49 L Ed 2d 788, 96 S Ct 2831 (finding it unlikely that parental veto power over abortion "will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure").

Even if the State's interest is construed as merely the *facilitation* of the exercise of parental authority, the notification and delay requirements are not narrowly drawn. Parental authority is not limitless. Certainly where parental involvement threatens to harm the child, the parent's authority must yield. Prince v Massachusetts, supra, at 169-170, 88 L Ed 645, 64 S Ct 438; H. L. v Matheson, supra, at 449, 67 L Ed 2d 388, 101 S Ct 1164 (Marshall, J., dissenting). Yet the notification and delay requirements facilitate

the exercise of parental authority even where it may physically or psychologically harm the child. See supra, at 470, 111 L Ed 2d, at 383.

---

health than abortion, see supra, at 466-467, 111 L Ed 2d, at 381. In any event, compelled notification is unlikely to result in helpful parental involvement in those families in which a parent reacts to the news of the daughter's predicament by rejecting or abusing the young woman. See supra this page, 111 L Ed 2d, at 383.

Furthermore, the exercise of parental authority in some instances will take the form of obstructing the minor's decision to have an abortion. A parent who objects to the abortion, once notified, can exert strong pressure on the minor—in the form of stern disapproval, withdrawal of financial support, or physical or emotional abuse—to block her from getting an abortion. See Bellotti II, 443 US, at 647, 61 L Ed 2d 797, 99 S Ct 3035 (opinion of Powell, J.) ("[M]any parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct . . . an abortion"). See also H. L. v Matheson, 450 US, at 438-439, 67 L Ed 2d 388, 101 S Ct 1164 (Marshall, J., dissenting). In such circumstances, the notification requirement becomes, in effect, a consent requirement. As discussed below, infra, at 473, 111 L Ed 2d, at 385-386, the State may not permit any person, including a parent, to veto a woman's decision to terminate her pregnancy. Because the notification and delay requirements effectively give parents the opportunity to exercise an unconstitutional veto in some situations, those requirements are not narrowly tailored to the State's interest in facilitating *legitimate* exercises of parental authority.

III

The parental notification and 48-hour delay requirements, then, do not satisfy the strict scrutiny applicable to laws restricting a woman's constitutional right to have an abortion. The judicial bypass procedure cannot salvage those requirements because that procedure itself is unconstitutional.

A

The State argues that the bypass procedure saves the notification and delay requirements because it provides an alternative way to obtain a legal abortion for minors who would be harmed by those requirements. This Court has upheld a

one-parent consent requirement where the State provided an alternative judicial procedure " 'whereby a pregnant minor [could] demonstrate that she [was] sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests.' " Planned Parenthood Assn. of Kansas City, Mo., Inc. v Ashcroft, 462 US 476, 491, 76 L Ed 2d 733, 103 S Ct 2517 (1983) (opinion of Powell, J.) (quoting Akron Center for Reproductive Health, 462 US, at 439-440, 76 L Ed 2d 687, 103 S Ct 2481).

I continue to believe, however, that a judicial bypass procedure of this sort is itself unconstitutional because it effectively gives a judge "an absolute veto over the decision of the physician and his patient." Planned Parenthood Assn. of Kansas City, supra, at 504, 76 L Ed 2d 733, 103 S Ct 2517 (Blackmun, J., concurring in part and dissenting in part); see also Bellotti II, 443 US, at 655, 61 L Ed 2d 797, 99 S Ct 3035 (Stevens, J., concurring in judgment) ("The provision of an absolute veto to a judge . . . is to me particularly troubling. . . . It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties") (footnote omitted); Planned Parenthood of Central Mo., supra, at 74, 49 L Ed 2d 788, 96 S Ct 2831 ("[T]he

State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent"). No person may veto *any* minor's decision, made in consultation with her physician, to terminate her pregnancy. An "immature" minor has no less right to make decisions regarding her own body than a mature adult.

Minnesota's bypass provision allows a judge to authorize an abortion if he determines either that a woman is sufficiently mature to make the decision on her own or, if she is not sufficiently mature, that an abortion without parental notification would serve her best interests. Minn Stat § 144.343(6) (1988). Of course, if a judge refuses to authorize

an abortion, a young woman can then reevaluate whether she wants to notify a parent. But many women will carry the fetus to term rather than notify a parent. See supra, at 466-467, 111 L Ed 2d, at 381. Other women may decide to inform a parent but then confront parental pressure or abuse so severe as to obstruct the abortion. For these women, the judge's refusal to authorize an abortion effectively constitutes an absolute veto.

The constitutional defects in any provision allowing someone to veto a woman's abortion decision are exacerbated by the vagueness of the standards contained in this statute. The statute gives no guidance on how a judge is to determine whether a minor is sufficiently "mature" and "capable" to make the decision on her own. See Minn Stat § 144.343(6)(c)(i) (1988) (judge shall authorize abortion if he "determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion"). Cf. Lewis, 42 American Psychologist, at 84, 87 (noting the absence of a judicial standard for assessing maturity). The statute similarly is silent as to how a judge is to determine whether an abortion without parental notification would serve an immature minor's "best interests." § 144.343(6)(c)(i) (judge shall authorize abortion for immature minor without notification "if said judge concludes that the pregnant woman's best interests would be served thereby"). Is the judge expected to know more about the woman's medical needs or psychological makeup than her doctor? Should he consider the woman's financial and emotional status to determine the quality of life the woman and her future child would enjoy in this world? Neither the record nor the Court answers such questions. As Justice Stevens wrote in Bellotti II, the best interest standard "provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores whose enforcement upon the minor—particularly when contrary to her own informed and reasonable decision—is fundamentally at odds with privacy interests underlying the constitutional protection

afforded to her decision." 443 US, at 655-656, 61 L Ed 2d 797, 99 S Ct 3035 (opinion concurring in judgment). It is difficult to conceive of any reason, aside from a judge's personal opposition to abortion, that would justify a finding that an immature woman's best interests would be served by forcing her to endure pregnancy and childbirth against her will.

B

Even if I did not believe that a judicial bypass procedure was facially unconstitutional, the experience of Minnesota's procedure in operation demonstrates that the bypass provision before us cannot save the parental notification and delay requirements. This Court has addressed judicial bypass procedures only in the context of facial challenges. See Planned Parenthood Assn. of Kansas City, 462 US, at 490-493, 76 L Ed 2d 733, 103 S Ct 2517 (opinion of Powell, J.); Akron Center for Reproductive Health, 462 US, at 439-442, 76 L Ed 2d 687, 103 S Ct 2481; Bellotti II, 443 US, at 643-644, 61 L Ed 2d 797, 99 S Ct 3035 (opinion of Powell, J.). The Court has never considered the actual burdens a particular bypass provision imposes on a woman's right to choose an abortion. Such consideration establishes that, even if judges authorized every abortion sought by petitioning minors, Minnesota's judicial bypass is far too burdensome to remedy an otherwise unconstitutional statute.

The District Court found that the bypass procedure imposed significant burdens on minors. First, "scheduling practices in Minnesota courts typically require minors to wait two or three days between their first contact with the court and the hearing on their petitions. This delay may combine with other factors to result in a delay of a week or more." 648 F Supp, at 763. As noted above, supra, at 467-468, 111 L Ed 2d, at 382, a delay of only a few days can significantly increase the health risks to the minor; a week-long delay inevitably does. Furthermore, in several counties in Minnesota, no judge is willing to hear bypass petitions, forcing women in those areas to travel long distances to obtain a hearing. 648 F Supp, at

763; Donovan, Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions, 15 Family Planning Perspectives 259, 264 (1983) (50% of Minnesota minors utilizing bypass were not residents of city in which court was located); Melton, 42 American Psychologist, at 80 ("In Minnesota, where judges in rural counties have often recused themselves from participation in the abortion hearings, minors sometimes have to travel a round-trip of more than 500 miles for the hearing"). The burden of such travel, often requiring an overnight stay in a distant city, is particularly heavy for poor women from rural areas. Furthermore, a young woman's absence from home, school, or work during the time required for such travel and for the hearing itself can jeopardize the woman's confidentiality. See ibid.

The District Court also found that the bypass procedure can be extremely traumatic for young women.

> "The experience of going to court for a judicial authorization produces fear and tension in many minors. Minors are apprehensive about the prospect of facing an authority figure who holds in his hands the power to veto their decision to proceed without notifying one or both parents. Many minors are angry and resentful at being required to justify their decision before complete strangers. Despite the confidentiality of the proceeding, many minors resent having to reveal intimate details of their personal and family lives to these strangers. Finally, many minors

are left feeling guilty and ashamed about their lifestyle and their decision to terminate their pregnancy. Some mature minors and some minors in whose best interests it is to proceed without notifying their parents are so daunted by the judicial proceeding that they forego the bypass option and either notify their parents or carry to term.

"Some minors are so upset by the bypass proceeding that they consider it more difficult than the medical procedure itself. Indeed the anxiety resulting from the bypass

[497 US 477]

proceeding may linger until the time of the medical procedure and thus render the latter more difficult than necessary." 648 F Supp, at 763-764.[8]

Yet, despite the substantial burdens imposed by these proceedings, the bypass is, in effect, a "rubber stamp," id., at 766 (testimony of Hon. William Sweeney); only an extremely small number of petitions are denied, id., at 765. See also Melton, supra, at 80 ("Available research indicates that judicial bypass proceedings are merely pro forma. Although they represent substantial intrusion on minors' privacy and take up significant amounts of court time, there is no evidence that they promote more reasoned decisionmaking or screen out adolescents who may be particularly immature or vulnerable. . . . The hearings typically last less than 15 minutes. . . . Despite the complex issues involved (maturity and the best interests of the minor), experts are rarely if ever called to testify"). The judges who have adjudicated over 90% of the bypass petitions between 1981 and 1986 could not identify any positive effects of the bypass procedure. See 648 F Supp, at 766; ante, at 441-442, 111 L Ed 2d, at 364, and n 29. The large number of women who undergo the bypass process do not receive any sort of counseling from the court—which is not surprising, given the court's limited role and lack of expertise in that area. The bypass process itself thus cannot serve the state interest of promoting informed decisionmaking by all minors. If the State truly were concerned about ensuring

[497 US 478]

that all minors consult with a knowledgeable and caring adult, it would provide for some form of counseling rather than for a judicial procedure in which a judge merely gives or withholds his consent.[9]

---

[8] Dr. Hodgson testified that some minors dread the court procedure so much that they become "wringing wet with perspiration" and frequently require a sedative beforehand. App 468. One judge who has heard a significant number of bypass petitions testified that the court experience is " 'very nervewracking' " for young women. 648 F Supp, at 766. Another testified that pregnant minors' " 'level of apprehension is twice what I normally see in court. . . . You see all the typical things that you would see with somebody under incredible amounts of stress, answering monosyllabically, tone of voice, tenor of voice, shaky, wringing of hands, you know, one young lady had her—her hands were turning blue and it was warm in my office.' " Ibid.

[9] Maine, for example, requires that a minor obtain the consent of a parent, guardian, or adult family member; undergo a judicial bypass; *or* receive counseling from the physician or a counselor according to specified criteria. See Me Rev Stat Ann, Tit 22, § 1597-A (Supp 1989). Wisconsin requires abortion providers to encourage parental notification unless they determine that the minor has a valid reason for not notifying her parents. Wis Stat § 146.78 (1987-1988). In the latter situation, the provider must encourage—but not require—the minor to notify "another family member, close family friend, school counselor, social worker or other appropriate person." § 146.78(5)(c). I express no opinion on

Thus, regardless of one's view of the facial validity of a bypass procedure, Minnesota's procedure in practice imposes an excessive burden on young women's right to choose an abortion. Cf. Bellotti II, 443 US, at 655, 61 L Ed 2d 797, 99 S Ct 3035 (Stevens, J., concurring in judgment) ("[T]he need to commence judicial proceedings in order to obtain a legal abortion would impose a burden at least as great as, and probably greater than, that imposed on the minor child by the need to obtain the consent of a parent"). Furthermore, the process does not serve the State's interest of ensuring that minors' decisions are informed. Surely, then, a State could not require that *all* minor women seeking an abortion obtain judicial approval.[10] The Court's holding that the burdensome bypass procedure saves the State's burdensome notification and delay requirements

thus strikes me as the equivalent of saying that two wrongs make a right. I cannot accept such a novel judicial calculus.

IV

A majority of the Court today strikes down an unreasonable and vastly overbroad requirement that a pregnant minor notify both her parents of her decision to obtain an abortion. With that decision I agree. At the same time, though, a different majority holds that a State may require a young woman to notify one or even both parents and then wait 48 hours before having an abortion, as long as the State provides a judicial bypass procedure. From that decision I vehemently dissent. This scheme forces a young woman in an already dire situation to choose between two fundamentally unacceptable alternatives: notifying a possibly dictatorial or even abusive parent and justifying her profoundly personal decision in an intimidating judicial proceeding to a blackrobed stranger. For such a woman, this dilemma is more likely to result in trauma and pain than in an informed and voluntary decision.

Justice **Scalia,** concurring in the judgment in part and dissenting in part.

As I understand the various opinions today: One Justice holds that two-parent notification is unconstitutional (at least in the present circumstances) without judicial bypass, but constitutional with bypass, ante, at 459-461, 111 L Ed 2d, at 376-378 (O'Connor, J., concurring in part and concurring in judgment in part); four Justices would hold that two-parent notification is constitutional with or without bypass, post, at 488-497, 111 L Ed 2d, at 395-401 Kennedy, J., concurring in judgment in part and dissenting in part); four Justices would hold that

---

the constitutionality or efficacy of these schemes, but raise them only as examples of alternatives that seem more closely related than a judicial bypass procedure to the goal of ensuring that the minor's decision is informed.

In any event, most abortion clinics already provide extensive counseling. See 1 National Research Council, Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing 191-192 (C. Hayes ed 1987) (90% of abortion clinics routinely provide counseling for all first-abortion patients, and all clinics make counseling available to all patients on request).

[10] Indeed, the State conceded in oral argument before the Eighth Circuit, sitting en banc, that a judicial approval provision by itself would be unconstitutional. See 853 F2d, at 1469 (Lay, C. J., dissenting).

two-parent notification is unconstitutional with or without bypass, though the four apply two different standards, ante, at 455-458, 111 L Ed 2d, at 374-375 (opinion of Stevens, J.), ante, at 472-479, 111 L Ed 2d, at 385-389 (Marshall, J., concurring in part, concurring in judgment in part and dissenting in part);

six Justices hold that one-parent notification with bypass is constitutional, though for two different sets of reasons, Ohio v Akron Center for Reproductive Health, post, at 510-517, 111 L Ed 2d 405, 110 S Ct 2972; post, at 522-524, 111 L Ed 2d 405, 110 S Ct 2972 (Stevens, J., concurring in part and concurring in judgment); and three Justices would hold that one-parent notification with bypass is unconstitutional, post, at 526-527, 111 L Ed 2d 405, 110 S Ct 2972 (Blackmun, J., dissenting). One will search in vain the document we are supposed to be construing for text that provides the basis for the argument over these distinctions; and will find in our society's tradition regarding abortion no hint that the distinctions are constitutionally relevant, much less any indication how a constitutional argument about them ought to be resolved. The random and unpredictable results of our consequently unchanneled individual views make it increasingly evident, Term after Term, that the tools for this job are not to be found in the lawyer's—and hence not in the judge's—workbox. I continue to dissent from this enterprise of devising an Abortion Code, and from the illusion that we have authority to do so.

Justice **Kennedy,** with whom The **Chief Justice,** Justice **White,** and Justice **Scalia** join, concurring in the judgment in part and dissenting in part.

" 'There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support.' " Bellotti v Baird (Bellotti II), 443 US 622, 640-641, 61 L Ed 2d 797, 99 S Ct 3035 (1979) (opinion of Powell, J.) (quoting Planned Parenthood of Central Mo. v Danforth, 428 US 52, 91, 49 L Ed 2d 788, 96 S Ct 2831 (1976) (Stewart, J., concurring)); see also H. L. v Matheson, 450 US 398, 409-411, 67 L Ed 2d 388, 101 S Ct 1164 (1981); id., at 422-423, 67 L Ed 2d 388, 101 S Ct 1164 (Stevens, J., concurring in judgment); Danforth, supra, at 94-95, 49 L Ed 2d 788, 96 S Ct 2831 (White, J., concurring in part and dissenting in part); id., at 102-103, 49 L Ed 2d 788, 96 S Ct 2831 (Stevens, J., concurring in

part and dissenting in part). Today, the Court holds that a statute requiring a minor to notify both parents that she plans to have an abortion is not a permissible means of furthering the interest described with such specificity in Bellotti II. This conclusion, which no doubt will come as a surprise to most parents, is incompatible with our constitutional tradition and any acceptable notion of judicial review of legislative enactments. I dissent from the portion of the Court's judgment affirming the Court of Appeal's conclusion that the Minnesota's two-parent notice statute is unconstitutional.

[2c] The Minnesota statute also provides, however, that if the two-parent notice requirement is invalidated, the same notice requirement is effective unless the pregnant minor obtains a court order permitting the abortion to proceed. Minn Stat § 144.343(6) (1988). The Court of Appeals sustained this portion of the statute, in effect a two-parent notice requirement with a judicial bypass. Five Members of the Court, the four who join this opinion and Justice O'Connor, agree with the Court of Appeals' decision on this aspect of the statute. As announced by Justice Stevens, who dissents from this part of the Court's decision, the Court of Appeals' judgment on this portion of the statute is therefore affirmed.

I

The provisions of the statute before us are straightforward. In essence, the statute provides that before a physician in Minnesota may perform an abortion on an unemancipated minor, the physician or the physician's agent must notify both of the minor's parents, if each one can be located through reasonable effort, either personally or by certified mail at least 48 hours before the abortion is performed. Minn Stat §§ 144.343(2)-(3) (1988). Notification is not required if the abortion is necessary to prevent the minor's death; or if both parents have consented to the abortion; or if the minor declares that she is the victim of sexual abuse, neglect, or physical abuse. § 144.343(4). Failure to comply

[497 US 482]

with these requirements is a misdemeanor, and the statute authorizes a civil action against the noncomplying physician by the minor's parents. § 144.343(5).

The statute also provides that, if a court enjoins the notice requirement of subdivision 2, parental notice under the subdivision shall still be required, unless the minor obtains a court order dispensing with it. Under the statute, the court is required to authorize the physician to perform the abortion without parental notice if the court determines that the minor is "mature and capable of giving informed consent to the proposed abortion" or that "the performance of an abortion upon her without notification of her parents, guardian, or conservator would be in her best interests." § 144.343(6).

II

The State identifies two interests served by the law. The first is the State's interest in the welfare of pregnant minors. The second is the State's interest in acknowledging and promoting the role of parents in the care and upbringing of their children. Justice Stevens, writing for two Members of the Court, acknowledges the legitimacy of the first interest, but decides that the second interest is somehow illegitimate, at least as to whichever parent a minor chooses not to notify. I cannot agree that the Constitution prevents a State from keeping both parents informed of the medical condition or medical treatment of their child under the terms and conditions of this statute.

The welfare of the child has always been the central concern of laws with regard to minors. The law does not give to children many rights given to adults, and provides, in general, that children can exercise the rights they do have only through and with parental consent. Parham v J. R., 442 US 584, 621, 61 L Ed 2d 101, 99 S Ct 2493 (1979) (Stewart, J., concurring in judgment). Legislatures historically have acted on the basis of the qualitative differences in maturity between children and adults, see Schall v Martin, 467 US 253, 265-567, 81 L Ed 2d 207, 104 S Ct 2403 (1984); Thompson

[497 US 483]

v Oklahoma, 487 US 815, 853-854, 101 L Ed 2d 702, 108 S Ct 2687 (1988) (O'Connor, J., concurring in judgment) (collecting cases); Stanford v Kentucky, 492 US 361, 384, 106 L Ed 2d 306, 109 S Ct 2969 (1989) (Brennan, J., dissenting), and not without reason. Age is a rough but fair approximation of maturity and judgment, and a State has an interest in seeing that a child, when confronted with serious decisions such as whether or not to abort a pregnancy, has the assistance of her parents in making the choice. If anything is settled by our previous cases dealing with parental notification and consent laws, it is this point. See Bellotti II, 443 US, at 640-641, 61 L Ed 2d 797, 99 S Ct 3035 (opinion of Powell, J.); Matheson, 450 US, at 409-411, 67 L Ed 2d 388, 101 S Ct 1164; id., at 422-423, 67 L Ed 2d 388, 101 S Ct 1164 (Stevens, J., concurring in judgment).

Protection of the right of each parent to participate in the upbringing of her or his own children is a further discrete interest that the State recognizes by the statute. The common law historically has given recognition to the right of parents, not merely to be notified of their children's actions, but to speak and act on their behalf. Absent a showing of neglect or abuse, a father "possessed the paramount right to the custody and control of his minor children, and to superintend their education and nurture." J. Schouler, Law of Domestic Relations 337 (3d ed 1882); see also 1 W. Blackstone, Commentaries *452-*453; 2 J. Kent, Commentaries on American Law *203-*206; G. Field, Legal Relations of Infants 63-80 (1888). In this century, the common law of most States has abandoned the idea that parental rights are vested solely in fathers, with mothers being viewed merely as agents of their husbands, cf. ante, at 446, n 32, 111 L Ed 2d, at 368; it is now the case that each parent has parental rights and parental responsibilities, see W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts, ch 4, § 18, p 115 (5th ed 1984). Limitations have emerged on the prerogatives of parents to act contrary to the best interests of the child with respect to matters such as compulsory schooling and child labor. As a general matter, however, it remains

[497 US 484]

"cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v Massachusetts, 321 US 158, 166, 88 L Ed 645, 64 S Ct 438 (1944). "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." Wisconsin v Yoder, 406 US 205, 232, 32 L Ed 2d 15, 92 S Ct 1526 (1972); see also Pierce v Society of Sisters, 268 US 510, 535, 69 L Ed 1070, 45 S Ct 571, 39 ALR 468 (1925).

A State pursues a legitimate end under the Constitution when it attempts to foster and preserve the parent-child relationship by giving all parents the opportunity to participate in the care and nurture of their children. We have held that parents have a liberty interest, protected by the Constitution, in having a reasonable opportunity to develop close relations with their children. See Santosky v Kramer, 455 US 745, 753-754, 71 L Ed 2d 599, 102 S Ct 1388 (1982); Caban v Mohammed, 441 US 380, 60 L Ed 2d 297, 99 S Ct 1760 (1979); Stanley v Illinois, 405 US 645, 651-652, 31 L Ed 2d 551, 92 S Ct 1208 (1972). We have recognized, of course, that there are limits to the constitutional right of parents to have custody of, or to participate in decisions affecting, their children. If a parent has relinquished the opportunity to develop a relationship with the child, and his or her only link to the child is biological, the Constitution does not require a State to allow parental participation. See Lehr v Robertson, 463 US 248, 261-265, 77 L Ed 2d 614, 103 S Ct 2985 (1983); Quilloin v Walcott, 434 US 246, 254-256, 54 L Ed 2d 511, 98 S Ct 549 (1978). But the fact that the Constitution does not protect the parent-child relationship in all circumstances does not mean that the State cannot attempt to foster parental participation where the Constitution does not demand that it do so. A State may seek to protect and facilitate the parent-child bond on the assumption that parents will act in their child's best interests. See Parham v J. R., supra, at 602-603, 61 L Ed 2d 101, 99 S Ct 2493; Ginsberg v New York, 390 US 629, 639, 20 L Ed 2d 195, 88 S Ct 1274 (1968). Indeed,

[497 US 485]

we have held that a State cannot terminate parental rights based upon a presumption that a class of parents is unfit without affording individual parents an opportunity to rebut the presumption. See Stanley, supra, at 654-658, 31 L Ed 2d 551, 92 S Ct 1208; Santosky, supra, at 753, 71 L Ed 2d 599, 102 S Ct 1388 ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents . . ."). If a State cannot legislate on the broad assumption that classes of parents are unfit and undeserving of parental rights without affording an opportunity to rebut the assumption, it is at least permissible for a State to legislate on the premise that parents, as a general rule, are interested in their children's welfare and will act in accord with it.

The Court's descriptions of the State's interests in this case are caricatures, both of the law and of our most revered institutions. The Court labels these interests as ones in "standardizing its children and adults," and in ensuring that each family, to the extent possible, "conform to some state-designed ideal." Ante, at 452, 111 L Ed 2d, at 372; see also ante, at 471, 111 L Ed 2d, at 384 (Marshall, J., concurring in part, concurring in judgment in part, and dissenting in part) (accusing Minnesota of "trying to force families to conform to the State's archetype of the ideal family"). Minnesota asserts no such purpose, by explicit statement or by any permissible inference. All that Minnesota asserts is an interest in seeing that parents know about a vital decision facing their child. That interest is a valid one without regard to whether the child is living with either one or both parents, or to the attachment between the minor's parents. How the family unit responds to such notice is, for the most part, beyond the State's control. The State would no doubt prefer that all parents, after being notified under the statute, would contact their daughters and assist them in making their decisions with the child's best interests at heart; but it has not, contrary to the Court's intimation, "decreed" communication, nor could it. What

[497 US 486]

the State can do is make the communication possible by at least informing parents of their daughter's intentions.

Minnesota has done no more than act upon the common-sense proposition that, in assisting their daughter in deciding whether to have an abortion, parents can best fulfill their roles if they have the same information about their own child's medical condition and medical choices as the child's doctor does; and that to deny parents this knowledge is to risk, or perpetuate, estrangement or alienation from the child when she is in the greatest need of parental guidance and support. The Court does the State, and our constitutional tradition, sad disservice by impugning the legitimacy of these elemental objectives.

Given the societal interest that underlies parental notice and consent laws, it comes as no surprise that most States have enacted statutes requiring that, in general, a physician must notify or obtain the consent of at least one of her parents or legal guardian before performing an abortion on a minor. See Wardle, "Time Enough": Webster v Reproductive Health Services and the Prudent Pace of Justice, 41 Fla L Rev 881, 963-965 (1989) (collecting statutes). Five States, including Minnesota, appear to require, as a general rule, the notification of both parents before a physician may perform an abortion on a minor. See Ark Code Ann §§ 20-16-801 through 20-16-808 (Supp 1989); Idaho Code § 18-610(6) (1987); Tenn Code Ann § 39-15-202(f) (Supp 1989); Utah Code Ann § 76-7-304 (1990). Another six States appear to require, with varying exceptions, the consent of both parents. See Del Code Ann, Tit 24, § 1790(b)(3) (1987); Ill Rev Stat, ch 38, ¶ 81-54(3) (1989); Ky Rev Stat Ann § 311.732 (Michie 1990); Mass Gen Laws § 112:12S (1988); Miss Code Ann § 41-41-53 (Supp 1989); ND Cent Code § 14-02.1-03.1 (1981). Whether these statutes are more or less restrictive than the Minnesota statute is not the issue, although I pause to note that because the Court's decision today turns upon its perception that the law's requirements,

[497 US 487]

despite its exceptions, are the most "stringent" in the country, see ante, at 459, 111 L Ed 2d, at 377 (O'Connor, J., concurring in part and concurring in judgment), the Court's decision has no import for the validity of these other statutes. What is important is that Minnesota is not alone in acknowledging the vitality of these governmental interests and adopting laws that, in the legislature's judgment, are best suited to serving them while protecting the minor's welfare.

On a more general level, the current trend among state legislatures is to enact joint custody laws making it the norm for divorced or separated parents to share the legal responsibility and authority for making decisions concerning their children's care, education, religion, and medical treatment. See 2 H. Clark, Law of Domestic Relations in the United States § 20.5 (2d ed 1987); Folberg, Joint Custody Law—The Second Wave, 23 J Family L 1, 14-55 (1984-1985) (collecting statutes). Under Minnesota law, for example, there exists a presumption in divorce proceedings that joint custody, if requested by either or both parents, is in the best interests of the child. See Minn Stat § 518.17(2) (Supp 1989). Even if joint custody is not awarded, Minnesota law provides that each parent, unless the court specifically directs otherwise to protect the welfare of a parent or the child, "has the right of access to, and to receive copies of, school, medical, dental, religious training, and other important records and information about the minor children"; the responsibility to "keep the other party informed as to the name and address of the school of attendance of the minor children"; the responsibility to "notify the other party of [an accident or serious illness of a minor child], and the name of the health care provider and the place of treatment"; and "the right to reasonable access and telephone contact with the minor children." Minn Stat § 518.17(3) (1988). Minnesota's two-parent notification law does no more than apply these general principles to the specific case of abortion.

[497 US 488]

Federal law contains similar provisions regulating the health and welfare of children that require the notification or consent of both parents. For example, one condition for obtaining a grant under the Adolescent Family Life Act is that an applicant must provide assurances that it will "notify the parents or guardians of any unemancipated minor requesting services [relating to family planning] from the applicant and . . . will obtain the permission of such parents or guardians with respect to the provision of such services." 42 USC § 300z-5(a)(22)(A)(i) (1982 ed) [42 USCS § 300z-5(a)(22)(A)(i)]; see § 300z-5(a)(22)(A)(ii) (requiring only notice to parents or guardians if the unemancipated minor is pregnant). See also 42 USC § 5671(d) (1982 ed, Supp V) [42 USCS § 5671(d)] (authorizing funding for certain experimental juvenile drug and alcohol treatment programs if safeguards are established for obtaining the informed consent of the "parents or guardians" of minors); 50 USC App § 454(c)(4) (1982 ed) [50 USCS Appx § 454(c)(4)] (permitting induction of a 17-year-old into the Armed Forces with the written consent of his "parents or guardian"); 45 CFR § 46.408 (1989) (requiring consent of both parents before a minor may participate in medical research posing more than a "minimal" risk of harm). With all respect, I submit the Court today errs when it states that Minnesota's two-parent notice law is an "oddity among state and federal consent provisions." Ante, at 454, 111 L Ed 2d, at 373.

III

[3c] At least two Members of the Court concede, as they must, that a State has a legitimate interest in the welfare of the pregnant minor and that, in furtherance of this interest, the State may require the minor to notify, and consult with, one of her parents. See ante, at 444-446, 111 L Ed 2d, at 366-367 (opinion of Stevens, J.); cf. ante, at 469, 111 L Ed 2d, at 383 (Marshall, J., concurring in part, concurring in judgment in part, and dissenting in part). The Court nonetheless holds the Minnesota statute unconstitutional because it requires the minor to notify not one parent, but both parents, a requirement that the Court says bears

[497 US 489]

no reasonable relation to the minor's welfare. See ante, at 450-455, 111 L Ed 2d, at 370-373; cf. ante, at 469-472, 111 L

Ed 2d, at 382-385 (Marshall, J., concurring in part, concurring in judgment in part, and dissenting in part). The Court also concludes that Minnesota does not have a legitimate interest in facilitating the participation of both parents in the care and upbringing of their children. Given the substantial protection that minors have under Minnesota law generally, and under the statute in question, the judicial bypass provisions of the law are not necessary to its validity. The two-parent notification law enacted by Minnesota is, in my view, valid without the judicial bypass provision of subdivision 6.

A

We have been over much of this ground before. It is beyond dispute that in many families, whether the parents are living together or apart, notice to both parents serves the interests of the parents and the minor, and that the State can legislate with this fact in mind. In H. L. v Matheson, 450 US 398, 67 L Ed 2d 388, 101 S Ct 1164 (1981), we considered the constitutionality of a statute which required a physician, before performing an abortion on a minor, to "'[n]otify, if possible, the [minor's] *parents* or guardian.'" Id., at 400, 67 L Ed 2d 388, 101 S Ct 1164 (quoting Utah Code Ann § 76-7-304 (1978)) (emphasis added). We held that the statute, as applied to unmarried, dependent, and immature minors, "plainly serves important state interests, is narrowly drawn to protect only those interests, and does not violate any guarantees of the Constitution." 450 US, at 413, 67 L Ed 2d 388, 101 S Ct 1164. Our holding was made with knowledge of the contentions, supported by citations to medical and sociological literature, that are proffered again today for the proposition that notification imposes burdens on minors. See id., at 436-441, 67 L Ed 2d 388, 101 S Ct 1164 (Marshall, J., dissenting). We nonetheless rejected arguments that a requirement of parental notification was the equivalent of a requirement of parental consent, id., at 411, 67 L Ed 2d 388, 101 S Ct 1164; that the statute was unconstitutional because it required notification only as to abortions, and not as to other medical

procedures, id., at 412, 67 L Ed 2d 388, 101 S Ct 1164; and that the statute was unconstitutional because it might deter some minors from seeking abortions, id., at 413, 67 L Ed 2d 388, 101 S Ct 1164.

Our decision was based upon the well-accepted premise that we must defer to a reasonable judgment by the state legislature when it determines what is sound public policy. Justice Stevens' opinion concurring in the Court's judgment relied upon an explicit statement of this principle. Concluding that the Utah statute requiring notification of both parents was valid as to all unmarried minors, both mature and immature, Justice Stevens reasoned that the State's interest in ensuring that a young woman considering an abortion receive appropriate consultation was "plainly sufficient to support a state legislature's determination that such appropriate consultation should include parental advice." Id., at 423, 67 L Ed 2d 388, 101 S Ct 1164. The Court today departs from this rule. It now suggests that a general requirement that both parents be notified is unconstitutional because of its own conclusion that the law is unnecessary when notice produces favorable results, see ante, at 450, 111 L Ed 2d, at 370, and irrational in all of the instances when it produces unfavorable results, see ante, at 450-451, 111 L Ed 2d, at 371. In Matheson, Justice Stevens rejected these same arguments as insufficient to establish that the Utah statute was unconstitutional:

> "Of course, a conclusion that the Utah statute is invalid would not prevent young pregnant women from voluntarily seeking the advice of their parents prior to making the abortion decision. But the State may legitimately decide that such consultation should be made more probable by ensuring that parents are informed of their daughter's decision . . . .
>
> . . . . .
>
> "Utah's interest in its parental-notice statute is not diminished by the fact that there can be no guarantee that meaningful parent-child communication will actually occur. Good-faith compliance with the statute's requirements
>
> **[497 US 491]**
>
> would tend to facilitate communication between daughters and parents regarding the abortion decision. *The possibility that some parents will not react with compassion and understanding upon being informed of their daughter's predicament or that, even if they are receptive, they will incorrectly advise her, does not undercut the legitimacy of the State's attempt to establish a procedure that will enhance the probability that a pregnant young woman exercise as wisely as possible her right to make the abortion decision."* 450 US, at 423-424, 67 L Ed 2d 388, 101 S Ct 1164 (emphasis added).

Justice Stevens' reasoning was correct then, and it remains correct today.

B

In applying the standards established in our prior decisions to the cases at hand, "we must keep in mind that when we are concerned with extremely sensitive issues, such as the one involved here, 'the appropriate forum for their resolution in a democracy is the legislature. We should not forget that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." Missouri, K. & T. R. Co. v May, 194 US 267, 270 [48 L Ed 971, 24 S Ct 638] (1904) (Holmes, J.).' Maher v Roe, 432 US 464, 479-480 [53 L Ed 2d 484, 97 S Ct 2376 (1977)] (footnote omitted)." Akron v Akron Center for Reproductive Health, Inc. 462 US 416, 465, 76 L Ed 2d 687, 103 S Ct 2481 (1983) (O'Connor, J., dissenting). The Minnesota Legislature, like the legislatures of many States, has found it necessary to address the issue of parental notice in its statutory laws. In my view it has acted in a permissible manner.

All must acknowledge that it was reasonable for the legislature to conclude that in most cases notice to both parents will work to the minor's benefit. See Bellotti II, 443 US, at 640, n 20, 61 L Ed 2d 797, 99 S Ct 3035 (opinion of Powell, J.) (parental involvement, if compassionate and supportive, is highly desirable). This is true not only in what the Court calls the "ideal family setting," where both parents and the minor live under one roof,

[497 US 492]

but also where the minor no longer lives with both parents. The Court does not deny that many absent parents maintain significant ties with their children, and seek to participate in their lives, to guide, to teach, and to care for them. It is beyond dispute that these attachments, in cases not involving mistreatment or abuse, are essential to the minor's well-being, and that parental notice is supportive of this kind of family tie. Although it may be true that notice to one parent will often result in notice to both, the State need not rely upon the decision of one parent to notify the other, particularly where both parents maintain ties with their daughter but not with each other, and when both parents share responsibilities and duties with respect to the child.

I acknowledge that in some cases notifying both parents will not produce desirable results despite the fact that no actual instance is in the record before us, as the two-parent notification requirement was enjoined before it went into effect. Cf. ante, at 438, 111 L Ed 2d, at 362 (stating as a matter of historical fact that the "two-parent notification requirement *had* particularly harmful effects on both the minor and the custodial parent" and that fears that notification of an absent parent would produce harmful results "*were* often realized") (emphasis added). We need not decide today, however, whether the Constitution permits a State to require that a physician notify both biological parents before performing an abortion on any minor, for the simple reason that Minnesota has not enacted such a law.

The Minnesota statute in fact contains exceptions to ensure that the statutory notice requirement does not apply if it proves a serious threat to the minor's health or safety. First, the statute does not require notice at all costs; to comply with the law, a physician need only use "reasonably diligent effort" to locate and notify both of the minor's parents. If the second parent cannot be located, as may be the case if the parent has deserted the family or ceased to maintain contact with the minor or the other parent, the only notice required is to the first parent. Minn Stat § 144.343(3) (1988).

Second, even where both parents can be located, notice is not required if the physician certifies that the abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice, § 144.343(4)(a); if the minor's parents have authorized the abortion in writing, § 144.343(4)(b); or if the minor declares that she is the victim of sexual abuse, neglect, or physical abuse, § 144.343(4)(c). Under Minnesota law, "neglect" of a minor means the failure of a parent "to supply a child with necessary food, clothing, shelter or medical care when reasonably able to do so or failure to protect a child from conditions or actions which imminently and seriously endanger the child's physical or mental health when reasonably able to do so," Minn Stat § 626.556(2)(c) (Supp 1989); physical abuse is defined as "any physical injury inflicted by a person responsible for the child's care on a child other than by accidental means," § 626.556(2)(d); and sexual abuse includes any sexual contact by a parent or other person responsible for the child's care or in a position of authority with respect to the child, § 626.556(2)(a). I cannot believe that these exceptions are too narrow to eliminate from the statute's coverage those instances in which notice would place the minor in danger of parental violence or other conduct that is a real threat to the physical or mental health of the child.

The Court challenges the efficacy of this last exception because it believes that the statutory requirement that a physician report a minor's declaration of abuse to appropriate authorities, see Minn Stat § 144.343(4)(c) (1988), will deter minors from using the exception. This is not a proper basis for declaring the law invalid. Laws are not declared unconstitutional because of some general reluctance to follow a statutory scheme the legislature finds necessary to accomplish a legitimate state objective. Beyond any question it is reasonable for the State to require that physicians report declarations of abuse to ensure that mistreatment is known to authorities responsible for the protection of minors. This

[497 US 494]

requirement is but a single manifestation of the broad duty in Minnesota to report suspected cases of child abuse to the proper authorities. See Minn Stat § 626.556(1) (1988) (declaring it to be the public policy of the State "to protect children whose health or welfare may be jeopardized through physical abuse, neglect or sexual abuse" and "to strengthen the family and make the home, school, and community safer for children by promoting responsible child care in all settings").

No one can contend that a minor who is pregnant is somehow less deserving of the State's protection. It is reasonable to provide that any minor who contends that she cannot notify her parent or parents because she is the victim of neglect or abuse must allow the State to use its power to investigate her declaration and protect her from harm. Any parent, moreover, who responds to notice by threatening or harming the minor or the other parent may be prosecuted by the State to the full extent of its laws. See Minn Stat § 518B.01 (1988) (Domestic Abuse Act); Minn Stat §§ 609.221, 609.222, 609.223, 609.224 (1988 and Supp 1989) (assault statutes); §§ 609.341 through 609.345 (sexual abuse statutes); § 609.378 (criminal neglect statute). Just as it relies upon such laws as its first line of defense for dealing with all other instances of abuse in family situations, so too is the State entitled to rely upon them here.

Notwithstanding the exceptions and protections we have discussed, it does remain possible, of course, that in some instances notifying one or both parents will not be in the minor's best interests. Allegations of a similar possibility, based upon sociological evidence similar to that presented in this case, was made by the appellant in Matheson. See Brief for Appellant in H. L. v Matheson, OT 1980, No. 79-5903, pp 10-11; Brief for Planned Parenthood Federation of America, Inc., et al., as Amici Curiae in Matheson, 16-31. The Court there held that the parental notification law was valid, at least as to immature minors, for the simple reason that a

[497 US 495]

law is not invalid if it fails to further the governmental interest in every instance. This point formed the cornerstone of Justice Stevens' concurring opinion in Matheson, see 450 US, at 423-424, 67 L Ed 2d 388, 101 S Ct 1164, and it finds its most explicit statement in the Court's opinion in Parham v J. R. 442 US, at 602-603, 61 L Ed 2d 101, 99 S Ct 2493:

> "The law's concept of the family rests on a presumption that parents possess what a child lacks in

> maturity, experience, and capacity for judgment required for making life's difficult decisions. More importantly, historically, it has recognized that natural bonds of affection lead parents to act in the best interests of their children. . . .
>
> "As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attest to this. That some parents 'may at times be acting against the best interests of their children' . . . creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests."

The only cases in which a majority of the Court has deviated from this principle are those in which a State sought to condition a minor's access to abortion services upon receipt of her parent's consent to do so. In Planned Parenthood of Central Mo. v Danforth, 428 US 52, 49 L Ed 2d 788, 96 S Ct 2831 (1976), the Court invalidated a Missouri law requiring that a physician obtain the consent of one parent before performing an abortion. The Court's reasoning was unmistakable: "[T]he State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." Id., at 74, 49 L Ed 2d 788, 96 S Ct 2831. The Court today, ignoring this statement, relies heavily upon isolated passages from Danforth, see ante, at 452-453, 111 L Ed 2d, at 372, and other cases involving parental consent laws,

see, e. g., ante, at 453, 111 L Ed 2d, at 372-373 (citing Bellotti II). Justice Marshall, on the other hand, expressly equates laws requiring parental consent with laws requiring parental notification, see ante, at 471-472, 111 L Ed 2d, at 384-385 (Marshall, J., concurring in part, concurring in judgment in part, and dissenting in part).

The difference between notice and consent was apparent to us before and is apparent now. Unlike parental consent laws, a law requiring parental notice does not give any third party the legal right to make the minor's decision for her, or to prevent her from obtaining an abortion should she choose to have one performed. We have acknowledged this distinction as "fundamental," and as one "substantially modify[ing] the federal constitutional challenge." Bellotti v Baird (Bellotti I), 428 US 132, 145, 148, 49 L Ed 2d 844, 96 S Ct 2857 (1976); see also Matheson, supra, at 411, n 17, 67 L Ed 2d 388, 101 S Ct 1164. The law before us does not place an absolute obstacle before any minor seeking to obtain an abortion, and it represents a considered weighing of the competing interests of minors and their parents.

[3d] "It cannot be doubted that as long as a state statute is within 'the bounds of reason and [does not] assum[e] the character of a merely arbitrary fiat . . . [then] [t]he State . . . must decide upon measures that are needful for the protection of its people . . . .'" Akron, 462 US, at 459, 76 L Ed 2d 687, 103 S Ct 2481 (O'Connor, J., dissenting) (quoting Purity Extract & Tonic Co. v Lynch, 226 US 192, 204-205, 57 L Ed 184, 33 S Ct 44 (1912)). Like all laws of general application, the Minnesota statute cannot produce perfect results in every situation to which it applies; but the State is under no obligation to enact perfect laws. The statute before us, including the 48-hour waiting period, which is necessary to enable notified parents to consult with their daughter or their daughter's physician, if they so wish, and results in little or no delay, represents a permissible, reasoned attempt to preserve the parents' role in a minor's decision to have an abortion without placing any absolute obstacles before a minor who is determined to elect an abortion for her own interest as she sees it. Section 144.343, without the

judicial bypass provision of subdivision 6, is constitutional. I would reverse the contrary judgment of the Court of Appeals.

IV

[2d] Because a majority of the Court holds that the two-parent notice requirement contained in subdivision 2 is unconstitutional, it is necessary for the Court to consider whether the same notice requirement is constitutional if the minor has the option of obtaining a court order permitting the abortion to proceed in lieu of the required notice. Minn Stat § 144.343(6) (1988). Assuming, as I am bound to do for this part of the analysis, that the notice provisions standing alone are invalid, I conclude that the two-parent notice requirement with the judicial bypass alternative is constitutional.

The Court concludes that Minnesota's two-parent notice law without a judicial bypass is unconstitutional because of the possibility that, in some cases, the rule would not work to the benefit of minors or their parents. If one were to attempt to design a statute that would address the Court's concerns, one would do precisely what Minnesota has done in § 144.343(6): create a judicial mechanism to identify, and exempt from the strictures of the law, those cases in which the minor is mature or in which notification of the minor's parents is not in the minor's best interests. The bypass procedure comports in all respects with our precedents. See Bellotti II, 443 US, at 643-644, 61 L Ed 2d 797, 99 S Ct 3035 (opinion of Powell, J.); Planned Parenthood Assn. of Kansas City, Mo., Inc. v Ashcroft, 462 US 476, 491, 76 L Ed 2d 733, 103 S Ct 2517 (1983) (opinion of Powell, J.); id., at 505, 76 L Ed 2d 733, 103 S Ct 2517 (O'Connor, J., concurring in judgment in part and dissenting in part); Ohio v Akron Center for Reproductive Health, post, p 502, 111 L Ed 2d 405, 110 S Ct 2972.

In providing for the bypass, Minnesota has done nothing other than attempt to fit its legislation into the framework that we have supplied in our previous cases. The simple fact is that our decision in Bellotti II stands for the proposition that a two-parent consent law is constitutional if it provides

for a sufficient judicial bypass alternative, and it requires us to sustain the statute before us here. In Bellotti II, the Court considered the constitutionality of a statute which required a physician to obtain, in most circumstances, the consent of both of a minor's parents before performing an abortion on the minor. See 443 US, at 625-626, 61 L Ed 2d 797, 99 S Ct 3035 (opinion of Powell, J.) (citing Mass Gen Laws Ann, ch 112, § 12S (West Supp 1979)). Although eight Members of the Court concluded that the statute was unconstitutional, five indicated that they would uphold a two-parent consent statute with an adequate judicial bypass.

For four of the eight Justices forming the majority in Bellotti II, the failure of the statute lay in its inadequate bypass procedure, not its requirement that both of the minor's parents consent to the abortion. See 443 US, at 643, 61 L Ed 2d 797, 99 S Ct 3035 (opinion of Powell, J.). Justice Powell's opinion specifically stated that "if the State decides to require a pregnant minor to obtain *one or both* parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained," ibid. (emphasis added; footnote omitted), and then stated the minimum requirements for such a procedure. In response to the dissent's contention that his opinion was advisory, Justice Powell stated that the four Members of the Court thought it necessary

> "to provide some guidance as to how a State constitutionally may provide for adult involvement—either by parents or a state official such as a judge—in the abortion decision of minors. In view of the importance of the issue raised, and the protracted litigation to which these parties already have been subjected, we think it would be irresponsible simply to invalidate [the Massachusetts law] without stating our views as to the controlling principles." Id., at 652, n 32, 61 L Ed 2d 797, 99 S Ct 3035.

See also id., at 651-652, 61 L Ed 2d 797, 99 S Ct 3035 (Rehnquist, J., concurring) (joining Justice Powell's opinion because "unless and until [the Court is willing to overrule Danforth], literally thousands of judges

cannot be left with nothing more than the guidance offered by a truly fragmented holding of this Court").

Justice White dissented from the Court's judgment that the Massachusetts statute was unconstitutional. In his view no bypass was necessary, so it must follow that a two-parent consent statute with an adequate bypass procedure would have been valid. See id., at 656-657, 61 L Ed 2d 797, 99 S Ct 3035. In sum, five Members of the Court in Bellotti II found, either by express statement or by implication, that it was permissible under the Constitution for a State to require the consent of two parents, as long as it provides a consent substitute in the form of an adequate judicial bypass procedure.

I cannot accept Justice Stevens' suggestion today that Justice Powell, in announcing these rules, did not "conside[r]" the fact that he was doing so in the context of a two-parent consent requirement, see ante, at 34, 111 L Ed 2d, at 374. The statute was explicit in its command that both parents consent to the abortion. See 443 US, at 625-626, 61 L Ed 2d 797, 99 S Ct 3035. Justice Powell indicated that he was aware of this fact, see id., at 630, and n 10, 61 L Ed 2d 797, 99 S Ct 3035, and the dissent drew a specific contrast between the two-parent consent requirement then before the Court and the one-parent consent requirement before the Court in Danforth, see id., at 656-657 (opinion of White, J.); see also id., at 653, 61 L Ed 2d 797, 99 S Ct 3035 (Stevens, J., concurring in judgment). Aware of all of these circumstances, Justice Powell stated the controlling principles with specific reference to laws requiring the consent of "one or both" parents. Id., at 643, 61 L Ed 2d 797, 99 S Ct 3035. Justice Powell's considered reasoning, coupled with the dissenting views of Justice White, was intended to set forth the dispositive principles of law for deciding the constitutionality of parental consent laws. The Court has relied upon these principles in deciding the constitutionality of laws requiring notice or the consent of one parent, see Akron v Akron Center for Reproductive Health, Inc., 462 US, at 439-442, 76 L Ed 2d 687, 103 S Ct 2481 (consent); Ohio v Akron Center for Reproductive Health, post, at 511-514, 111 L Ed 2d 405, 110 S Ct 2972 (notice). As Bellotti II dealt with the far more demanding

requirement of two-parent consent, and approved of such a requirement when coupled with a judicial bypass alternative, I must conclude that these same principles validate a two-parent notice requirement when coupled with a judicial bypass alternative.

A second precedent that compels the conclusion that a two-parent notice law with a judicial bypass alternative is constitutional is our decision in Matheson. There we held that a two-parent notice statute without a bypass was constitutional as applied to immature minors whose best interests would be served by notice. Like the statute before the Court in Matheson, the Minnesota statute, as amended by subdivision 6, requires a physician to notify the parents of those immature minors whose best interest will be served by the communication.

If a two-parent notification law may be constitutional as applied to immature minors whose best interests are served by the law, but not as applied to minors who are mature or whose best interests are not so served, a judicial bypass is an expeditious and efficient means by which to separate the applications of the law which are constitutional from those which are not. Justice Stevens' characterization of the judicial bypass procedure discussed in our past cases as a necessary "exception" to a "reasonable general rule," such as a one-parent consent requirement, see ante, at 456, 457, 111 L Ed 2d, at 374, 375, is far off the mark. If a judicial bypass is mandated by the Constitution at all, it must be because a general consent rule is unreasonable in at least some of its applications, and the bypass is necessary to save the statute. See, e. g., Bellotti II, supra, at 643, 61 L Ed 2d 797, 99 S Ct 3035 (opinion of Powell, J.); Matheson, 450 US, at 420, 67 L Ed 2d 388, 101 S Ct 1164 (Powell, J., concurring). No reason can be given for refusing to apply a similar analysis to the less demanding case of a notice statute. It follows that a similar result should obtain: A law that requires notice to one or both parents is constitutional with a bypass. I thus concur in that portion of the judgment announced, but not agreed with, by Justice Stevens

which affirms the Court of Appeals' conclusion that § 144.343(6) is constitutional.

V

In this case, the Court rejects a legislature's judgment that parents should at least be aware of their daughter's intention to seek an abortion, even if the State does not empower the parents to control the child's decision. That judgment is rejected although it rests upon a tradition of a parental role in the care and upbringing of children that is as old as civilization itself. Our precedents do not permit this result.

It is true that for all too many young women the prospect of two parents, perhaps even one parent, sustaining her with support that is compassionate and committed is an illusion. Statistics on drug and alcohol abuse by parents and documentations of child neglect and mistreatment are but fragments of the evidence showing the tragic reality that becomes day-to-day life for thousands of minors. But the Court errs in serious degree when it commands its own solution to the cruel consequences of individual misconduct, parental failure, and social ills. The legislative authority is entitled to attempt to meet these wrongs by taking reasonable measures to recognize and promote the primacy of the family tie, a concept which this Court now seems intent on declaring a constitutional irrelevance.

EDITOR'S NOTE

An annotation on "Supreme Court's views as to validity, under Federal Constitution, of abortion laws," appears p 879, infra.

[497 US 502]

OHIO, Appellant

v

AKRON CENTER FOR REPRODUCTIVE HEALTH et al.

497 US 502, 111 L Ed 2d 405, 110 S Ct 2972

[No. 88-805]

Argued November 29, 1989. Decided June 25, 1990.

Decision: Fourteenth Amendment held not violated by Ohio statute prohibiting abortion on minor absent either (1) parental notice, (2) parental consent, (3) judicial bypass, or (4) judicial inaction.

SUMMARY

In November 1985, the Ohio legislature enacted a statute which made it a criminal offense for a physician or other person to perform an abortion on an unmarried, unemancipated minor under the age of 18, except under four circumstances. Pursuant to the statute, a physician could perform an abortion on such a minor where either (1) the physician provided at least 24 hours' actual notice of his intention to perform the abortion, in person or by telephone, to (a) one of the minor's parents or her guardian or custodian, or (b) the minor's adult brother, sister, stepparent, or grandparent, if the minor and the other relative each filed an affidavit in the juvenile court stating that the minor feared physical, sexual, or severe emotional abuse from one of her parents—provided that a physician who could not give actual notice after a reasonable effort could perform the abortion after at least 48 hours' constructive notice by both ordinary and certified mail; (2) the minor's parent, guardian, or custodian consented to the abortion in writing; (3) a juvenile court issued an order authorizing the minor to consent—thus bypassing parental notice or consent—after (a) the minor filed a complaint stating that she was pregnant, unmarried, unemancipated, and under 18 years of age, that she desired to have an abortion without notifying one of her parents, and that either (i) she had sufficient maturity and information to make an intelligent decision whether to have an abortion without notice, (ii) one of her parents had engaged in a pattern of physical, sexual, or emotional abuse against her, or (iii) notice was not in her best interests, (b) a guardian ad litem and an attorney were appointed to represent the minor

SUBJECT OF ANNOTATION

Beginning on page 879, infra

Supreme Court's views as to validity, under Federal Constitution, of abortion laws

Briefs of Counsel, p 941, infra.

if she had not retained her own counsel, and (c) the minor proved her allegation of maturity, pattern of abuse, or best interests by clear and convincing evidence at a hearing which the court conducted while preserving the anonymity of the complainant and keeping all papers confidential; or (4) judicial inaction provided constructive authorization for the minor to consent, where either (a) the juvenile court failed (i) to hold its hearing within 5 "business day[s]" after the minor filed her complaint, (ii) to render its decision immediately after the conclusion of the hearing, or (iii) to deliver the notice of appeal and record to a state appellate court (the Ohio Court of Appeals) within 4 "days" after the minor filed a notice of appeal, or (b) the appellate court failed (i) to docket the appeal upon receipt of the notice of appeal and record, or (ii) to issue a decision within 5 "days" after the docketing. With respect to the judicial bypass procedure, the statutory scheme further provided that (1) the minor had to choose among three pleading forms prescribed by the Supreme Court of Ohio—one of which alleged her maturity only, the second of which alleged her best interests only, and the third of which alleged both her maturity and her best interests; and (2) the minor had to supply the name of one of her parents on the complaint form and, if not represented by counsel, sign the form. In March 1986, days before the effective date of the statute, an action was brought against Ohio in the United States District Court for the Northern District of Ohio, in which action the statute's constitutionality was challenged by an Akron, Ohio facility which provided abortions, a physician who performed abortions at the facility, and an unmarried, unemancipated minor woman who sought an abortion at the facility. The District Court issued an order permanently enjoining the enforcement of the statute (633 F Supp 1123). On appeal, the United States Court of Appeals for the Sixth Circuit, affirming, expressed the view that the statute was constitutionally defective with respect to (1) the expedition of the judicial bypass procedure, (2) the guarantee of the minor's anonymity, (3) the constructive authorization provisions, (4) the clear and convincing evidence standard, (5) the pleading form requirements, and (6) the physician's obligation to give notice to one of the minor's parents (854 F2d 852).

On appeal, the United States Supreme Court reversed. In an opinion by Kennedy, J., joined in pertinent part by Rehnquist, Ch. J., and White, Stevens, O'Connor, and Scalia, JJ., it was held that (1) the statute's judicial bypass procedure satisfied the requirements of due process under the Federal Constitution's Fourteenth Amendment; (2) the provisions dealing with the expedition of the judicial bypass, the minor's anonymity, constructive authorization, the clear and convincing evidence standard, and the pleading requirements all facially comported with the due process clause; (3) assuming that the statute gave a pregnant minor the right to avoid unnecessary or hostile parental involvement if she could demonstrate, in the judicial bypass procedure, that her maturity or best interests favored authorizing her to consent to an abortion without notifying one of her parents, the bypass procedure was not made unfair, and the minor was not deprived of such right without due process, by (a) the pleading requirements, (b) the alleged lack of expedition and lack of anonymity for the minor, and (c) the clear and convincing evidence standard; and (4) the requirement that the physician give parental notice was not unconstitutional.

Scalia, J., concurring, joined the court's opinion, and also expressed the view that (1) the Federal Constitution contained no right to abortion, (2) it was both legally correct and pragmatic to leave the matter of the right to abortion to the political process, and (3) the Supreme Court should end its disruptive intrusion into this field as soon as possible.

Stevens, J., concurring in part and concurring in the judgment, expressed the view that (1) while the judicial bypass provided by the statute might be so obviously inadequate in exceptional situations—such as where notice (a) would cause a realistic risk of physical harm to the pregnant woman, (b) would cause trauma to an ill parent, or (c) would enable the parent to prevent the abortion for reasons that were unrelated to the best interests of the minor—such conclusion should not be reached before the statute has been implemented and the significance of its restrictions evaluated in the light of its administration; (2) the statute, on its face, provided a sufficient procedure for cases in which the minor was mature or parental notice would not be in her best interests; and (3) the requirement that the physician give parental notice was not unconstitutional on its face, since (a) the statute required that the physician take reasonable steps to notify a minor's parent, and (b) such notification might contribute to the decisionmaking process.

Blackmun, J., joined by Brennan and Marshall, JJ., dissenting, expressed the view that (1) in enacting the statute, Ohio (a) created a tortuous maze rather than a judicial bypass system that reflected the sensitivity necessary when dealing with a minor making the abortion decision, and (b) utterly failed to show that it had any significant interest in deliberately placing its pattern of obstacles in the path of the minor who sought to exercise her constitutional right to terminate a pregnancy; (2) the statutory provisions dealing with the expedition of the judicial bypass, the minor's anonymity, constructive authorization, the clear and convincing evidence standard, and the pleading requirements singly and collectively crossed the limit of constitutional acceptance; and (3) even if the judicial bypass procedure was itself constitutional, the statute was nevertheless unconstitutional because it required a physician's personal and nondelegable obligation to give the required statutory notice.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Abortion § 8; Constitutional Law §§ 526, 778.5 — due process — minors — parental consent — judicial bypass procedure

1a-1d. A state statute's judicial bypass procedure for an unmarried, unemancipated minor who seeks to obtain an abortion without parental notice or parental consent satisfies the requirements of due process under the Federal Constitution's Fourteenth Amendment, where such procedure (1) permits the minor to show that she is sufficiently mature and well enough informed to decide intelligently whether to have an abortion; (2) requires a juvenile court to authorize the minor's consent where the court determines that the abortion is in the minor's best interests and in cases where the minor has shown a pattern of physical, sexual, or emotional abuse; (3) assures the minor's anonymity by providing that (a) the juvenile court shall not notify the minor's parents that she is pregnant or that she wants to have an abortion, and (b) the juvenile court and a state appellate court must maintain the confidentiality of the

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

1 Am Jur 2d, Abortion §§ 1.5, 37.5

13A Am Jur Legal Forms 2d, Parent and Child § 191:74; 15 Am Jur Legal Forms 2d, Physicians and Surgeons § 202:130

USCS, Constitution, Amendment 14

US L Ed Digest, Abortion §§ 8, 9; Constitutional Law §§ 526, 778.5, 830.7

Index to Annotations, Abortion; Children; Notice and Knowledge

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Supreme Court's views as to validity of laws restricting or prohibiting sale or distribution to minors of particular types of goods or services otherwise available to adults. 52 L Ed 2d 892.

Supreme Court's views as to concept of "liberty" under due process clauses of Fifth and Fourteenth Amendments. 47 L Ed 2d 975.

Validity, under Federal Constitution, of abortion laws. 35 L Ed 2d 735.

Requisites and conditions of judicial consent to minor's abortion. 23 ALR4th 1061.

Right of minor to have abortion performed without parental consent. 42 ALR3d 1406.

complaint and all other papers as nonpublic records, which records state employees are prohibited from disclosing under state criminal statutes; and (4) requires (a) the juvenile court to make its decision within 5 "business day[s]" after the minor files her complaint, (b) the appellate court to docket an appeal within 4 "days" after the minor files a notice of appeal, and (c) the appellate court to render a decision within 5 "days" after docketing the appeal. (Blackmun, Brennan, and Marshall, JJ., dissented from this holding.)

[See annotation p 879, infra]

Abortion § 8; Constitutional Law §§ 526, 778.5 — due process — minors — judicial bypass procedure — confidentiality of complaint

2a-2c. With respect to the right of an unmarried, unemancipated minor to obtain an abortion through a judicial bypass procedure without notifying one of her parents, the dictates of minimal due process, under the Federal Constitution's Fourteenth Amendment, are satisfied on the face of a state statutory provision which requires a minor seeking court authorization to (1) sign a complaint form unless she has counsel, and (2) supply the name of one of her parents at four different places on the complaint form even if she has counsel; in such context, the distinction between confidentiality and anonymity does not have constitutional significance, and complete anonymity is not critical. (Blackmun, Brennan, and Marshall, JJ., dissented from this holding.)

[See annotation p 879, infra]

Abortion § 8; Constitutional Law §§ 526, 778.5 — due process — minors — judicial bypass — expedition of procedure

3a-3c. With respect to the right of an unmarried, unemancipated minor to obtain an abortion through a judicial bypass procedure without notifying one of her parents, the dictates of minimal due process, under the Federal Constitution's Fourteenth Amendment, are satisfied on the face of a state statutory provision which requires that (1) the juvenile court make its decision within 5 "business day[s]" after the minor files her complaint, and (2) a state appellate court docket a minor's appeal within 4 "days" after the minor files a notice of appeal, and render a decision within 5 "days" after docketing; even assuming that such judicial bypass procedure could take up to 22 days based upon a calculation which interpreted the term "days" as business days, the mere possibility of such occurrence in a rare case is insufficient to invalidate the procedure. (Blackmun, Brennan, and Marshall, JJ., dissented from this holding.)

[See annotation p 879, infra]

Abortion § 8; Constitutional Law §§ 526, 778.5 — due process — minors — judicial bypass procedure — constructive authorization

4a-4c. A state statutory provision which constructively authorizes an unmarried, unemancipated minor to consent to an abortion without notifying one of her parents—if either (1) the juvenile court fails to hold its hearing within 5 "business day[s]" after the minor files her complaint, (2) a state appellate court fails to docket an appeal within 4 "days" after the minor files a notice of appeal, or (3) the appellate court fails to render a decision within 5 "days" after docketing the appeal—comports on its face with the due process clause of the Federal Constitution's Fourteenth Amendment, notwithstanding the absence of an affirmative court order; such statute, in providing definite and reasonable deadlines, is constitutional where there is no showing that the time limitations which it imposes will be ignored, since a state may expect that its judges will follow mandated procedural requirements absent a demonstrated pattern of abuse or defiance. (Blackmun, Brennan, and Marshall, JJ., dissented from this holding.)

[See annotation p 879, infra]

Abortion § 8; Constitutional Law §§ 526, 830.7 — due process — minors — judicial bypass procedure — clear and convincing evidence

5a-5c. A state statutory provision which authorizes a minor to consent to an abortion without notifying one of her parents—if a juvenile court finds that the minor has proven in an ex parte proceeding, by clear and convincing evidence, that either (1) she has sufficient maturity and information to make an intelligent decision whether to have an abortion without notice, (2) one of her parents has engaged in a pattern of physical, sexual, or emotional abuse against her, or (3) notice is not in her best interests—does not deprive a minor of her liberty interest in obtaining an abortion, under the due process clause of the Federal Constitution's Fourteenth Amendment, by imposing a heightened standard of proof upon the minor, where the minor is assisted by an attorney and a guardian ad litem; the state does not have to bear the burden of proof on the issues of the minor's maturity or best interests, insofar as the clear and convincing evidence standard insures that the judge will take special care in deciding whether the minor's consent to abortion should proceed without parental notification. (Blackmun, Brennan, and Marshall, JJ., dissented from this holding.)

[See annotation p 879, infra]

Abortion § 8; Constitutional Law §§ 526, 778.5 — due process — minors — judicial bypass procedure — pleading forms — maturity — best interests

6a-6c. An unmarried, unemancipated minor who seeks to obtain an abortion is not deprived of her right, under the due process clause of the Federal Constitution's Fourteenth Amendment, to prove either that she has sufficient maturity and information to make an intelligent decision whether to have an abortion, or that parental notice would not be in her best interests, by a state statute generally prohibiting any person from performing an abortion on such a minor absent notice to one of the minor's parents, but allowing a juvenile court to authorize the minor's consent, where the minor has to choose among three pleading forms—one of which alleges her maturity only, the second of which alleges her best interests only, and the third of which alleges both her maturity and her best interests; even assuming that such pleading scheme could produce some initial confusion because few minors would have counsel when pleading, such procedure is simple and straightforward, does not deprive the minor of an opportunity to prove her case, and thus, on its face, satisfies the dictates of minimal due process, where (1) it seems unlikely that the state courts would treat a minor's choice of complaint form without due care and understanding for her unrepresented status, and (2) the minor does not make a binding election by the initial choice of pleading form and can move for leave to amend the pleadings upon receiving appointed counsel after filing the complaint. (Blackmun, Brennan, and Marshall, JJ., dissented from this holding.)

[See annotation p 879, infra]

Abortion § 8; Constitutional Law §§ 526, 778.5 — due process — judicial bypass procedure — avoidance of parental involvement

7a, 7b. Assuming that a state statute gives a pregnant minor the right to avoid unnecessary or hostile parental involvement if she can demonstrate, in a judicial bypass procedure, that her maturity or best interests favor authorizing her to consent to an abortion without notifying one of her parents, the bypass procedure is not made unfair, and the minor is not deprived of such right without due process, by (1) a requirement that the minor choose among three pleading forms, where one form alleges her maturity only, another alleges her best interests only, and a third alleges both her maturity and her best interests; (2) requirements that (a) the juvenile court make its decision within 5 "business day[s]" after the minor files her complaint, and (b) a state appellate court docket a minor's appeal within 4 "days" after the minor files a notice of appeal and render a decision within 5 "days" after docketing; (3) requirements that the minor (a) sign her complaint form unless she has counsel, and (b) supply the name of one of her parents at four different places on the form even if she has counsel; and (4) a requirement that the minor prove, by clear and convincing evidence, that either (1) she has sufficient maturity and information to make an intelligent decision whether to have an abortion without notice, or (2) notice is not in her best interests due to parental abuse or other reasons. (Blackmun, Brennan, and Marshall, JJ., dissented from this holding.)

[See annotation p 879, infra]

Abortion § 9 — notification of minor's parent by physician — constructive notice

8a, 8b. A provision of a state statute that, with certain exceptions, prohibits any person from performing an abortion on an unmarried, unemancipated minor absent notice to one of the minor's parents or a juvenile court order authorizing the minor to consent—which provision allows a physician to perform an abortion on such a minor where either (1) the physician provides at least 24 hours' actual notice of his intention to perform the abortion, in person or by telephone, to (a) one of the minor's parents or her guardian or custodian, or (b) the minor's adult brother, sister, stepparent, or grandparent, if the minor and the other relative each file an affidavit in the juvenile court stating that the minor fears physical, sexual, or severe emotional abuse from one of her parents, or (2) a physician who cannot give actual notice after a reasonable effort provides at least 48 hours' constructive notice by both ordinary and certified mail—does not render the statute unconstitutional, under the Federal Constitution, insofar as such provision requires that notice be given by the physician, rather than by some other qualified person; a state may constitutionally require a physician to take reasonable steps to notify the parent of a minor seeking an abortion, because (1) the parent often will provide important medical data to the physician, (2) a conversation with the physician may enable the parent to provide better advice to the minor, and (3) access to an experienced and—in an ideal case—detached physician who can assist the parent in approaching the problem in a mature and balanced way may benefit both the parent and the child in a manner not possible through notice by less qualified persons; furthermore, any imposition which such provision makes on the physician's schedule is unobjectionable in light of the provision's allowance for notice by mail and for the forgoing of notice in the event of certain emergencies. (Blackmun, Brennan, and Marshall, JJ., dissented from this holding.)

[See annotation p 879, infra]

Abortion § 8 — parental consent — bypass procedure

9. In order to prevent another person from having an absolute veto power over a minor's decision to have an abortion, a state must, under the Federal Constitution, provide some sort of bypass procedure if it elects to require parental consent.

[See annotation p 879, infra]

Abortion §§ 8, 9 — parental consent — notice

10. It is a corollary to the greater intrusiveness of statutes which require parental consent for a minor's abortion that a bypass procedure that will suffice, under the Federal Constitution, for a consent statute will suffice for a parental notice statute also.

[See annotation p 879, infra]

Evidence § 99(1); Statutes § 107 — avoidance of unconstitutionality

11. Where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality; parties making a facial challenge to a statute must show that no set of circumstances exists under which the statute would be valid.

SYLLABUS BY REPORTER OF DECISIONS

As enacted, Ohio's Amended Substitute House Bill 319 (HB 319) makes it a crime for a physician or other person to perform an abortion on an unmarried, unemancipated, minor woman, unless, inter alia, the physician provides timely notice to one of the minor's parents or a juvenile court issues an order authorizing the minor to consent. To obtain a judicial bypass of the notice requirement, the minor must present clear and convincing proof that she has sufficient maturity and information to make the abortion decision herself, that one of her parents has engaged in a pattern of physical, emotional, or sexual abuse against her, or that notice is not in her best interests. Among other things, HB 319 also allows the physician to give constructive notice if actual notice to the parent proves impossible "after a reasonable effort"; requires the minor to file a bypass complaint in the juvenile court on prescribed forms; requires that court to appoint a guardian ad litem and an attorney for the minor if she has not retained counsel; mandates expedited bypass hearings and decisions in that court and expedited review by a court of appeals; provides constructive authorization for the minor to consent to the abortion if either court fails to act in a timely fashion; and specifies that both courts must maintain the minor's anonymity and the confidentiality of all papers. Shortly before HB 319's effective date, appellees—an abortion facility, one of its doctors, and an unmarried, unemancipated, minor woman seeking an abortion there—and others filed a facial challenge to the statute's constitutionality in the Federal District Court, which ultimately issued an injunction preventing HB 319's enforcement. The Court of Appeals affirmed, concluding that various of the statute's provisions were constitutionally defective.

Held: The judgment is reversed.

854 F2d 852, reversed.

Justice Kennedy delivered the opinion of the Court with respect to Parts I, II, III, and IV, concluding that, on its face, HB 319 does not impose an undue, or otherwise unconstitutional, burden on a minor seeking an abortion.

1. House Bill 319 accords with this Court's cases addressing the constitutionality of parental notice or consent statutes in the abortion context. Planned Parenthood of Central Mo. v Danforth, 428 US 52, 49 L Ed 2d 788, 96 S Ct 2831; Bellotti v Baird, 443 US 622, 61 L Ed 2d 797, 99 S Ct 3035; H. L. v Matheson, 450 US 398, 67 L Ed 2d 388, 101 S Ct 1164; Planned Parenthood Assn. of Kansas City, Mo., Inc. v Ashcroft, 462 US 476, 76 L Ed 2d 733, 103 S Ct 2517; Akron v Akron Center for Reproductive Health, Inc. 462 US 416, 76 L Ed 2d 687, 103 S Ct 2481.

(a) Whether or not the Fourteenth Amendment requires parental notice statutes, as opposed to parental consent statutes, to contain judicial bypass procedures, HB 319's bypass procedure is sufficient because it meets the requirements identified in Danforth, Bellotti, Ashcroft, and Akron for the more intrusive consent statutes, particularly the four criteria set forth by the principal opinion in Bellotti, supra, at 643-644, 61 L Ed 2d 797, 99 S Ct 3035 (opinion of Powell, J.). First, the statute satisfies the requirement that the minor be allowed to show the maturity to make her abortion decision without regard to her parents' wishes. Second, by requiring the juvenile court to authorize her consent upon determining that the abortion is in her best interests and in cases where she has shown a pattern of abuse, HB 319 satisfies the requirement that she be allowed to show that, even if she cannot make the decision by herself, the abortion would be in her best interests. Third, the requirement that a bypass procedure ensure the minor's anonymity is satisfied, since HB 319 prohibits the juvenile court from notifying the parents that the complainant is pregnant and wants an abortion and requires both state courts to preserve her anonymity and the confidentiality of court papers, and since state law makes it a crime for any state employee to disclose documents not designated as public records. Neither the mere possibility of unauthorized, illegal disclosure by state employees nor the fact that the HB 319 complaint forms require the minor to provide identifying information for administrative purposes is dispositive. Complete anonymity is not critical under this Court's decisions, and HB 319 takes reasonable steps to prevent the public from learning of the minor's identity. Fourth, HB 319's time limits on judicial action satisfy the requirement that a bypass procedure be conducted with expedition. Even if, as appellees contend, the bypass procedure could take up to 22 calendar days, including weekends and legal holidays, that possibility does not suffice to invalidate the statute on its face. See, e.g., Ashcroft, supra, at 477, n 4, 491, n 16, 76 L Ed 2d 733, 103 S Ct 2517.

(b) The Bellotti criteria need not

be extended by imposing appellees' suggested additional requirements on bypass procedures. First, HB 319 is not rendered unconstitutional by the fact that its constructive authorization provisions do not require an affirmative order authorizing the physician to act in the event that either state court fails to act within the prescribed time limits. Absent a showing that those limits will be ignored, the State may expect that its judges will follow mandated procedural requirements. Moreover, Ashcroft, supra, at 479-480, n 4, 76 L Ed 2d 733, 103 S Ct 2517, does not require constructive authorization provisions, which were added by Ohio out of an abundance of caution and concern for the minor's interests. Second, a bypass procedure such as Ohio's does not violate due process by placing the burden of proof on the issues of maturity or best interests on the minor or by requiring a heightened, clear and convincing evidence standard of proof. Justice Powell in Bellotti, supra, at 634, 61 L Ed 2d 797, 99 S Ct 3035, indicated that a State may require the minor to bear the burden of proof on these issues. Moreover, a State may require a heightened standard of proof when, as here, the bypass procedure contemplates an ex parte proceeding at which no one opposes the minor's testimony and she is assisted by an attorney and a guardian ad litem. Third, HB 319's statutory scheme and the bypass complaint forms do not deny an unwary and unrepresented minor the opportunity to prove her case by requiring her to choose among three forms, the first of which relates only to maturity, the second to best interests, and the third to both. Even assuming some initial confusion, it is unlikely that the Ohio courts will treat a minor's choice of forms without due care and understanding for her unrepresented status. Moreover, she does not make a binding election by her initial form choice, since HB 319 provides her with appointed counsel after filing the complaint and allows her to move to amend the pleadings.

2. Even assuming that HB 319 gives a minor a substantive, state-law liberty or property right "to avoid unnecessary or hostile parental involvement" upon proof of maturity or best interests, the statute does not deprive her of this right without due process, since its confidentiality provisions, expedited procedures, pleading form requirements, clear and convincing evidence standard, and constructive authorization provisions are valid on their face.

3. House Bill 319 is not facially invalid simply because it requires parental notice to be given by the physician rather than by some other qualified person. Since the physician has a superior ability to garner and use important medical and psychological data supplied by a parent upon receiving notice, a State may require the physician himself to take reasonable steps to notify the parent. See Matheson, supra, at 400, 411, 67 L Ed 2d 388, 101 S Ct 1164. In addition, the conversation with an experienced and detached physician may assist the parent in approaching the problem in a mature and balanced way and thereby enable him to provide better advice to the minor than would a conversation with a less experienced person. Any imposition on the physician's schedule is diminished by provisions allowing him to give notice by mail if

he cannot reach the parent "after a reasonable effort" and to forgo notice in the event of certain emergencies, which provisions constitute an adequate recognition of his professional status. Akron, supra, at 446-449, 76 L Ed 2d 687, 103 S Ct 2481, distinguished.

Justice Kennedy, joined by The Chief Justice, Justice White, and Justice Scalia, concluded in Part V that HB 319 constitutes a rational way to further legitimate ends. A free and enlightened society may decide that each of its members should attain a clearer, more tolerant understanding of the profound philosophic choices confronting a woman considering an abortion, which decision will affect her own destiny and dignity and the origins of the other human life within the embryo. It is both rational and fair for the State to conclude that, in most instances, the beginnings of that understanding will be within the family, which will strive to give a lonely or even terrified minor advice that is both compassionate and mature.

Justice Stevens, agreeing that HB 319 is not unconstitutional on its face, concluded that, in some of its applications, the one-parent notice requirement will not reasonably further the State's legitimate interest in protecting the welfare of its minor citizens. The question whether the judicial bypass is so obviously inadequate for such exceptional situations that the entire statute should be invalidated must await the statute's implementation and the evaluation of the significance of its restrictions in light of its administration. The State must provide an adequate mechanism for avoiding parental notification for cases in which the minor is mature or notice would not be in her best interests. See Akron v Akron Center for Reproductive Health, Inc., 462 US 416, 441, n 31, 76 L Ed 2d 687, 103 S Ct 2481.

Kennedy, J., announced the judgment of the Court, and delivered the opinion of the Court with respect to Parts I, II, III, and IV, in which Rehnquist, C. J., and White, Stevens, O'Connor, and Scalia, JJ., joined, and an opinion with respect to Part V, in which Rehnquist, C. J., and White and Scalia, JJ., joined. Scalia, J., filed a concurring opinion. Stevens, J., filed an opinion concurring in part and concurring in the judgment. Blackmun, J., filed a dissenting opinion, in which Brennan and Marshall, JJ., joined.

APPEARANCES OF COUNSEL

Rita S. Eppler argued the cause for appellant.
Linda R. Sogg argued the cause for appellees.
Briefs of Counsel, p 941, infra.

OPINION OF THE COURT

[497 US 506]

Justice **Kennedy** announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, and IV*, and an opinion with respect to Part V, in which The **Chief Justice,** Justice **White,** and Justice **Scalia** join.

[1a, 2a, 3a, 4a, 5a, 6a, 7a, 8a] The Court of Appeals held invalid an Ohio statute that, with certain exceptions, prohibits any person from performing an abortion on an unmarried, unemancipated, minor woman absent notice to one of the woman's parents or a court order of approval. We reverse, for we determine that the statute accords with our precedents on parental notice and [497 US 507] consent in the abortion context and does not violate the Fourteenth Amendment.

---

* Justice **Stevens** and Justice **O'Connor** join only Parts I, II, III, and IV of the opinion.

I

A

The Ohio Legislature, in November 1985, enacted Amended Substitute House Bill 319 (HB 319), which amended Ohio Rev Code Ann § 2919.12 (1987), and created Ohio Rev Code Ann §§ 2151.85 and 2505.073 (Supp 1988). Section 2919.12(B), the cornerstone of this legislation, makes it a criminal offense, except in four specified circumstances, for a physician or other person to perform an abortion on an unmarried and unemancipated woman under 18 years of age. See § 2919.12(D) (making the first offense a misdemeanor and subsequent offenses felonies); § 2919.12(E) (imposing civil liability).

The first and second circumstances in which a physician may perform an abortion relate to parental notice and consent. First, a physician may perform an abortion if he provides "at least twenty-four hours actual notice, in person or by telephone," to one of the woman's parents (or her guardian or custodian) of his intention to perform the abortion. § 2919.12(B)(1)(a)(i). The physician, as an alternative, may notify a minor's adult brother, sister, stepparent, or grandparent, if the minor and the other relative each file an affidavit in the juvenile court stating that the minor fears physical, sexual, or severe emotional abuse from one of her parents. See §§ 2919.12(B)(1)(a)(i), 2919.12(B)(1)(b), 2919.12(B)(1)(c). If the physician cannot give the notice "after a reasonable effort," he may perform the abortion after "at least forty-eight hours constructive notice" by both ordinary and certified mail. § 2919.12(B)(2). Second, a physician may perform an abortion on the minor if one of her parents (or her guardian or custodian) has consented to the abortion in writing. See § 2919.12(B)(1)(a)(ii).

The third and fourth circumstances depend on a judicial procedure that allows a minor to bypass the notice and consent [497 US 508] provisions just described. The statute allows a physician to perform an abortion without notifying one of the minor's parents or receiving the parent's consent if a juvenile court issues an order authorizing the minor to consent, § 2919.12(B)(1)(a)(iii), or if a juvenile court or court of appeals, by its inaction, provides constructive authorization for the minor to consent, § 2919.12(B)(1)(a)(iv).

The bypass procedure requires the minor to file a complaint in the juvenile court, stating (1) that she is pregnant; (2) that she is unmarried, under 18 years of age, and unemancipated; (3) that she desires to have an abortion without notifying one of her parents; (4) that she has sufficient maturity and information to make an intelligent decision whether to have an abortion without such notice, *or* that one of her parents has engaged in a pattern of physical, sexual, or emotional abuse against her, *or* that notice is not in her best interests; and (5) that she has or has not retained an attorney. §§ 2151.85(A)(1)-(5). The Ohio Supreme Court, as discussed below, has prescribed pleading forms for the minor to use. See App 6-14.

The juvenile court must hold a hearing at the earliest possible time, but not later than the fifth business day after the minor files the complaint. § 2151.85(B)(1). The court must render its decision immediately after the conclusion of the hearing. Ibid. Failure to hold the hearing within this time results in constructive authorization for the minor to consent to the abortion. Ibid. At the hearing the court must appoint a guardian ad litem and an attorney to represent the minor if she has not retained her own counsel. § 2151.85(B)(2). The minor must prove her allegation of maturity, pattern of abuse, or best interests by clear and convincing evidence, § 2151.85(C), and the juvenile court must conduct the hearing to preserve the anonymity of the complainant, keeping all papers confidential. §§ 2151.85(D), (F).

The minor has the right to expedited review. The statute provides that, within four days after the minor files a

[497 US 509]

notice of appeal, the clerk of the juvenile court shall deliver the notice of appeal and record to the state court of appeals. § 2505.073(A). The clerk of the court of appeals dockets the appeal upon receipt of these items. Ibid. The minor must file her brief within four days after the docketing. Ibid. If she desires an oral argument, the court of appeals must hold one within five days after the docketing and must issue a decision immediately after oral argument. Ibid. If she waives the right to an oral argument, the court of appeals must issue a decision within five days after the docketing. Ibid. If the court of appeals does not comply with these time limits, a constructive order results authorizing the minor to consent to the abortion. Ibid.

B

Appellees in this action include the Akron Center for Reproductive Health, a facility that provides abortions; Max Pierre Gaujean, M. D., a physician who performs abortions at the Akron Center; and Rachael Roe, an unmarried, unemancipated, minor woman, who sought an abortion at the facility. In March 1986, days before the effective date of HB 319, appellees and others brought a facial challenge to the constitutionality of the statute in the United State District Court for the Northern District of Ohio. The District Court, after various proceedings, issued a preliminary injunction and later a permanent injunction preventing the State of Ohio from enforcing the statute. Akron Center for Reproductive Health v Rosen, 633 F Supp 1123 (1986).

The Court of Appeals for the Sixth Circuit affirmed, concluding that HB 319 had six constitutional defects. These points, discussed below, related to the sufficiency of the expedited procedures, the guarantee of anonymity, the constructive authorization provisions, the clear and convincing evidence standard, the pleading requirements, and the physician's personal obligation to give notice to one of the minor's

[497 US 510]

parents. Akron Center for Reproductive Health v Slaby, 854 F2d 852 (1988). The State of Ohio, on appeal under 28 USC § 1254(2) (1982 ed) [28 USCS § 1254(2)], prob juris noted, 492 US 916, 106 L Ed 2d 586, 109 S Ct 3239 (1989), challenges the Court of Appeals' decision in its entirety. Appellees seek affirmance on the grounds adopted by the Court of Appeals and on other grounds.

II

We have decided five cases addressing the constitutionality of parental notice or parental consent statutes in the abortion context. See Planned Parenthood of Central Mo. v Danforth, 428 US 52, 49 L

Ed 2d 788, 96 S Ct 2831 (1976); Bellotti v Baird, 443 US 622, 61 L Ed 2d 797, 99 S Ct 3035 (1979); H. L. v Matheson, 450 US 398, 67 L Ed 2d 388, 101 S Ct 1164 (1981); Planned Parenthood Assn of Kansas City Mo., Inc. v Ashcroft, 462 US 476, 76 L Ed 2d 733, 103 S Ct 2517 (1983); Akron v Akron Center for Reproductive Health, Inc. 462 US 416, 76 L Ed 2d 687, 103 S Ct 2481 (1983). We do not need to determine whether a statute that does not accord with these cases would violate the Constitution, for we conclude that HB 319 is consistent with them.

A

[1b, 9, 10] This dispute turns, to a large extent, on the adequacy of HB 319's judicial bypass procedure. In analyzing this aspect of the dispute, we note that, although our cases have required bypass procedures for parental consent statutes, we have not decided whether parental notice statutes must contain such procedures. See Matheson, supra, at 413, and n 25, 67 L Ed 2d 388, 101 S Ct 1164 (upholding a notice statute without a bypass procedure as applied to immature, dependent minors). We leave the question open, because, whether or not the Fourteenth Amendment requires notice statutes to contain bypass procedures, HB 319's bypass procedure meets the requirements identified for parental consent statutes in Danforth, Bellotti, Ashcroft, and Akron. Danforth established that, in order to prevent another person from having an absolute veto power over a minor's decision to have an abortion, a State must provide some sort of bypass procedure if it elects to require parental

consent. See 428 US, at 74, 49 L Ed 2d 788, 96 S Ct 2831. As we hold today in Hodgson v Minnesota, ante, p 417, 111 L Ed 2d 344, 110 S Ct 2926, it is a corollary to the greater intrusiveness of consent statutes that a bypass procedure that will suffice for a consent statute will suffice also for a notice statute. See also Matheson, supra, at 411, n 17, 67 L Ed 2d 388, 101 S Ct 1164 (notice statutes are not equivalent to consent statutes because they do not give anyone a veto power of over a minor's abortion decision).

[1c] The principal opinion in Bellotti stated four criteria that a bypass procedure in a consent statute must satisfy. Appellees contend that the bypass procedure does not satisfy these criteria. We disagree. First, the Bellotti principal opinion indicated that the procedure must allow the minor to show that she possesses the maturity and information to make her abortion decision, in consultation with her physician, without regard to her parents' wishes. See 443 US, at 643, 61 L Ed 2d 797, 99 S Ct 3035 (opinion of Powell, J.). The Court reaffirmed this requirement in Akron by holding that a State cannot presume the immaturity of girls under the age of 15. 462 US, at 440, 76 L Ed 2d 687, 103 S Ct 2481. In the case now before us, we have no difficulty concluding that HB 319 allows a minor to show maturity in conformity with the principal opinion in Bellotti. The statute permits the minor to show that she "is sufficiently mature and well enough informed to decide intelligently whether to have an abortion." Ohio Rev Code Ann § 2151.85(C)(1) (Supp 1988).

Second, the Bellotti principal opinion indicated that the procedure must allow the minor to show that, even if she cannot make the abortion decision by herself, "the desired abortion would be in her best interests

443 US, at 644, 61 L Ed 2d 797, 99 S Ct 3035. We believe that HB 319 satisfies the Bellotti language as quoted. The statute requires the juvenile court to authorize the minor's consent where the court determines that the abortion is in the minor's best interest and in cases where the minor has shown a pattern of physical, sexual, or emotional abuse. See § 2151.85(C)(2).

Third, the Bellotti principal opinion indicated that the procedure must insure the minor's anonymity. See 443 US, at 644, 61 L Ed 2d 797, 99 S Ct 3035. HB 319 satisfies this standard. Section 2151.85(D) provides that "[t]he [juvenile] court shall not notify the parents, guardian, or custodian of the complainant that she is pregnant or that she wants to have an abortion." Section 2151.85(F) further states:

> "Each hearing under this section shall be conducted in a manner that will preserve the anonymity of the complainant. The complaint and all other papers and records that pertain to an action commenced under this section shall be kept confidential and are not public records."

Section 2505.073(B), in a similar fashion, requires the court of appeals to preserve the minor's anonymity and confidentiality of all papers on appeal. The State, in addition, makes it a criminal offense for an employee to disclose documents not designated as public records. See §§ 102.03(B), 102.99(B).

[2b] Appellees argue that the complaint forms prescribed by the Ohio Supreme Court will require the minor to disclose her identity. Unless the minor has counsel, she must sign a complaint form to initiate the bypass procedure and, even if she has counsel, she must supply the name of one of her parents at four different places. See App 6-14 (pleading forms). Appellees would prefer protections similar to those included in the statutes that we reviewed in Bellotti and Ashcroft. The statute in Bellotti protected anonymity by permitting use of a pseudonym, see Planned Parenthood League of Massachusetts v Bellotti, 641 F2d 1006, 1025 (CA1 1981), and the statute in Ashcroft allowed the minor to sign the petition with her initials, see 462 US, at 491, n 16, 76 L Ed 2d 733, 103 S Ct 2517. Appellees also maintain that the Ohio laws requiring court employees not to disclose public documents are irrelevant because the right to anonymity is broader than the right not to have officials reveal one's identity to the public at large.

Confidentiality differs from anonymity, but we do not believe that the distinction has constitutional significance in the present context. The distinction has not played a part in our previous decisions, and, even if the Bellotti principal opinion is taken as setting the standard, we do not find complete anonymity critical. HB 319, like the statutes in Bellotti and Ashcroft, takes reasonable steps to prevent the public from learning of the minor's identity. We refuse to base a decision on the facial validity of a statute on the mere possibility of unauthorized, illegal disclosure by state employees. HB 319, like many sophisticated judicial procedures, requires participants to provide identifying information for administrative purposes, not for public disclosure.

[1d] Fourth, the Bellotti principal

opinion indicated that courts must conduct a bypass procedure with expedition to allow the minor an effective opportunity to obtain the abortion. See 443 US, at 644, 61 L Ed 2d 797, 99 S Ct 3035. HB 319, as noted above, requires the trial court to make its decision within five "business day[s]" after the minor files her complaint, § 2151.85(B)(1); requires the court of appeals to docket an appeal within four "days" after the minor files a notice of appeal, § 2505.073(A); and requires the court of appeals to render a decision within five "days" after docketing the appeal, ibid.

The District Court and the Court of Appeals assumed that all of the references to days in §§ 2151.85(B)(1) and 2505.073(A) meant business days as opposed to calendar days. Cf. Ohio Rule App Proc 14(A) (excluding nonbusiness days from computations of less than seven days). They calculated, as a result, that the procedure could take up to 22 calendar days because the minor could file at a time during the year in which the 14 business days needed for the bypass procedure would encompass 3 Saturdays, 3 Sundays, and 2 legal holidays. Appellees maintain, on the basis of an affidavit included in the record, that a 3-week delay could increase by a substantial measure both the costs and the medical risks of an abortion. See App 18. They conclude, as did those

courts, that HB 319 does not satisfy the Bellotti principal opinion's expedition requirement.

[3b, 11] As a preliminary matter, the 22-day calculation conflicts with two well-known rules of construction discussed in our abortion cases and elsewhere. "Where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality." Ashcroft, supra, at 493, 76 L Ed 2d 733, 103 S Ct 2517 (opinion of Powell, J.). Although we recognize that the other federal courts "'are better schooled in and more able to interpret the laws of their respective States'" than are we, Frisby v Schultz, 487 US 474, 482, 101 L Ed 2d 420, 108 S Ct 2495 (1988), the Court of Appeals' decision strikes us as dubious. Interpreting the term "days" in § 2505.073(A) to mean business days instead of calendar days seems inappropriate and unnecessary because of the express and contrasting use of "business day[s]" in § 2151.85(B)(1). In addition, because appellees are making a facial challenge to a statute, they must show that "no set of circumstances exists under which the Act would be valid." Webster v Reproductive Health Services, 492 US 490, 524, 106 L Ed 2d 410, 109 S Ct 3040 (1989) (O'Connor, J., concurring). The Court of Appeals should not have invalidated the Ohio statute on a facial challenge based upon a worst-case analysis that may never occur. Cf. Ohio Rev Code § 2505.073(A) (Supp 1988) (allowing the court of appeals, upon the minor's motion, to shorten or extend the time periods). Moreover, under our precedents, the mere possibility that the procedure may require up to 22 days in a rare case is plainly insufficient to invalidate the statute on its face. Ashcroft, for example, upheld a Missouri statute that contained a bypass procedure that could require 17 calendar days plus a sufficient time for deliberation and decisionmaking at both the trial and appellate levels. See 462 US, at 477, n 4, 491, n 16, 76 L Ed 2d 733, 103 S Ct 2517.

B

[4b] Appellees ask us, in effect, to extend the criteria used by some members of the Court in Bellotti and the cases following it by imposing three additional requirements on bypass

[497 US 515]

procedures. First, they challenge the constructive authorization provisions in HB 319, which enable a minor to obtain an abortion without notifying one of her parents if either the juvenile court or the court of appeals fails to act within the prescribed time limits. See Ohio Rev Code Ann §§ 2151.85(B)(1), 2505.073(A), and § 2919.12(B)(1)(a)(iv) (1987 and Supp 1988). They speculate that the absence of an affirmative order when a court fails to process the minor's complaint will deter the physician from acting.

We discern no constitutional defect in the statute. Absent a demonstrated pattern of abuse or defiance, a State may expect that its judges will follow mandated procedural requirements. There is no showing that the time limitations imposed by HB 319 will be ignored. With an abundance of caution, and concern for the minor's interests, Ohio added the constructive authorization provisions in HB 319 to ensure expedition of the bypass procedures even if these time limits are not met. The State represents that a physician can obtain certified documentation from the juvenile or appellate court that constructive authorization has occurred. Brief for Appellant 36. We did not require a similar safety net in the bypass procedures in Ashcroft, supra, at 479-480, n 4, 76 L Ed 2d 733, 103 S Ct 2517, and find no defect in the procedures that Ohio has provided.

[5b] Second, appellees ask us to rule that a bypass procedure cannot require a minor to prove maturity or best interests by a standard of clear and convincing evidence. They maintain that, when a State seeks to deprive an individual of liberty interests, it must take upon itself the risk of error. See Santosky v Kramer, 455 US 745, 755, 71 L Ed 2d 599, 102 S Ct 1388 (1982). House Bill 319 violates this standard, in their opinion, not only by placing the burden of proof upon the minor, but also by imposing a heightened standard of proof.

This contention lacks merit. A State does not have to bear the burden of proof on the issues of maturity or best interests. The principal opinion in Bellotti indicates that a State may require the minor to prove these facts in a bypass

[497 US 516]

procedure. See 443 US, at 643, 61 L Ed 2d 797, 99 S Ct 3035 (opinion of Powell, J.). A State, moreover, may require a heightened standard of proof when, as here, the bypass procedure contemplates an ex parte proceeding at which no one opposes the minor's testimony. We find the clear and convincing standard used in HB 319 acceptable. The Ohio Supreme Court has stated:

> "Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal." Cross v Ledford, 161 Ohio St 469, 477, 120 NE2d 118, 123 (1954) (emphasis deleted).

Our precedents do not require the State to set a lower standard. Given that the minor is assisted in the courtroom by an attorney as well as a guardian ad litem, this aspect of HB 319 is not infirm under the Constitution.

[6b] Third, appellees contend that the pleading requirements in HB 319 create a trap for the unwary. The minor, under the statutory scheme and the requirements prescribed by the Ohio Supreme Court, must choose among three pleading forms. See Ohio Rev Code § 2151.85(C) (Supp 1988); App 6-14. The first alleges only maturity and the second alleges only best interests. She may not attempt to prove both maturity and best interests unless she chooses the third form, which alleges both of these facts. Appellees contend that the complications imposed by this scheme deny a minor the opportunity, required by the principal opinion in Bellotti, to prove either maturity or best interests or both. See 443 US, at 643-644, 61 L Ed 2d 797, 99 S Ct 3035.

Even on the assumption that the pleading scheme could produce some initial confusion because few minors would have counsel when pleading, the simple and straightforward procedure does not deprive the minor of an opportunity to

[497 US 517]

prove her case. It seems unlikely that the Ohio courts will treat a minor's choice of complaint form without due care and understanding for her unrepresented status. In addition, we note that the minor does not make a binding election by the initial choice of pleading form. The minor, under HB 319, receives appointed counsel after filing the complaint and may move for leave to amend the pleadings. See 2151.85(B)(2); Ohio Rule Juvenile Proc 22(B); see also Hambleton v R. G. Barry Corp. 12 Ohio St 3d 179, 183-184, 465 NE2d 1298, 1302 (1984) (finding a liberal amendment policy in the state civil rules). Regardless of whether Ohio could have written a simpler statute, HB 319 survives a facial challenge.

III

[7b] Appellees contend our inquiry does not end even if we decide that HB 319 conforms to Danforth, Bellotti, Matheson, Ashcroft, and Akron. They maintain that HB 319 gives a minor a state-law substantive right "to avoid unnecessary or hostile parental involvement" if she can demonstrate that her maturity or best interests favor abortion without notifying one of her parents. They argue that HB 319 deprives the minor of this right without due process because the pleading requirements, the alleged lack of expedition and anonymity, and the clear and convincing evidence standard make the bypass procedure unfair. See Mathews v Eldridge, 424 US 319, 335, 47 L Ed 2d 18, 96 S Ct 893 (1976). We find no merit in this argument.

[2c, 3c, 4c, 5c, 6c] The confidentiality provisions, the expedited procedures, and the pleading form requirements, on their face, satisfy the dictates of minimal due process. We see little risk of erroneous deprivation under these provisions and no need to require additional procedural safeguards. The clear and convincing evidence standard, for reasons we have described, does not place an unconstitutional burden on the types of proof to be presented. The minor is assisted by an attorney and a guardian ad litem and the proceeding is ex parte. The

[497 US 518]

standard ensures that the judge will take special care in deciding whether the minor's consent to an abortion should proceed without parental notification. As a final matter, given that the statute provides definite and reasonable deadlines, Ohio Rev Code Ann § 2505.073(A) (Supp 1988), the constructive authorization provision, § 2151.85(B)(1), also comports with due process on its face.

IV

[8b] Appellees, as a final matter, contend that we should invalidate HB 319 in its entirety because the statute requires the parental notice to be given by the physician who is to perform the abortion. In Akron, the Court found unconstitutional a requirement that the attending physician provide the information and counseling relevant to informed consent. See 462 US, at 446-449, 76 L Ed 2d 687, 103 S Ct 2481. Although the Court did not disapprove of informing a woman of the health risks of an abortion, it explained that "[t]he State's interest is in ensuring that the woman's consent is informed and unpressured; the critical factor is whether she obtains the necessary information and counseling from a qualified person, not the identity of the person from whom she obtains it." Id., at 448, 76 L Ed 2d 687, 103 S Ct 2481. Appellees maintain, in a similar fashion, that Ohio has no reason for requiring the minor's physician, rather than some other qualified person, to notify one of the minor's parents.

Appellees, however, have failed to consider our precedent on this matter. We upheld, in Matheson, a statute that required a physician to notify the minor's parents. See 450 US, at 400, 67 L Ed 2d 388, 101 S Ct 1164. The distinction between notifying a minor's parents and informing a woman of the routine risks of an abortion has ample justification; although counselors may provide information about general risks as in Akron, appellees do not contest the superior ability of a physician to garner and use information supplied by a minor's parents upon receiving notice. We continue to believe that a State may require the physician himself or herself to take reasonable

steps to notify a minor's parent because the parent often will provide important medical data to the physician. As we explained in Matheson:

> "The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature. An adequate medical and psychological case history is important to the physician. Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data." 450 US, at 411, 67 L Ed 2d 388, 101 S Ct 1164 (footnote omitted).

The conversation with the physician, in addition, may enable a parent to provide better advice to the minor. The parent who must respond to an event with complex philosophical and emotional dimensions is given some access to an experienced and, in an ideal case, detached physician who can assist the parent in approaching the problem in a mature and balanced way. This access may benefit both the parent and child in a manner not possible through notice by less qualified persons.

Any imposition on a physician's schedule, by requiring him or her to give notice when the minor does not have consent from one of her parents or court authorization, must be evaluated in light of the complete statutory scheme. The statute allows the physician to send notice by mail if he or she cannot reach the minor's parent "after a reasonable effort," Ohio Rev Code Ann § 2919.12(B)(2) (1987), and also allows him or her to forgo notice in the event of certain emergencies, see § 2919.12(C)(2). These provisions are an adequate recognition of the physician's professional status. On this facial challenge, we find the physician notification requirement unobjectionable.

V

The Ohio statute, in sum, does not impose an undue, or otherwise unconstitutional, burden on a minor seeking an

[497 US 520]

abortion. We believe, in addition, that the legislature acted in a rational manner in enacting HB 319. A free and enlightened society may decide that each of its members should attain a clearer, more tolerant understanding of the profound philosophic choices confronted by a woman who is considering whether to seek an abortion. Her decision will embrace her own destiny and personal dignity, and the origins of the other human life that lie within the embryo. The State is entitled to assume that, for most of its people, the beginnings of that understanding will be within the family, society's most intimate association. It is both rational and fair for the State to conclude that, in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature. The statute in issue here is a rational way to further those ends. It would deny all dignity to the family to say that the State cannot take this reasonable step in regulating its health professions to ensure that, in most cases, a young woman will receive guidance and understanding from a parent. We uphold HB 319 on its face and reverse the judgment of the Court of Appeals.

It is so ordered.

SEPARATE OPINIONS

Justice **Scalia,** concurring.

I join the opinion of the Court, because I agree that the Ohio statute neither deprives minors of procedural due process nor contradicts our holdings regarding the constitutional right to abortion. I continue to believe, however, as I said in my separate concurrence last Term in Webster v Reproductive Health Services, 492 US 490, 106 L Ed 2d 410, 109 S Ct 3040 (1989), that the Constitution contains no right to abortion. It is not to be found in the longstanding traditions of our society, nor can it be logically deduced from the text of the Constitution—not, that is, without volunteering a judicial answer to the nonjusticiable question of when human life begins. Leaving this matter to the political process is not only legally correct, it is pragmatically so. That alone—and not lawyerly dissection of federal judicial

[497 US 521]

precedents—can produce compromises satisfying a sufficient mass of the electorate that this deeply felt issue will cease distorting the remainder of our democratic process. The Court should end its disruptive intrusion into this field as soon as possible.

Justice **Stevens,** concurring in part and concurring in the judgment.

As the Court emphasizes, appellees have challenged the Ohio statute only on its face. The State may presume that, in most of its applications, the statute will reasonably further its legitimate interest in protecting the welfare of its minor citizens. See H. L. v Matheson, 450 US 398, 422-423, 67 L Ed 2d 388, 101 S Ct 1164 (1981) (Stevens, J., concurring in judgment). In some of its applications, however, the one-parent notice requirement will not reasonably further that interest. There will be exceptional situations in which notice will cause a realistic risk of physical harm to the pregnant woman, will cause trauma to an ill parent, or will enable the parent to prevent the abortion for reasons that are unrelated to the best interests of the minor. The Ohio statute recognizes that possibility by providing a judicial bypass. The question in this case is whether that statutory protection for the exceptional case is so obviously inadequate that the entire statute should be invalidated. I am not willing to reach that conclusion before the statute has been implemented and the significance of its restrictions evaluated in the light of its administration. I therefore agree that the Court of Appeals' judgment must be reversed, and I join Parts I-IV of the Court's opinion.[1]

[497 US 522]

The Court correctly states that we have not decided the specific question whether a judicial bypass procedure is necessary in order to save the constitutionality of a one-parent notice statute. See ante, at 510, 111 L Ed 2d, at 418. We have, however, squarely held that a requirement of preabortion parental notice in all cases involving pregnant minors is unconstitutional. Although it need not take the form of a judicial bypass, the State must provide an adequate mechanism for cases in which the minor is mature or notice would not be in her best interests.

In Akron v Akron Center for Reproductive Health, Inc. 462 US 416, 76 L Ed 2d 687, 103 S Ct 2481 (1983), the city argued that the constitutionality of its ordinance requiring parental consent was saved by the minor's opportunity to invoke the State's juvenile court procedures. We held the same day in Planned Parenthood Assn. of Kansas City, Mo., Inc. v Ashcroft, 462 US 476, 493, 76 L Ed 2d 733, 103 S Ct 2517 (1983) (opinion of Powell, J.), that a similar provision which did not require parental notification avoided any constitutional infirmities in such a statute. We rejected the argument in Akron, however, because the procedures in that case required that the parent be given notice when the minor's petition was filed. Writing for six Justices, including the author of the Court's opinion in H. L. v Matheson, supra, Justice Powell explained:

---

[1] It is perhaps trite for a judge to reiterate the familiar proposition that an opinion about the facial constitutionality of a statute says nothing about the judge's views concerning the wisdom or unwisdom of the measure. I have made this observation before, see National League of Cities v Usery, 426 US 833, 881, 49 L Ed 2d 245, 96 S Ct 2465 (1976) (dissenting opinion), and am moved by Justice Blackmun's eloquent dissent to do so again. It would indeed be difficult to contend that each of the challenged provisions of the Ohio statute—or the entire mosaic—represents wise legislation.

> "Even assuming that the Ohio courts would construe these provisions as permitting a minor to obtain judicial approval for the 'proper or necessary . . . medical or surgical care' of an abortion, where her parents had refused to provide that care, the statute makes no provision for a mature or emancipated minor completely to avoid hostile parental involvement by demonstrating to the satisfaction of the court that she is capable of exercising her constitutional right to choose an abortion. On the contrary, the statute requires that the minor's parents be notified once a petition has been filed, [Ohio Rev Code Ann] § 2151.28 [(Supp 1982)], a requirement that in the case
>
> **[497 US 523]**
>
> of a mature minor seeking an abortion would be unconstitutional. See H. L. v Matheson, 450 US, at 420 [67 L Ed 2d 388, 101 S Ct 1164] (Powell, J., concurring); id., at 428, n 3 [67 L Ed 2d 388, 101 S Ct 1164] (Marshall, J., dissenting)." 462 US, at 441, n 31, 76 L Ed 2d 687, 103 S Ct 2481.

Thus, while a judicial bypass may not be necessary to take care of the cases in which the minor is mature or parental notice would not be in her best interests—and, indeed, may not be the preferable mechanism—the Court has held that some provision must be made for such cases.

The Ohio statute, on its face, provides a sufficient procedure for those cases. The pleading requirements and the constructive authorization and confidentiality provisions of the Act satisfy the standards established in Ashcroft, supra, for a judicial bypass. As the Court states, the minor is not bound by her initial choice of pleading form, ante, at 517, 111 L Ed 2d, at 422, the constructive authorization provision functions as an additional "safety net" when the statutory deadlines are not met, ante, at 515, 111 L Ed 2d, at 421, and the State has taken reasonable steps to ensure confidentiality, ante, at 512-513, 111 L Ed 2d, at 419. The requirement that the minor prove maturity or best interests by clear and convincing evidence is supported by the presumption that notification to a parent will in most circumstances be in the minor's best interests: It is not unreasonable to require the minor, *when assisted by counsel and a guardian* ad litem, ante, at 517-518, 111 L Ed 2d, at 421-422, to overcome that presumption by clear and convincing evidence. Cf. Parham v J. R. 442 US 584, 610, 61 L Ed 2d 101, 99 S Ct 2493 (1979) ("[P]resumption that parents act in the best interests of their child" is relevant in determining what process is due in commitment proceeding).[2] I have more concern

[497 US 524]

about the possible delay in the bypass procedure, but the statute permits the Ohio courts to expedite the procedure upon a showing of good cause, see ante, at 515, 111 L Ed 2d, at 421 (citing Ohio Rev Code Ann § 2505.073(A) (Supp 1988)), and sensitive administration of the deadlines may demonstrate that my concern is unwarranted.

---

[2] The standard of proof for the minor's abortion decision is no more onerous than that for any medical procedure of which the parents may disapprove. Under Ohio law, a determination that a child is neglected or dependent, which is necessary before a court or guardian ad litem may authorize proper or necessary medical or surgical care, must be made by clear and convincing evidence. See Ohio Rev Code Ann § 2151.35 (Supp 1988); see also In re Willmann, 24 Ohio App 3d 191, 198-199, 493 NE2d 1380, 1389 (1986); In re Bibb, 70 Ohio App 2d 117, 120, 435 NE2d 96, 99 (1980).

There is some tension between the statutory requirement that the treating physician notify the minor's parent and our decision in Akron, 462 US, at 446-449, 76 L Ed 2d 687, 103 S Ct 2481, that a State may not require the attending physician to personally counsel an abortion patient. One cannot overlook the possibility that this provision was motivated more by a legislative interest in placing obstacles in the woman's path to an abortion, see Maher v Roe, 432 US 464, 474, 53 L Ed 2d 484, 97 S Ct 2376 (1977), than by a genuine interest in fostering informed decisionmaking. I agree with the Court, however, that the Ohio statute requires only that the physician take "reasonable steps" to notify a minor's parent and that such notification may contribute to the decisionmaking process. Ante, at 518-519, 111 L Ed 2d, at 423. Accordingly, I am unable to conclude that this provision is unconstitutional on its face.

Justice **Blackmun,** with whom Justice **Brennan** and Justice **Marshall** join, dissenting.

I

The constitutional right to "control the quintessentially intimate, personal, and life-directing decision whether to carry a fetus to term," Webster v Reproductive Health Services, 492 US 490, 538, 106 L Ed 2d 410, 109 S Ct 3040 (1989) (opinion concurring in part and dissenting in part), does "not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." Planned Parenthood of

Central Mo. v Danforth, 428 US 52, 74, 49 L Ed 2d 788, 96 S Ct 2831 (1976); Hodgson v Minnesota, ante, at 435, 111 L Ed 2d 344, 110 S Ct 2926 ("[T]he constitutional protection against unjustified state intrusion into the process of deciding whether or not to bear a child extends to pregnant minors as well as adult women"). Although the Court "has recognized that the State has somewhat broader authority to regulate the activities of children than of adults," in doing so, the State nevertheless must demonstrate that there is a "*significant state interest* in conditioning an abortion . . . that is not present in the case of an adult." Danforth, 428 US, at 74-75, 49 L Ed 2d 788, 96 S Ct 2831 (emphasis added). "Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." Id., at 75, 49 L Ed 2d 788, 96 S Ct 2831.

"The abortion decision differs in important ways from other decisions that may be made during minority. The need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with *particular sensitivity* when it legislates to foster parental involvement in this matter." Bellotti v Baird, 443 US 622, 642, 61 L Ed 2d 797, 99 S Ct 3035 (1979) (opinion of Powell, J.) (emphasis added) (Bellotti II). "[P]articular sensitivity" is mandated because "there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible." Ibid. It should be obvious that "considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor." Ibid.

The State of Ohio has acted with particular *in*sensitivity in enacting the statute the Court today upholds. Rather than create a judicial-bypass system that reflects the sensitivity necessary when dealing with a minor making this deeply intimate decision, Ohio has created a tortuous maze. Moreover, the State has failed utterly to show that it has any significant

state interest in deliberately placing its pattern of obstacles in the path of the pregnant minor seeking to exercise her constitutional right to terminate a pregnancy. The challenged provisions of the Ohio statute are merely "poorly disguised elements of discouragement for the abortion decision." Thornburgh v American College of Obstetricians and Gynecologists, 476 US 747, 763, 90 L Ed 2d 779, 106 S Ct 2169 (1986).

II

The majority does not decide whether the Ohio parental-notice statute must contain a judicial-bypass procedure because the majority concludes that the bypass procedure in the statute "meets the requirements identified for parental consent statutes in Danforth, Bellotti, Ashcroft, and Akron." Ante, at 510, 111 L Ed 2d, at 418. I conclude, however, that, because of the minor's emotional vulnerability and financial dependency on her parents, and because of the "unique nature of the abortion decision," Bellotti II, 443 US, at 642, 61 L Ed 2d 797, 99 S Ct 3035, and its consequences, a parental-notice statute is tantamount to a parental-consent statute. As a practical matter, a notification requirement will have the same deterrent effect on a pregnant minor seeking to exercise her constitutional right as does a consent statute. See Akron v Akron Center for Reproductive Health, Inc. 462 US 416, 441, n 31, 76 L Ed 2d 687, 103 S Ct 2481 (1983); H. L. v Matheson, 450 US 398, 420, n 9, 67 L Ed 2d 388, 101 S Ct 1164 (1981) (concurring opinion). Thus a notice statute, like a consent statute, must contain a bypass procedure that comports with the standards set forth in Bellotti II. Because I disagree with the Court's conclusion that the Ohio bypass procedure complies with the dictates of Bellotti II and its progeny, I would strike down Ohio Amended Substitute House Bill 319.

The Bellotti II principal opinion stated: "A pregnant minor is entitled in such a [judicial-bypass] proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2)

that even if she is not able to make this decision independently, the desired abortion would be in her best interests." 443 US, at 643-664, 61 Ed 2d 797, 99 S Ct 3035 (opinion of Powell, J.) (footnote omitted). The language of the Ohio statute purports to follow the standards for a bypass procedure that are set forth in Bellotti II, but at each stage along the way, the statute deliberately places "substantial state-created obstacles in the pregnant [minor's] path to an abortion," Maher v Roe, 432 US 464, 477, n 10, 53 L Ed 2d 484, 97 S Ct 2376 (1977), in the legislative hope that she will stumble, perhaps fall, and at least ensuring that she "conquer a multifaceted obstacle course" before she is able to exercise her constitutional right to an abortion. Dellinger & Sperling, Abortion and the Supreme Court: Retreat from Roe v Wade, 138 U Pa L Rev 83, 100 (1989). The majority considers each provision in a piecemeal fashion, never acknowledging or assessing the "degree of burden that the entire regime of abortion regulations places" on the minor. Ibid.

A

The obstacle course begins when the minor first enters the courthouse to fill out the complaint forms. The " 'procedural trap,' " as it appropriately was described by the Court of Appeals, Akron Center for Reproductive Health v Slaby, 854 F2d 852, 863 (CA6 1988), requires the minor to choose among three forms. The first alleges *only* maturity; the second alleges *only* that the abortion is in her best interest. App 6-11. Only if the minor chooses the third form, which alleges both, id., at 12-13, may the minor attempt to prove both maturity *and* best interest as is her right under Bellotti II. See Ohio Rev Code Ann § 2151.85(C)(3) (Supp 1988). The majority makes light of what it acknowledges might be "some initial confusion" of the unsophisticated minor who is trying to deal with an unfamiliar and mystifying court system on an intensely intimate matter. Ante, at 516-517, 111 L Ed 2d, at 422. The Court points out that the minor, with counsel appointed after she filed the complaint, "may move for leave to amend the

pleadings" and avers that it "seems unlikely that the Ohio courts will treat a minor's choice of complaint form without due care." Ibid. I would take the Ohio Legislature's word, however, that its pleading requirement was intended to be meaningful. The constitutionality of a procedural provision cannot be analyzed on the basis that it may have no effect. If the pleading requirement prevents some minors from showing either that they are mature or that an abortion would be in their best interests, it plainly is unconstitutional.

The majority fails to elucidate *any* state interest in setting up this barricade for the young pregnant woman—a barricade that will "serve only to confuse . . . her and to heighten her anxiety." Thornburgh, 476 US, at 762, 90 L Ed 2d 779, 106 S Ct 2169. The justification the State put forward before the Court of Appeals was the "absurd contention that '[a]ny minor claiming to be mature and well enough informed to independently make such an important decision as an abortion should also be mature enough to file her complaint under [the appropriate subsection].' " See 854 F2d, at 863, quoting Brief for State of Ohio in No. 86-3664, (CA6), p 43. This proffered "justification" is even more harsh than the Court of Appeals noted. It excludes the mature minor who may not have the intellectual capacity to understand these tangled forms, and it spurns the immature minor who is abused or who contends for some other reason that an abortion without parental involvement would be in her best interest. Surely, the goal of the court proceeding is to assist, not to entrap, the young pregnant woman.

The State's interest in "streamlining" the claims, belatedly asserted for the first time before this Court, is no less absurd. It is ludicrous to confound the pregnant minor, forced to go to court at this time of crisis in her life, with alternative complaint forms that must later be rescinded by appointed counsel and replaced by the only form that is constitutionally valid. Moreover, this ridiculous pleading scheme leaves to the judge's discretion whether the minor may amend her

[497 US 529]

pleading and attempt to prove both her maturity and best interest. To allow the resolution of this vital issue to turn on a judge's discretion does not comport with Bellotti II's declaration that the minor who "fails to satisfy the court that she is competent to make this decision independently . . . *must* be permitted to show that an abortion nevertheless would be in her best interests." Bellotti II, 443 US, at 647-648, 61 L Ed 2d 797, 99 S Ct 3035 (opinion of Powell, J.) (emphasis added).

B

As the pregnant minor attempts to find her way through the labyrinth set up by the State of Ohio, she encounters yet another obstruction even before she has completed the complaint form. In Bellotti II, the principal opinion insisted that the judicial bypass procedure "must assure that a resolution of the issue, and any appeals that may follow, will be completed with *anonymity . . . .*" Id., at 644, 61 L Ed 2d 797, 99 S Ct 3035 (emphasis added). That statement was not some idle procedural requirement, but stems from the proposition that the Due Process Clause protects the woman's right to make her decision "independently and privately." Hodgson, ante, at 434, 111 L Ed 2d 344, 110 S Ct 2926. The zone of privacy long has been held to encompass an "individual interest in avoiding disclosure of personal matters." Whalen v Roe, 429 US 589, 599, 51 L Ed 2d 64, 97 S Ct 869 (1977). The Ohio statute does not safeguard that right. Far from keeping the identity of the minor anonymous, the statute requires the minor to sign her full name and the name of one of her parents on the complaint form. See App 6-14 (pleading forms). See ante, at 512, 111 L Ed 2d, at 419 ("Unless the minor has counsel, she must sign a complaint form to initiate the bypass procedure and, even if she has counsel, she must supply the name of one of her parents at four different places"). Acknowledging that "[c]onfidentiality differs from anonymity," the majority simply asserts that "complete anonymity" is not "critical." Ante, at 513, 111 L Ed 2d, at 419. That easy conclusion is irreconcilable with Bellotti's anonymity requirement. The definition of "anonymous" is "not named or identified."

[497 US 530]

Webster's Ninth New Collegiate Dictionary 88 (1983). Complete anonymity, then, appears to be the only kind of anonymity that a person could possibly have. The majority admits that case law regarding the anonymity requirement has permitted no less. See ante, at 512, 111 L Ed 2d, at 419, citing Planned Parenthood League of Massachusetts v Bellotti, 641 F2d 1006, 1025 (CA1 1981) (pseudonym); Planned Parenthood Assn. of Kansas City, Mo., Inc. v Ashcroft, 462 US 476, 491, n 16, 76 L Ed 2d 733, 103 S Ct 2517 (1983) (initials). See also Thornburgh, 476 US, at 766, 90 L Ed 2d 779, 106 S Ct 2169 ("[T]he decision to terminate a pregnancy is an intensely private one that must be protected in a way that assures anonymity").

The majority points to Ohio laws requiring court employees not to disclose public documents, blithely assuming that the "mere possibility of unauthorized, illegal disclosure by state employees" is insufficient to establish that the confidentiality of the proceeding is not protected. Ante, at 513, 111 L Ed 2d, at 419. In fact, the provisions regarding the duty of court employees not to disclose public documents amount to no more than "generally stated principles of . . . confidentiality." American College of Obstetricians and Gynecologists v Thornburgh, 737 F2d 283, 297 (CA3 1984), aff'd on other grounds, 476 US 747, 90 L Ed 2d 779, 106 S Ct 2169 (1986). As the District Court pointed out, there are no indications of how a clerk's office, large or small, is to ensure that the records of abortion cases will be distinguished from the records of all other cases that are available to the public. Akron Center for Reproductive Health v Rosen, 633 F Supp 1123, 1143-1144 (ND Ohio 1986). Cf. Planned Parenthood League of Massachusetts v Bellotti, 641 F2d, at 1025 (minor proceeds under pseudonym and affidavit containing her identity is kept in separate, sealed file). Nor are there measures for sealing the record after the case is closed to prevent its public availability; Planned Parenthood Assn. of the Atlanta Area, Inc. v Harris, 670 F Supp 971, 991 (ND Ga 1987) (noting with disapproval that Georgia statute made no provision for court documents to be sealed).

[497 US 531]

This Court is well aware that, unless special care is taken, court documents of an intimate nature will find their way to the press and public. See The Florida Star v B. J. F., 491 US 524, 105 L Ed 2d 443, 109 S Ct 2603 (1989) (reporter in police room copied police report and published article with rape victim's full name). The State has offered no justification for its failure to provide specific guidelines to be followed by the Juvenile Court to ensure anonymity for the pregnant minor—even though it has in place a procedure to assure the anonymity of juveniles who have been adjudicated delinquent or unruly. See Ohio Rev Code Ann § 2151.358 (1976) (detailed provision for sealing record and for expungement of record).

"A woman and her physician will necessarily be more reluctant to choose an abortion if there exists a possibility that her decision and her identity will become known publicly." Thornburgh, 476 US, at 766, 90 L Ed 2d 779, 106 S Ct 2169. A minor, whose very purpose in going through a judicial-bypass proceeding is to avoid notifying a hostile or abusive parent, would be most alarmed at signing her name and the name of her parent on the complaint form. Generalized statements concerning the confidentiality of records would be of small comfort, even if she were aware of them. True anonymity is essential to an effective, meaningful bypass. In the face of the forms that the minor must actually deal with, the State's assurances that the minor's privacy will be protected ring very hollow. I would not permit the State of Ohio to force a minor to forgo her anonymity in order to obtain a waiver of the parental-notification requirement.

C

Because a "pregnant adolescent . . . cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy," this Court has required that the State "must assure" that the "resolution of the issue, and any appeals that may follow, will be completed with . . . sufficient expedition to provide an effective opportunity for an abortion to be obtained." Bellotti II, 443 **[497 US 532]** US, at 642, 644, 61 L Ed 2d 797, 99 S Ct 3035 (opinion of Powell, J.); see also H. L. v Matheson, 450 US, at 412, 67 L Ed 2d 388, 101 S Ct 1164 (time is of the essence in an abortion decision). Ohio's judicial-bypass procedure can consume up to three weeks of a young woman's pregnancy. I would join the Sixth Circuit, the District Court, and the other federal courts that have held that a time span of this length fails to guarantee a sufficiently expedited procedure. See 854 F2d, at 868; 633 F Supp, at 1143. See also, e. g., American College of Obstetricians and Gynecologists v Thornburgh, 656 F Supp 879, 887-888 (ED Pa 1987) (statutory scheme allowing 23 days for judicial proceeding is unconstitutional); Glick v McKay, 616 F Supp 322, 326-327 (Nev 1985).

The majority is unconcerned that "the procedure may require up to 22 days in a rare case." Ante, at 514, 111 L Ed 2d, at 420. I doubt the "rarity" of such cases. In any event, the Court of Appeals appropriately pointed out that, because a minor often does not learn of her pregnancy until a late stage in the first trimester, time lost during that trimester is especially critical. 854 F2d, at 867-868. The Court ignores the fact that the medical risks surrounding abortion increase as pregnancy advances and that such delay may push a woman into her second trimester, where the medical risks, economic costs, and state regulation increase dramatically. See Roe v Wade, 410 US 113, 150, 163, 35 L Ed 2d 147, 93 S Ct 705 (1973); H. L. v Matheson, 450 US, at 439, and n 25, 67 L Ed 2d 388, 101 S Ct 1164 (dissenting opinion). Minors, who are more likely to seek later abortions than adult women,[1] and who usually are not financially independent, will suffer acutely from any delay. See Ashcroft, 462 US, at 497-498, 76 L Ed 2d 733, 103 S Ct 2517 (opinion concurring in part and dissenting in part) (an increased cost factor "may seem insignificant from the Court's comfortable perspective," but is not "equally insignificant" to "the unemployed teenager" for whom this additional cost may well put an abortion beyond reach). Because a delay of up to 22 **[497 US 533]** days may limit significantly a woman's ability to obtain an abortion, I agree with the conclusions of the District Court and the Court of Appeals that the statute violates this Court's command that a judicial-bypass proceeding be conducted with sufficient speed to maintain "an effective opportunity for an abortion to be obtained." Bellotti II, 443 US, at 644, 61 L Ed 2d 797, 99 S Ct 3035 (opinion of Powell, J.).[2]

---

[1] Indeed, the threat of parental notice itself may cause a minor to delay requesting assistance with her pregnancy. See H. L. v Matheson, 450 US 398, 439, and n 25, 67 L Ed 2d 388, 101 S Ct 1164 (1981) (dissenting opinion).

[2] The majority finds comfort in Planned Parenthood of Kansas City, Mo., Inc. v Ashcroft, 462 US 476, 76 L Ed 2d 733, 103 S Ct 2517 (1983), and insists that this Court upheld a Missouri statute that contained a bypass procedure "that could require 17 calendar days plus a sufficient time for deliberation and decision-making at both the trial and appellate levels." Ante, at 514, 111 L Ed 2d, at 420. The majority disregards the limited nature of the Ashcroft holding. The Court there looked only at the Missouri appellate procedure and determined that the 24-hour deadline for docketing the appeal and the 5-day deadline for completing the record and perfecting the appeal, together with the requirement that the Missouri Supreme Court provide for expedited appeal by court rule, provided a constitutionally sufficient "framework" for complying with Bellotti's mandate

D

The Ohio statute provides that if the juvenile or appellate courts fail to act within the statutory time frame, an abortion without parental notification is "constructively" authorized. Although Ohio's Legislature may have intended this provision to expedite the bypass procedure, the confusion that will result from the constructive-authorization provision will add further delay to the judicial-bypass proceeding, and is yet one more obstruction in the path of the pregnant minor. The physician risks civil damages, criminal penalties, including imprisonment, as well as revocation of his license for disobeying the statute's commands, but the statute provides for no formal court order or other relief to safeguard the physician from these penalties. See §§ 2151.85(B)(1), 2919.12(D), 2919.12(E), 4731.22(B)(23). The State argues that a combination of a date-stamped copy of the minor's complaint and

a "docket sheet showing no entry" would inform the physician that the abortion could proceed. Brief for Appellant 36. Yet, the mere absence of an entry on a court's docket sheet hardly would be reassuring to a physician facing such dire consequences, and the State offers no reason why a formal order or some kind of actual notification from the clerk of court would not be possible. There is no doubt that the nebulous authorization envisioned by this statute "in conjunction with a statute imposing strict civil and criminal liability . . . could have a profound chilling effect on the willingness of physicians to perform abortions . . . ." Colautti v Franklin, 439 US 379, 396, 58 L Ed 2d 596, 99 S Ct 675 (1979). I agree with the Court of Appeals that the "practical effect" of the " 'pocket approval' " provision is to frustrate the minor's right to an expedient disposition of her petition. 854 F2d, at 868.

E

If the minor is able to wend her way through the intricate course of preliminaries Ohio has set up for her and at least reaches the court proceeding, the State shackles her even more tightly with still another "extra layer and burden of regulation on the abortion decision." Danforth, 428 US, at 66, 49 L Ed 2d 788, 96 S Ct 2831. The minor must demonstrate by "clear and convincing evidence" either (1) her maturity; (2) or that one of her parents has engaged in a pattern of physical, sexual, or emotional abuse against her; or (3) that notice to a parent is not in her best interest. § 2151.85(C). The imposition of this heightened standard of proof unduly burdens the minor's right to seek an abortion and demonstrates a fundamental misunderstanding of the real nature of a court-bypass proceeding.

The function of a standard of proof is to " 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions,' " Addington v Texas, 441 US 418, 423, 60 L Ed 2d 323, 99 S Ct 1804 (1979), quoting In re Winship, 397 US 358, 370, 25 L Ed 2d 368, 90 S Ct 1068 (1970) (concurring

---

for expedited appeals. See 462 US, at 491, n 16, 76 L Ed 2d 733, 103 S Ct 2517. The Court made no ruling as to whether the Missouri law provided constitutionally sufficient expedition at the initial stages of the bypass.

opinion), and is "a societal judgment about how the risk of error should be distributed between the litigants." Santosky v Kramer, 455 US 745, 755, 71 L Ed 2d 599, 102 S Ct 1388 (1982). By imposing such a stringent standard of proof, this Ohio statute improperly places the risk of an erroneous decision on the minor, the very person whose fundamental right is at stake. Cf. id., at 756, 71 L Ed 2d 599, 102 S Ct 1388 (clear and convincing standard of proof usually has been employed to preserve fundamental fairness in a variety of *government-initiated* proceedings that threaten to deprive the *individual* involved with a significant deprivation of liberty). Even if the judge is satisfied that the minor is mature or that an abortion is in her best interest, the court may not authorize the procedure unless it additionally finds that the evidence meets a "clear and convincing" standard of proof.

The majority asserts that a State may require a heightened standard of proof because the procedure is ex parte. Ante, at 516, 111 L Ed 2d, at 421. According to the majority, the only alternative to the "clear and convincing" standard is a preponderance of the evidence standard, which would require proof by the greater weight of the evidence. The majority reasons that the preponderance standard is unsuited to a Bellotti II bypass because, if the minor presents any evidence at all, and no evidence is put forth in opposition, the minor always will present the greater weight of the evidence. Yet, as the State explained at argument, the bypass procedure is inquisitorial in nature, where the judge questions the minor to discover if she meets the requirements set down in Bellotti II. See Tr of Oral Arg 9. The judge will be making this determination after a hearing that resembles an interview, not an evidentiary proceeding.[3] The District Court observed, "the judge's decision will necessarily be based largely on subjective standards without the benefit of any evidence other then a woman's testimony." 633 F Supp, at 1137. Thus, unlike the procedure the majority seems to envision, it is not the quantity of the evidence presented that is crucial in the bypass proceeding; rather, the crucial factors are the nature of the minor's statements to the judge and her demeanor. Contrary to the majority's theory, if the minor presents evidence that she is mature, she still must *satisfy* the judge that this is so, even without this heightened standard of proof. The use of a heightened standard in the very special context of Bellotti's court-bypass procedure does little to facilitate a fair and reliable result and imports an element from the adversarial process into this unique inquiry where it has no rightful place.

Although I think the provision is constitutionally infirm for all minors, I am particularly concerned about the effect it will have on sexually or physically abused minors. I agree that parental interest in the welfare of their children is "particularly strong where a *normal* family relationship exists." Bellotti II, 443 US, at 648, 64 L Ed 2d 580, 100 S Ct 1925 (opinion of Powell, J.) (emphasis added). A minor needs no statute to seek the support of loving parents. Where trust and confidence exist within the family structure, it is likely that communication already exists.[4] If that compassionate support is lacking, an unwanted pregnancy is a poor way to generate it.

---

[3] Bellotti v Baird, 443 US 622, 61 L Ed 2d 797, 99 S Ct 3035 (1979), itself recognized the unique nature of the bypass procedure when it required the minor merely to show or satisfy the court that she is mature or that an abortion would be in her best interests, without imposing any standard of proof. See also id., at 643, n 22, 61 L Ed 2d 797, 99 S Ct 3035 (opinion of Powell, J.) ("Much can be said for employing procedures and a forum less formal than those associated with a court of general jurisdiction").

Sadly, not all children in our country are fortunate enough to be members of loving families. For too many young pregnant women, parental involvement in this most intimate decision

threatens harm, rather than promises comfort.[5] The Court's selective blindness to this stark social reality is bewildering and distressing. Lacking the protection that young people typically find in their intimate family associations, these minors are desperately in need of constitutional protection. The sexually or physically abused minor may indeed be "lonely or even terrified," ante, at 520, 111 L Ed 2d, at 424, not of the abortion procedure, but of an abusive family member.[6] The Court's placid reference, ibid., to the "compassionate and mature" advice the minor will receive from within the family must seem an unbelievable and cruel irony to those children trapped in violent families.[7]

Under the system Ohio has set up, a sexually abused minor must go to court and demonstrate to a complete stranger by clear and convincing evidence that she has been the victim of a pattern of sexual abuse. When asked at argument what kind of evidence a minor would be required to adduce at her bypass hearing, the State answered that the minor would tell her side to the judge and the judge would consider how well

"the minor is able to articulate what her particular concerns are." Tr of Oral Arg 9. The court procedure alone, in many cases, is extremely traumatic. See Hodgson, ante, at 441, and n 29, 111 L Ed 2d 344, 110 S Ct 2926. The State and the Court are impervious to the additional burden imposed on the abused minor who, as any experienced social worker or counselor knows, is often afraid and ashamed to reveal what has happened to her to anyone outside the home. The Ohio statute forces that minor, despite her very real fears, to experience yet one more hardship. She must attempt, in public, and before strangers, to "articulate what her particular concerns are" with sufficient clarity to meet the State's "clear and convincing evidence" standard. The upshot is that for the abused minor the risk of error entails a risk of violence.

---

[4] It has been said that the majority of all minors voluntarily tell their parents about their pregnancy. The overwhelming majority of those under 16 years of age do so. See Torres, Forrest, & Eisman, Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services, 12 Family Planning Perspectives 284, 287-288, 291 (1980).

[5] In 1986, more than 1 million children and adolescents suffered harm from parental abuse or neglect, including sexual abuse. See Brief for American Psychological Association et al. as Amici Curiae 9-10, and sources cited therein. This figure is considered to be a minimum estimate because the incidence of abuse is substantially underreported. Pregnancy does not deter, and may even precipitate, physical attacks on women. Ibid.

[6] "[P]regnant minors may attempt to self-abort or to obtain an illegal abortion rather than risk parental notification." H. L. v Matheson, 450 US, at 439, and n 26, 67 L Ed 2d 388, 101 S Ct 1164 (dissenting opinion).

[7] The majority and the State of Ohio piously fail to mention what happens to these unwanted babies, born to mothers who are little more than children themselves, who have little opportunity, education, or life skills. Too often, the unwanted child becomes trapped in a cycle of poverty, despair, and violence. This Court, by experience, knows all too well that the States are unable adequately to supervise and protect these vulnerable citizens. See Baltimore City Dept. of Social Services v Bouknight, 493 US 549, 107 L Ed 2d 992, 110 S Ct 900 (1990); DeShaney v Winnebago County Dept. of Social Services, 489 US 189, 103 L Ed 2d 249, 109 S Ct 998 (1989).

I would affirm the judgments below on the grounds of the several constitutional defects identified by the District Court and the Court of Appeals. The pleading requirements, the so-called and fragile guarantee of anonymity, the insufficiency of the expedited procedures, the constructive-authorization provision, and the "clear and convincing evidence" requirement singly and collectively cross the limit of constitutional acceptance.

III

Even if the Ohio statute complied with the Bellotti II requirements for a constitutional court bypass, I would conclude that the Ohio procedure is unconstitutional because it requires the physician's personal and nondelegable obligation to give the required statutory notice. Particularly when viewed in context with the other impediments this statute places in the minor's path, there is more than a "possibility" that the physician-notification provision "was motivated more by a legislative interest in placing obstacles in the woman's path to an abortion, see Maher v Roe, 432 US 464, 474 [53 L Ed 2d 484, 97 S Ct 2376] (1977), than by a genuine interest in fostering informed decisionmaking." Ante, at 524, 111 L Ed 2d, at 427 (Stevens, J., concurring in judgment). Most telling in this regard is the fact that, according

to the Court of Appeals and the District Court, the State has never claimed that personal notice by the physician was required to effectuate an interest in the minor's health until the matter reached this Court. In fact, the State has taken three different positions as to its justification for this provision. See 854 F2d, at 862 ("[T]he state's interest is in insuring that immature, unemancipated minors or minors whose best interests require notification have an adequate opportunity for parental intervention. The state has made no showing that this interest is advanced by requiring the attending physician, as opposed to another qualified, responsible person, to effectuate notification"); 633 F Supp, at 1135 ("[T]he state's attempt to characterize this duty as 'merely ministerial' does not advance its case at all, but rather suggests that its interest in having the physician perform this function is even less weighty than having him or her perform counseling to obtain informed consent [that was struck down in Akron v Akron Center for Reproductive Health, Inc., 462 US 416, 76 L Ed 2d 687, 103 S Ct 2481 (1983)])." If these chimerical health concerns now asserted in fact were the true motivation behind this provision, I seriously doubt that the State would have taken so long to say so.

Even if the State's interest in the health of the minor were the motivation behind the provision, the State never explains why it is that a physician interested in obtaining information, or a parent interested in providing information to a physician, cannot do so following the actual notification by some other competent professional, such as a nurse or counselor. And the State and the majority never explain why, if the physician's ability to garner information from the parents is of such paramount importance that only the physician may notify the parent, the statute allows the physician to send notice by mail if he or she cannot reach the minor's parent "after a reasonable effort." § 2919.12(B)(2).

The State's asserted interest in the minor's health care is especially ironic in light of the statute's interference with her

physician's experienced professional judgment.[8] "If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment," Doe v Bolton, 410 US 179, 199, 35 L Ed 2d 201, 93 S Ct 739 (1973), and he should be permitted to exercise that judgment as to whether he or another professional should be the person who will notify a minor's parents of her decision to terminate her pregnancy. I have no doubt that the attending physician, better than the Ohio Legislature, will know when a consultation with the parent is necessary. "If he fails in this, professional censure and deprivation of his license are available remedies" already in place. Ibid. The strictures of this Ohio law not only unduly burden the minor's right to an abortion, but impinge on the physician's professional discretion in the practice of medicine.[9]

IV

The Ohio Legislature, in its wisdom, in 1985 enacted its antiabortion statute. That statute, when subjected to facial challenge, has been held unconstitutional by the United States District Court for the Northern District of Ohio and by the Court of Appeals for the Sixth Circuit. It is now, however, upheld on that challenge by a majority of this Court. The majority opinion takes up each challenged provision

in turn; concludes, with brief comment, that it is within the bounds of the principal opinion in Bellotti II; and moves on routinely and in the same fashion to the succeeding provisions, one by one. A plurality then concludes, in Part V of the primary opinion, with hyperbole that can have but one result: to further incite an American press, public, and pulpit already inflamed by the pronouncement made by a plurality of this Court last Term in Webster v Reproductive Health Services, 492 US 490, 106 L Ed 2d 410, 109 S Ct 3040 (1989). The plurality indulges in paternalistic comments about "profound philosophic choices"; the "[woman's] own destiny and personal dignity"; the "origins of the human life that lie within the embryo"; the family as "society's most intimate association"; the striving of the family to give to the minor "advice that is both compassionate and mature"; and the desired assumption that "in most cases" the woman will receive "guidance and understanding from a parent." Ante, at 520, 111 L Ed 2d, at 424.

---

[8] In light of its asserted interest, I find it odd that Ohio allows minors to consent to treatment for sexually transmitted diseases, Ohio Rev Code Ann § 3709.241 (1988), and drug and alcohol abuse, § 3719.012 (A). In each of these sensitive areas of health care, the State apparently trusts the physician to use his informed medical judgment as to whether he should question or inform the parent about the minor's medical and psychological condition.

[9] The majority's reliance on H. L. v Matheson is misplaced. In that case, unlike this one, the Utah Supreme Court had limited the steps that a physician would have to take to notify the minor's parents. See 450 US, at 405, 67 L Ed 2d 388, 101 S Ct 1164. In contrast, in Akron v Akron Center for Reproductive Health, Inc., 462 US 416, 76 L Ed 2d 687, 103 S Ct 2481 (1983), the Court pointed out that the "critical factor is whether she obtains the necessary information and counseling from a qualified person, not the identity of the person from whom she obtains it." Id., at 448, 76 L Ed 2d 687, 103 S Ct 2481 (emphasis added).

Some of this may be so "in most cases" and, it is to be hoped, in judges' own and other warm and protected, nurturing family environments. But those "most cases" need not rely on constitutional protections that are so vital for others. I have cautioned before that there is "another world 'out there' " that the Court "either chooses to ignore or fears to recognize." Beal v Doe, 432 US 438, 463, 53 L Ed 2d 464, 97 S Ct 2366 (1977). It is the unfortunate denizens of that world, often frightened and forlorn, lacking the comfort of loving parental guidance and mature advice, who most need the constitutional protection that the Ohio Legislature set out to make as difficult as possible to obtain.

That that legislature set forth with just such a goal is evident from the statute it spawned. The underlying nature of the Ohio statute is proclaimed by its strident and offensively restrictive provisions. It is as though the legislature said: "If the courts of the United States insist on upholding a limited right to an abortion, let us make that abortion as difficult as possible to obtain" because, basically, whether on professed

moral or religious grounds or whatever, "we believe that is the way it must be." This often may be the way legislation is enacted, but few are the instances where the injustice is so evident and the impediments so gross as those inflicted by the Ohio Legislature on these vulnerable and powerless young women.

EDITOR'S NOTE

An annotation on "Supreme Court's views as to validity, under Federal Constitution, of abortion laws," appears p 879, infra.

HORACIO ALVARADO, Petitioner

v

UNITED STATES

497 US 543, 111 L Ed 2d 439, 110 S Ct 2995

[No. 89-6985]

Decided June 25, 1990.

Decision: Federal Court of Appeals' judgment rejecting federal defendant's claim that prosecution improperly challenged black jurors remanded for reconsideration in light of Solicitor General's recognition of error.

SUMMARY

At a criminal trial in a Federal District Court, the defendant claimed that the prosecution had used some of its peremptory challenges to remove black jurors solely on the basis of their race, contrary to Batson v Kentucky (1986) 476 US 79, 90 L Ed 2d 69, 106 S Ct 1712, but the District Court accepted the prosecution's race-neutral explanation for the challenges in question, and the defendant was convicted. In affirming the conviction, the United States Court of Appeals for the Second Circuit did not rule on the competing claims as to the true motive for the prosecution's challenges, but held that no appellate inquiry is required into the merits of a claim under Batson v Kentucky, supra, if the jury finally chosen represented a fair cross section of the community, as did the jury in the case at hand. The defendant, petitioning for certiorari to the United States Supreme Court, contended that the Court of Appeals had relied on an erroneous ground in rejecting his Batson claim, and the United States Solicitor General's brief, while urging that certiorari be denied on the ground that the defendant had not made out a prima facie case of intentional discrimination, agreed that the Court of Appeals had erred in holding that the Batson claim need not be reached so long as the fair cross-section concept of the Federal Constitution's Sixth Amendment had been satisfied.

Granting leave to proceed in forma pauperis and granting certiorari, the United States Supreme Court vacated and remanded to the Court of Appeals for further consideration in light of the Solicitor General's position. In a per curiam opinion expressing the view of Brennan, White, Marshall,

Blackmun, and STEVENS, JJ., it was held that such vacation and remand was the appropriate course to follow, since, if the judgment below rested on an improvident ground, as the Solicitor General suggested, then the Court of Appeals should, in the first instance, pass on the adequacy of the prosecution's reasons for exercising its peremptory challenges.

REHNQUIST, Ch. J., joined by O'CONNOR, SCALIA, and KENNEDY, JJ., dissented, expressing the view that the Court of Appeals' judgment should not be vacated, since the Solicitor General, while conceding that the Court of Appeals' analysis may have been wrong, took the position that the result reached by that court was correct.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

5 Am Jur 2d, Appeal and Error § 962; 21A Am Jur 2d, Criminal Law §§ 681, 682; 32 Am Jur 2d, Federal Practice and Procedure §§ 407-409, 424, 430; 47 Am Jur 2d, Jury §§ 173-187, 235-237

2 Federal Procedure, L Ed, Appeal, Certiorari, and Review §§ 3:693-3:695, 3:716; 9 Federal Procedure, L Ed, Criminal Procedure § 22:799

9 Am Jur Proof of Facts 2d 407, Discrimination in Jury Selection—Systematic Exclusion or Underrepresentation of Identifiable Group

30 Am Jur Trials 561, Jury Selection and Voir Dire in Criminal Cases

USCS, Constitution, Amendment 6

US L Ed Digest, Appeal §§ 910.6, 951, 1088, 1692.1

Index to Annotations, Appeal and Error; Discrimination; Equal Protection of Law; Jury and Jury Trial; Peremptory Challenges; Remand; Vacation and Modification of Judgment or Verdict

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Supreme Court's views as to use of peremptory challenges to exclude from jury persons belonging to same race as criminal defendant. 90 L Ed 2d 1078.

Supreme Court's views as to construction and application of provisions of 28 USCS § 2106 authorizing Supreme Court and other federal appellate courts to remand cause and direct entry of such appropriate judgment or require such further proceedings as may be just under the circumstances. 55 L Ed 2d 872.

Group or class discrimination in selection of grand or petit jury as prohibited by Federal Constitution—Supreme Court cases. 33 L Ed 2d 783.

Use of peremptory challenge to exclude from jury persons belonging to a class or race. 79 ALR3d 14.

HEADNOTE

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Appeal §§ 910.6, 951, 1088, 1692.1 — remand — grant of certiorari — leave to proceed in forma pauperis — brief — issue not decided by lower court

The United States Supreme Court will grant an accused's motion for leave to proceed in forma pauperis and petition for a writ of certiorari, will vacate a Federal Court of Appeals' judgment affirming a Federal District Court's conviction of a criminal defendant, and will remand the case to the Court of Appeals for further consideration in light of the United States Solicitor General's position that the Court of Appeals' judgment, though correct in its result, rested on an improvident ground, where (1) the District Court rejected the defendant's claim that the prosecution had used certain peremptory challenges to remove black jurors solely on the ground of race, contrary to Batson v Kentucky (1986) 476 US 79, 90 L Ed 2d 69, 106 S Ct 1712, as the District Court accepted the prosecution's explanations for its challenges; (2) the Court of Appeals held that no appellate inquiry is required into the merits of a claim under Batson v Kentucky, supra, if the jury finally chosen represented a fair cross section of the community, as had the jury in the case at hand; (3) the Solicitor General's brief to the Supreme Court, while urging that certiorari be denied because the defendant had not made out a prima facie case of intentional discrimination and because the reasons given for the challenges were race-neutral, stated that the Court of Appeals had erred in holding that a Batson inquiry is not required as long as the jury satisfied the fair cross-section concept of the Federal Constitution's Sixth Amendment; and (4) the Supreme Court expresses the view that vacation and remand is the appropriate course to follow in this case, since, if the judgment below rested on an improvident ground, as the Solicitor General suggested, then the Court of Appeals should, in the first instance, pass on the adequacy of the prosecution's reasons for exercising its peremptory challenges. (Rehnquist, Ch. J., and O'Connor, Scalia, and Kennedy, JJ., dissented from this holding.)

OPINION OF THE COURT

[497 US 543]

Per Curiam.

At his criminal trial, petitioner claimed that the Government used certain peremptory challenges to remove black jurors solely on the grounds of race, contrary to Batson v Kentucky, 476 US 79, 90 L Ed 2d 69, 106 S Ct 1712 (1986). The District Court accepted the Government's explanations for its challenges, and petitioner was convicted. He pursued his Batson claim in the Court of Appeals, claiming that the Government's explanations were pretextual. The Government asserted that petitioner had

[497 US 544]

not made out a prima facie Batson error and that it had race-neutral reasons for each challenge. The Court of Appeals did not rule on these competing claims, for it held that no appellate inquiry was required into the merits of a Batson claim if the jury finally chosen represented a fair cross section of the community, as did this jury. The conviction was affirmed.

Petitioner, seeking certiorari, urges that the Court of Appeals relied on an erroneous ground in rejecting the Batson claim. The United States agrees that the Court of Appeals erred in holding that as long as the petit jury chosen satisfied the Sixth Amendment's fair-cross-section concept, it need not inquire into the claim that the prosecution had stricken jurors on purely racial grounds. That holding, the Government states, is contrary to Batson and is also discredited by our decision in Holland v Illinois, 493 US 474, 107 L Ed 2d 905, 110 S Ct 803 (1990), which held that the fair-cross-section requirement of the Sixth Amendment did not apply to the petit jury and which was handed down after the Court of Appeals issued its opinion below. The Government urges us to deny certiorari, however, because petitioner failed to make out a prima facie case of intentional discrimination and because the reasons given for the challenges were race-neutral grounds for decision that the Court of Appeals did not reach.

When the Government has suggested that an error has been made by the court below, it is not unusual for us to grant certiorari, vacate the judgment below, and direct reconsideration in light of the representations made by the United States in this Court. See, e.g., Biddle v United States, 484 US 1054, 98 L Ed 2d 971, 108 S Ct 1004 (1988); Malone v United States, 484 US 919, 98 L Ed 2d 239, 108 S Ct 278 (1987). Nor is it novel to do so in a case where error is conceded but it is suggested that there is another ground on which the decision below could be affirmed if the case were brought here. Indeed, a case decided earlier this Term presented such a situation and, without dissent, we vacated the judgment below for reconsideration in light of the

[497 US 545]

position asserted by the Government in this Court. Chappell v United States, 494 US 1075, 108 L Ed 2d 931, 110 S Ct 1800 (1990). This is the appropriate course to follow in this case. If the judgment below rested on an improvident ground, as the Government suggests, the Court of Appeals should in the first instance pass on the adequacy of the Government's reasons for exercising its peremptory challenges.

Consequently, the motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of the position asserted by the Government in its brief filed May 21, 1990.

It is so ordered.

SEPARATE OPINION

Chief Justice **Rehnquist,** with whom Justice **O'Connor,** Justice **Scalia,** and Justice **Kennedy** join, dissenting.

I have previously expressed my doubt as to the wisdom of automatically vacating a Court of Appeals judgment favorable to the Government when the Government confesses error in this Court. See Mariscal v United States, 449 US

405, 406, 66 L Ed 2d 616, 101 S Ct 909 (1981) (dissenting opinion). Today the Court carries this unfortunate practice to new lengths: The Government has not confessed error in this case, but instead has taken the position that the judgment of the Court of Appeals was correct and that certiorari should be denied.

The Government's brief in opposition contains the following statement:

> "Although petitioner's Batson claim lacks merit, we agree with petitioner that the court of appeals' analysis departed from the general approach to discrimination in jury selection that this Court marked out in Batson." Brief in Opposition 12.

The Court seizes upon this concession that the "analysis" of the Court of Appeals may have been wrong as a justification

[497 US 546]

for vacating the judgment. But the entire thrust of the Government's brief is that the result reached by the Court of Appeals was correct.

A confession of error is at least a deliberate decision on the part of the Government to concede that a Court of Appeals *judgment* in favor of the Government was wrong. In the present case, however, we have only the above-quoted statement of the Government in its brief opposing a grant of certiorari. If we are now to vacate judgments on the basis of what are essentially observations in the Government's brief about the "approach" of the Court of Appeals in a particular case, I fear we may find the Government's future briefs in opposition much less explicit and frank than they have been in the past. Since we depend heavily on the Government in deciding whether to grant certiorari in cases in which the Government is a party, the Court will be the loser as a result.

METRO BROADCASTING, INC., Petitioner
v
FEDERAL COMMUNICATIONS COMMISSION et al. (No. 89-453)

ASTROLINE COMMUNICATIONS COMPANY LIMITED PARTNERSHIP, Petitioner
v
SHURBERG BROADCASTING OF HARTFORD, INC., et al. (No. 89-700)

497 US 547, 111 L Ed 2d 445, 110 S Ct 2997, reh den 497 US 1050, 111 L Ed 2d 829, 111 S Ct 15

[Nos. 89-453 and 89-700]

Argued March 28, 1990. Decided June 27, 1990.

Decision: FCC's minority preference policies with regard to applications for new broadcast licenses and "distress sales" of licenses held not to violate equal protection component of Fifth Amendment.

SUMMARY

When the Federal Communications Commission (FCC) compares competing applications for a new radio or television broadcast station license, it awards an enhancement credit for ownership and participation by members of minority groups, defined by the FCC as "those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian, and Asiatic American extraction." In addition, the FCC seeks to promote minority ownership of broadcast stations through its "distress sale" policy, under which a licensee whose qualifications to hold a broadcast license have come into question may, if certain conditions are met, assign its license to an FCC-approved minority enterprise without the hearing that is ordinarily required before a license may be assigned. Two consolidated cases presented the question whether these FCC policies violate the equal protection component of the Federal Constitution's Fifth Amendment. In the first case (No. 89-453), a license applicant which was 90-percent Hispanic-owned was

Briefs of Counsel, p 942, infra.

granted a license, where the FCC's Review Board found that the credit to be applied for minority ownership outweighed another applicant's local residence and civic participation advantage. The FCC denied review of the Board's decision, and the disappointed applicant sought review in the United States Court of Appeals for the District of Columbia Circuit. At the FCC's request, the court remanded the record for further consideration in light of a separate FCC inquiry regarding the validity of its minority and female ownership policies, including the minority enhancement credit policy. Prior to the completion of this inquiry, however, Congress enacted, and the President signed into law, appropriations legislation (101 Stat 1329-31) which prohibited the FCC from spending any appropriated funds to examine or change its minority ownership policies. The FCC thereupon closed its inquiry into those policies and reaffirmed its grant of the broadcast license. The Court of Appeals upheld the grant (277 App DC 134, 873 F2d 347). In the second case (No. 89-700), a licensee of a television station sought FCC permission to assign its broadcast license to a minority applicant pursuant to the "distress sale" policy. Another applicant urged the FCC to deny the request and to schedule a comparative hearing on the award of the license. The FCC approved the assignment of the license. The disappointed applicant appealed the FCC's order to the United States Court of Appeals for the District of Columbia Circuit. As in the first case, disposition of the appeal was delayed pending the FCC's review of its minority ownership policies, but, upon the enactment of the prohibitory appropriations legislation, the FCC reaffirmed its approval of the license assignment. The Court of Appeals, invalidating the "distress sale" policy as depriving the disappointed applicant of its equal protection rights under the Fifth Amendment, expressed the view that the policy (1) was not narrowly tailored to remedy past discrimination or to promote programming diversity; (2) unduly burdened the disappointed applicant, an innocent nonminority; and (3) was not reasonably related to the interests that the policy sought to vindicate (278 App DC 24, 876 F2d 902).

On certiorari, the United States Supreme Court affirmed in case No. 89-453, reversed in No. 89-700, and remanded both cases for further proceedings. In an opinion by Brennan, J., joined by White, Marshall, Blackmun, and Stevens, JJ., it was held that neither the minority enhancement credit policy nor the "distress sale" policy violates the equal protection component of the Fifth Amendment, because (1) the FCC's minority ownership programs had been mandated by Congress; (2) benign race-conscious measures mandated by Congress—even if they are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that such measures (a) serve important governmental objectives within the power of Congress, and (b) are substantially related to achievement of those objectives; (3) the interest in enhancing broadcast diversity was, at the very least, an important governmental objective; and (4) the policies in question were substantially related to the achievement of the government's interest.

Stevens, J., concurring, expressed the view that (1) racial or ethnic characteristics provide a relevant basis for disparate treatment in only extremely rare situations where the reasons for such classifications are clearly identified and unquestionably legitimate, and (2) the reason for the classification in the instant case—the recognized interest in broadcast diversity—was clearly identified, did not imply any judgment concerning the abilities of owners of different races or the merits of different kinds of programming, and was unquestionably legitimate.

O'Connor, J., joined by Rehnquist, Ch. J., and Scalia and Kennedy, JJ., dissenting, expressed the view that (1) under the Federal Constitution, the proper standard of review for the evaluation of the FCC minority ownership policies is "strict scrutiny," under which racial classifications, to be upheld, must be determined to be necessary and narrowly tailored to achieve a compelling state interest; (2) the interest in increasing broadcast diversity was clearly not a compelling interest; and (3) the policies at issue were not narrowly tailored, nor even substantially related, to achieving the government's interest.

Kennedy, J., joined by Scalia, J., dissenting, expressed the view that (1) under the court's modern precedents, strict scrutiny must be applied to the FCC's minority ownership policies, and (2) the approach taken to congressional measures under § 5 of the Federal Constitution's Fourteenth Amendment in Fullilove v Klutznick (1980) 448 US 448, 65 L Ed 2d 902, 100 S Ct 2758, even assuming its validity, was not applicable to the instant case.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

74 Am Jur 2d, Telecommunications § 163

31 Federal Procedure, L Ed, Telecommunications §§ 72:435-72:457

15A Federal Procedural Forms, L Ed, Telecommunications §§ 62:141-62:156, 62:161-62:179

23 Am Jur Pl & Pr Forms (Rev), Telecommunications, Forms 1-15

17 Am Jur Legal Forms 2d, Telecommunications §§ 245:161-245:167, 245:171-245:204

USCS, Constitution, Amendment 5

US L Ed Digest, Civil Rights § 6.5; Communications § 16

Index to Annotations, Discrimination; Equal Protection of Law; Federal Communications Act and Commission; Reverse Discrimination; Telecommunications

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Affirmative action benefiting particular employees or prospective employees as violating other employees' rights under Federal Constitution or under federal civil rights legislation—Supreme Court cases. 92 L Ed 2d 849.

First Amendment guaranty of free speech and press as applied to licensing and regulation of broadcast media—Supreme Court cases. 69 L Ed 2d 1110.

Racial discrimination in education—Supreme Court cases. 24 L Ed 2d 765.

Race discrimination—Supreme Court cases. 94 L Ed 1121, 96 L Ed 1291, 98 L Ed 882, 100 L Ed 488, 3 L Ed 2d 1556, 6 L Ed 2d 1302, 10 L Ed 2d 1105, 15 L Ed 2d 990, 21 L Ed 2d 915.

What constitutes reverse or majority discrimination on basis of sex or race violative of Federal Constitution or statutes. 26 ALR Fed 13.

Legal aspects of television. 15 ALR2d 785.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Civil Rights § 6.5; Communications §§ 16, 20, 25 — Federal Communications Commission — minority preference — radio and television broadcast licenses — availability of review

1a-1s. Minority preference policies adopted by the Federal Communications Commission (FCC)—which policies define the term "minority" to include persons of "Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian, and Asian American extraction," and under which policies (1) in comparative proceedings involving competing applicants for a new radio or television broadcast license, the FCC awards an enhancement credit for minority ownership and participation in management, and (2) a licensee whose qualifications to hold a broadcast license have come into question may, if certain "distress sale" conditions are met, assign the license to an FCC-approved minority enterprise without the hearing that is ordinarily required—do not violate the equal protection component of the Federal Constitution's Fifth Amendment, where Congress has enacted appropriations legislation (101 Stat 1329-31, 102 Stat 2216, and 103 Stat 1020) prohibiting the FCC from spending any appropriated funds to examine or change its minority ownership polices, because (1) the policies in question have been mandated by Congress; (2) the interest in enhancing broadcast diversity is, at the very least, an important governmental objective; and (3) the policies in question are substantially related to the achievement of the government's interest, since (a) both the FCC and Congress—whose joint determination must be given great weight—have concluded that there is a relationship between expanded minority ownership and greater broadcast diversity, (b) this judgment is based on extensive empirical evidence rather than on impermissible stereotyping, and (c) the policies are in other relevant respects substantially related to the goal of promoting broadcast diversity, inasmuch as (i) the FCC adopted and Congress endorsed minority ownership preferences only after long study and painstaking consideration of all available alternatives, including race-neutral means of increasing broadcast diversity and the more expansive alternative of setting aside certain frequencies for minority broadcasters, (ii) the policies are aimed directly at the barriers that minorities face in entering the broadcast industry, such as lack of adequate financing, paucity of information regarding license availability, and broadcast inexperience, (iii) the policies are appropriately limited in extent and duration, given that Congress has manifested its support for them through a series of appropriations acts of finite duration, thereby insuring future re-evaluations of the need for the minority ownership program, the goal of greater programming diversity carries its own natural limit, and there is provision for administrative and judicial review of all FCC decisions, which guarantees that the policies will be applied correctly in individual cases and that there will be frequent opportunities to revisit the merits of those policies, and (iv) the policies do not impose impermissible burdens on nonminorities, because applicants for a new broadcast license have no settled expectation that their applications will be granted without consideration of public interest factors such as minority ownership, and the distress sale policy may be invoked only with respect to a small fraction of licenses—those designated for revocation or renewal hearings to examine basic qualification issues—and only when the licensee chooses to sell out at a distress price rather than to go through with the hearing. (O'Connor, J., Rehnquist, Ch. J., and Scalia and Kennedy, JJ., dissented from this holding.)

Civil Rights § 3 — federal race-conscious policies

2. Benign race-conscious measures mandated by Congress—even if they are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that such measures (1) serve important governmental objectives within the power of Congress, and (2) are substantially related to achievement of those objectives. (O'Connor, J., Rehnquist, Ch. J., and Scalia and Kennedy, JJ., dissented from this holding.)

Courts § 106 — actual purpose of statute

3a, 3b. The mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.

Civil Rights §§ 3, 4.3 — racial classifications — Congress — states

4. For the purposes of equal protection analysis, race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments. (O'Connor, J., Rehnquist, Ch. J., and Scalia and Kennedy, JJ., dissented in part from this holding.)

Communications § 8 — federal control

5. Because of the scarcity of electromagnetic frequencies, the Federal Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.

Communications §§ 8, 15 — broadcast licensing — radio and television — Federal Communications Commission

6. The Federal Government's role in distributing the limited number of radio and television broadcast licenses is not merely that of a traffic officer; rather, it is axiomatic that (1) broadcasting may be regulated in light of the rights of the viewing and listening audience, and (2) the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public; safeguarding the public's right to receive a diversity of views and information over the airwaves is therefore an integral component of the Federal Communications Commission's mission.

Constitutional Law § 937 — broadcasting — First Amendment

7. The people as a whole retain their interest in free speech by radio and other forms of broadcast and their collective right to have the medium function consistently with the ends and purposes of the Federal Constitution's First Amendment; it is the right of the viewers and listeners, not the right of broadcasters, which is paramount.

Communications § 8 — congressional regulation — balanced presentation

8. Congress may seek to assure

that the public receives through the broadcast medium a balanced presentation of information on issues of public importance that otherwise might not be addressed if control of the medium were left entirely in the hands of those who own and operate broadcasting stations.

Civil Rights § 6.4 — university admissions

9. A diverse student body contributing to a robust exchange of ideas is a constitutionally permissible goal on which a race-conscious university admissions program may be predicated.

Communications § 25; Courts § 141 — review — deference to Congress and FCC

10. The United States Supreme Court does not defer to the judgment of the Congress and the Federal Communications Commission (FCC) on a federal constitutional question, and will not hesitate to invoke the Federal Constitution should the Supreme Court determine that the FCC has not fulfilled its task with appropriate sensitivity to equal protection principles.

United States § 19 — Congress — investigations

11. The special attribute of Congress as a legislative body lies in Congress' broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue; one appropriate source is information and expertise that Congress acquires in the consideration and enactment of earlier legislation.

Statutes §§ 1, 1.5 — enactment — executive approval

12a, 12b. Appropriations acts, like any other laws, are binding because they are passed by both Houses and signed by the President.

Constitutional Law § 937 — broadcasting — FCC regulation — First Amendment

13a, 13b. A policy of direct federal control by the Federal Communications Commission over discrete programming decisions by radio and television stations, in order to insure diversity by means of administrative decree, raises serious issues under the Federal Constitution's First Amendment, if such a policy (1) denies a broadcaster the ability to carry a particular program or to publish his own views, (2) risks government censorship of a particular program, or (3) leads to the official government view dominating public broadcasting.

Civil Rights § 3 — federal program — undue burdens

14. A congressionally mandated benign race-conscious program that is substantially related to the achievement of an important governmental interest is consistent with equal protection principles, so long as the program does not impose undue burdens on nonminorities. (O'Connor, J., Rehnquist, Ch. J., and Scalia and Kennedy, JJ., dissented from this holding.)

Constitutional Law § 937 — broadcast license — First Amendment

15. The limited number of frequencies on the electromagnetic spectrum means that no one has a right, under the Federal Constitution's First Amendment, to a broadcast license.

SYLLABUS BY REPORTER OF DECISIONS

These cases consider the constitutionality of two minority preference policies adopted by the Federal Communications Commission (FCC). First, the FCC awards an enhancement for minority ownership and participation in management, which is weighed together with all other relevant factors, in comparing mutually exclusive applications for licenses for new radio or television broadcast stations. Second, the FCC's so-called "distress sale" policy allows a radio or television broadcaster whose qualifications to hold a license have come into question to transfer that license before the FCC resolves the matter in a noncomparative hearing, but only if the transferee is a minority enterprise that meets certain requirements. The FCC adopted these policies in an attempt to satisfy its obligation under the Communications Act of 1934 to promote diversification of programming, taking the position that its past efforts to encourage minority participation in the broadcast industry had not resulted in sufficient broadcast diversity, and that this situation was detrimental not only to the minority audience but to all of the viewing and listening public. Metro Broadcasting, Inc., petitioner in No. 89-453, sought review in the Court of Appeals of an FCC order awarding a new television license to Rainbow Broadcasting in a comparative proceeding, which action was based on the ruling that the substantial enhancement granted Rainbow because of its minority ownership outweighed factors favoring Metro. The court remanded the appeal for further consideration in light of the FCC's separate, ongoing Docket 86-484 inquiry into the validity of its minority ownership policies. Prior to completion of that inquiry, however, Congress enacted the FCC appropriations legislation for fiscal year 1988, which prohibited the FCC from spending any appropriated funds to examine or change its minority policies. Thus, the FCC closed its Docket 86-484 inquiry and reaffirmed its grant of the license to Rainbow, and the Court of Appeals affirmed. Shurberg Broadcasting of Hartford, Inc., one of the respondents in No. 89-700, sought review in the Court of Appeals of an FCC order approving Faith Center, Inc.'s distress sale of its television license to Astroline Communications Company Limited Partnership, a minority enterprise. Disposition of the appeal was delayed pending resolution of the Docket 86-484 inquiry by the FCC, which, upon closing that inquiry as discussed supra, reaffirmed its order allowing the distress sale to Astroline. The court then invalidated the distress sale policy, ruling that it deprived Shurberg, a nonminority applicant for a license in the relevant market, of its right to equal protection under the Fifth Amendment.

Held: The FCC policies do not violate equal protection, since they bear the imprimatur of longstanding congressional support and direction and are substantially related to the achievement of the important governmental objective of broadcast diversity.

(a) It is of overriding significance in these cases that the minority ownership programs have been specifically approved—indeed mandated—by Congress. In light of that fact, this Court owes appropriate deference to Congress' judgment, see Fullilove v Klutznick, 448 US 448, 472-

478, 490, 491, 65 L Ed 2d 902, 100 S Ct 2758 (opinion of Burger, C. J.); id., at 500-510, 515-516, n 14, 65 L Ed 2d 902, 100 S Ct 2758 (Powell, J., concurring); id., at 517-520, 65 L Ed 2d 902, 100 S Ct 2758 (Marshall, J., concurring in judgment), and need not apply strict scrutiny analysis, see id., at 474, 65 L Ed 2d 902, 100 S Ct 2758 (opinion of Burger, C. J.); id., at 519, 65 L Ed 2d 902, 100 S Ct 2758 (Marshall, J., concurring in judgment). Benign race-conscious measures mandated by Congress—ven if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to the achievement of those objectives. Richmond v J. A. Croson Co. 488 US 469, 102 L Ed 2d 854, 109 S Ct 706, distinguished and reconciled.

(b) The minority ownership policies serve an important governmental objective. Congress and the FCC do not justify the policies strictly as remedies for victims of demonstrable discrimination in the communications media, but rather have selected them primarily to promote broadcast diversity. This Court has long recognized as axiomatic that broadcasting may be regulated in light of the rights of the viewing and listening audience, and that the widest possible dissemination of information from diverse and antagonistic sources is essential to the public welfare. Associated Press v United States, 326 US 1, 20, 89 L Ed 2013, 65 S Ct 1416. Safeguarding the public's right to receive a diversity of views and information over the airwaves is therefore an integral component of the FCC's mission, serves important First Amendment values, and is, at the very least, an important governmental objective that is a sufficient basis for the policies in question.

(c) The minority ownership policies are substantially related to the achievement of the Government's interest in broadcast diversity. First, the FCC's conclusion that there is an empirical nexus between minority ownership and greater diversity, which is consistent with its longstanding view that ownership is a prime determinant of the range of programming available, is a product of its expertise and is entitled to deference. Second, by means of the recent appropriations legislation and by virtue of a long history of support for minority participation in the broadcasting industry, Congress has also made clear its view that the minority ownership policies advance the goal of diverse programming. Great weight must be given to the joint determination of the FCC and Congress.

(d) The judgment that there is a link between expanded minority ownership and broadcast diversity does not rest on impermissible stereotyping. Neither Congress nor the FCC assumes that in every case minority ownership and management will lead to more minority-oriented programming or to the expression of a discrete "minority viewpoint" on the airwaves. Nor do they pretend that all programming that appeals to minorities can be labeled "minority" or that programming that might be so described does not appeal to nonminorities. Rather, they maintain simply that expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity. This judgment is corroborated by a host of empirical evidence suggesting that an owner's minority status influences the selection of topics for news coverage and the presentation of editorial viewpoint, especially on matters of particular concern to minorities, and has a special impact on the way in which images of minorities are presented. In addition, studies show that a minority owner is more likely to employ minorities in managerial and other important roles where they can have an impact on station policies. The FCC's policies are thus a product of analysis rather than a stereotyped reaction based on habit. Cf. Fullilove, supra, at 534, n 4, 65 L Ed 2d 902, 100 S Ct 2758 (Stevens, J., dissenting). The type of reasoning employed by the FCC and Congress is not novel, but is utilized in many areas of the law, including the selection of jury venires on the basis of a fair cross section, and the reapportionment of electoral districts to preserve minority voting strength.

(e) The minority ownership policies are in other relevant respects substantially related to the goal of promoting broadcast diversity. The FCC adopted and Congress endorsed minority ownership preferences only after long study, painstaking consideration of all available alternatives, and the emergence of evidence demonstrating that race-neutral means had not produced adequate broadcasting diversity. Moreover, the FCC did not act precipitately in devising the policies, having undertaken thorough evaluations in 1960, 1971, and 1978 before adopting them. Furthermore, the considered nature of the FCC's judgment in selecting these particular policies is illustrated by the fact that it has rejected other, more expansive types of minority preferences—e.g., set-asides of certain frequencies for minority broadcasters. In addition, the minority ownership policies are aimed directly at the barriers that minorities face in entering the broadcasting industry. Thus, the FCC assigned a preference to minority status in the comparative licensing proceeding in order to compensate for a dearth of minority broadcasting experience. Similarly, the distress sale policy addresses the problem of inadequate access to capital by effectively lowering the sale price of existing stations and the problem of lack of information regarding license availability by providing existing licensees with an incentive to seek out minority buyers. The policies are also appropriately limited in extent and duration and subject to reassessment and reevaluation before renewal, since Congress has manifested its support for them through a series of appropriations Acts of finite duration and has continued to hold hearings on the subject of minority ownership. Provisions for administrative and judicial review also guarantee that the policies are applied correctly in individual cases and that there will be frequent opportunities to revisit their merits. Finally, the policies impose only slight burdens on nonminorities. Award of a preference contravenes no legitimate, firmly rooted expectation of competing applicants, since the limited number of frequencies available means that no one has First Amendment right to a license, and the granting of licenses requires consideration of public interest factors. Nor does the distress sale policy impose an undue burden on nonminorities, since it may be invoked only with respect to a small fraction of broadcast licenses, only when the licensee chooses to sell out at a low price rather than risk a hearing, and only when no competing application has been filed. It is not a quota or fixed quantity set-aside, and nonminorities are free to compete for the vast remainder of other available license opportunities.

No. 89-453, 277 US App DC 134, 873 F2d 347, affirmed and remanded; No. 89-700, 278 US App DC 24, 876 F2d 902, reversed and remanded.

Brennan, J., delivered the opinion of the Court, in which White, Marshall, Blackmun, and Stevens, JJ., joined. Stevens, J., filed a concurring opinion. O'Connor, J., filed a dissenting opinion, in which Rehnquist, C.J., and Scalia and Kennedy, JJ., joined. Kennedy, J., filed a dissenting opinion, in which Scalia, J., joined.

APPEARANCES OF COUNSEL

Gregory H. Guillot argued the cause for petitioner in No. 89-453.

Daniel M. Armstrong argued the cause for respondent Federal Communications Commission in No. 89-453.

Margaret Polivy argued the cause for respondent Rainbow Broadcasting Company in No. 89-453.

J. Roger Wollenberg argued the cause for petitioner in No. 89-700.

Harry F. Cole argued the cause for respondents in No. 89-700.

Briefs of Counsel, p 942, infra.

OPINION OF THE COURT

[497 US 552]

Justice **Brennan** delivered the opinion of the Court.

[1a] The issue in these cases, consolidated for decision today, is whether certain minority preference policies of the Federal Communications Commission violate the equal protection component of the Fifth Amendment. The policies in question are (1) a program awarding an enhancement for minority ownership in comparative proceedings for new licenses, and (2) the minority "distress sale" program, which permits a limited category of existing radio and television broadcast stations to be transferred only to minority-controlled firms. We hold that these policies do not violate equal protection principles.

I

A

[1b] The policies before us today can best be understood by reference to the history of federal efforts to promote minority

[497 US 553]

participation in the broadcasting industry.[1] In the Communications Act of 1934, 48 Stat 1064, as amended, Congress assigned to the Federal Communications Commission (FCC or Commission) exclusive authority to grant licenses, based on "public convenience, interest, or necessity," to persons wishing to construct and operate radio and television broadcast stations in the United States. See 47 USC §§ 151, 301, 303, 307, 309 (1982 ed) [47 USCS §§ 151, 301, 303, 307, 309]. Although for the past two decades minorities have constituted at least one-fifth of the United States population, during this time relatively few members of minority groups have held broadcast licenses. In 1971, minorities owned only 10 of the approximately 7,500 radio stations in the country and none of the more than 1,000 television stations, see TV 9, Inc. v FCC, 161 US App DC 349, 357, n 28, 495 F2d 929, 937, n 28 (1973), cert denied, 419 US 986, 42 L Ed 2d 194, 95 S Ct 245 (1974); see also 1 US Commission on Civil Rights, Federal Civil Rights Enforcement Effort—1974, p 49 (Nov. 1974); in 1978, minorities owned less than 1 percent of the Nation's radio and television stations, see FCC Minority Ownership Task Force, Report on Minority Ownership in Broadcasting 1 (1978) (hereinafter Task Force Report); and in 1986, they owned just 2.1 percent of the more than 11,000 radio and television stations in the United States. See National Association of Broadcasters, Minority Broadcasting Facts 6 (Sept. 1986). Moreover, these statistics fail to reflect the fact that, as late entrants who often have been able to obtain only the less valuable stations, many minority

---

[1] The FCC has defined the term "minority" to include "those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction." Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC2d 979, 980, n 8 (1978). See also Commission Policy Regarding Advancement of Minority Ownership in Broadcasting, 92 FCC2d 849, 849, n 1 (1982), citing 47 USC § 309(i)(3)(C) (1982 ed) [47 USCS § 309(i)(3)(C)].

broadcasters serve geographically limited markets with relatively small audiences.[2]

The Commission has recognized that the viewing and listening public suffers when minorities are underrepresented among owners of television and radio stations:

> "Acute underrepresentation of minorities among the owners of broadcast properties is troublesome because it is the licensee who is ultimately responsible for identifying and serving the needs and interests of his or her audience. Unless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial portion of our citizenry will remain underserved and the larger, non-minority audience will be deprived of the views of minorities." Task Force Report 1.

The Commission has therefore worked to encourage minority participation in the broadcast industry. The FCC began by formulating rules to prohibit licensees from discriminating against minorities in employment.[3] The FCC explained that "broadcasting is an important mass media form which, because it makes use of the airwaves belonging to the public, must obtain a Federal license under a public interest standard and must operate in the public interest in order to obtain periodic renewals of that license." Nondiscrimination Employment Practices of Broadcast

---

[2] See Task Force Report 1; Wimmer, Deregulation and Market Failure in Minority Programming: The Socioeconomic Dimensions of Broadcast Reform, 8 Comm/Ent LJ 329, 426 n 516 (1986). See also n 46, infra.

[3] See, e.g., Nondiscrimination Employment Practices of Broadcast Licensees, 18 FCC2d 240 (1969); Nondiscrimination Employment Practices of Broadcast Licensees, 23 FCC2d 430 (1970); Nondiscrimination in Employment Policies and Practices of Broadcast Licensees, 54 FCC2d 354 (1975); Nondiscrimination in Employment Policies and Practices of Broadcast Licensees, 60 FCC2d 226 (1976). The FCC's current equal employment opportunity policy is outlined at 47 CFR § 73.2080 (1989).

Licensees, 13 FCC2d 766, 769 (1968). Regulations dealing with employment practices were justified as necessary to enable the FCC to satisfy [497 US 555] its obligation under the Communications Act of 1934 to promote diversity of programming. See NAACP v FPC, 425 US 662, 670, n 7, 48 L Ed 2d 284, 96 S Ct 1806 (1976). The United States Department of Justice, for example, contended that equal employment opportunity in the broadcast industry could " 'contribute significantly toward reducing and ending discrimination in other industries' " because of the " 'enormous impact which television and radio have upon American life.' " Nondiscrimination Employment Practices, supra, at 771 (citation omitted).

Initially, the FCC did not consider minority status as a factor in licensing decisions, maintaining as a matter of Commission policy that no preference to minority ownership was warranted where the record in a particular case did not give assurances that the owner's race likely would affect the content of the station's broadcast service to the public. See Mid-Florida Television Corp. 33 FCC2d 1, 17-18 (Rev Bd), review denied, 37 FCC2d 559 (1972), rev'd, TV 9, Inc. v FCC, supra. The Court of Appeals for the District of Columbia Circuit, however, rejected the Commission's position that an "assurance of superior community service attributable to . . . Black ownership and participation" was required before a preference could be awarded. TV 9, Inc., supra, at 358, 495 F2d, at 938. " 'Reasonable expectation,' " the court held, " 'not advance demonstration, is a basis for merit to be accorded relevant factors.' " Ibid. See also Garrett v FCC, 168 US App DC 266, 273, 513 F2d 1056, 1063 (1975).

In April 1977, the FCC conducted a conference on minority ownership policies, at which participants testified that minority preferences were justified as a means of increasing diversity of broadcast viewpoint. See Task Force Report 4-6. Building on the results of the conference, the recommendations of the task force, the decisions of the Court of Appeals for the District of Columbia Circuit, and a petition proposing [497 US 556] several minority ownership policies filed with the Commission in January 1978 by the Office of Telecommunications Policy (then part of the Executive Office of the President) and the Department of Commerce,[4] the FCC adopted in May 1978 its Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC2d 979. After recounting its past efforts to expand broadcast diversity, the FCC concluded:

> "[W]e are compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media. This situation is detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience. It enhances the diversified programming which is a key objective

---

[4] See Telecommunications Minority Assistance Program, Public Papers of the Presidents, Jimmy Carter, Vol 1, Jan 31, 1978, pp 252, 253 (1979). The petition observed that "[m]inority ownership markedly serves the public interest, for it ensures the sustained and increased sensitivity to minority audiences." Id., at 252. See also n 45, infra.

> not only of the Communications Act of 1934 but also of the First Amendment." Id., at 980-981 (footnotes omitted).

Describing its actions as only "first steps," id., at 984, the FCC outlined two elements of a minority ownership policy.

First, the Commission pledged to consider minority ownership as one factor in comparative proceedings for new licenses. When the Commission compares mutually exclusive applications for new radio or television broadcast stations,[5] it

looks principally at six factors: diversification of control of mass media communications, full-time participation in station operation by owners (commonly referred to as the "integration" of ownership and management), proposed program service, past broadcast record, efficient use of the frequency, and the character of the applicants. See Policy Statement on Comparative Broadcast Hearings, 1 FCC2d 393, 394-399 (1965); West Michigan Broadcasting Co. v FCC, 236 US App DC 335, 338-339, 735 F2d 601, 604-607 (1984), cert denied, 470 US 1027, 84 L Ed 2d 782, 105 S Ct 1392 (1985). In the Policy Statement on Minority Ownership, the FCC announced that minority ownership and participation in management would be considered in a comparative hearing as a "plus" to be weighed together with all other relevant factors. See WPIX, Inc., 68 FCC2d 381, 411-412 (1978). The "plus" is awarded only to the extent that a minority owner actively participates in the day-to-day management of the station.

Second, the FCC outlined a plan to increase minority opportunities to receive reassigned and transferred licenses through the so-called "distress sale" policy. See 68 FCC2d, at 983. As a general rule, a licensee whose qualifications to hold a broadcast license come into question may not assign or transfer that license until the FCC has resolved its doubts in a noncomparative hearing. The distress sale policy is an exception to that practice, allowing a broadcaster whose license has been designated for a revocation hearing, or whose renewal application has been designated for hearing, to assign the license to an FCC-approved minority enterprise. See ibid.; Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC2d 849, 851 (1982). The assignee must meet the FCC's basic qualifications, and the minority ownership must exceed 50 percent or be controlling.[6] The buyer must purchase the license before

the start of the revocation or renewal hearing, and the price must not exceed 75 percent of fair market value. These two Commission minority ownership policies are at issue today.[7]

---

[5] In Ashbacker Radio Corp. v FCC, 326 US 327, 90 L Ed 108, 66 S Ct 148 (1945), we held that when the Commission was faced with two "mutually exclusive" bona fide applications for license—that is, two proposed stations that would be incompatible technologically—it was obligated to set the applications for a comparative hearing. See id., at 333, 90 L Ed 108, 66 S Ct 148.

[6] In 1982, the FCC determined that a limited partnership could qualify as a minority enterprise if the general partner is a member of a minority group who holds at least a 20 percent interest and who will exercise "complete control over a station's affairs." 92 FCC2d, at 855.

[7] The FCC also announced in its 1978 statement a tax certificate policy and other minority preferences, see 68 FCC2d, at 983, and n 19; 92 FCC2d, at 850-851, which are not at issue today. Similarly, the Commission's

B

1

In No. 89-453, petitioner Metro Broadcasting, Inc. (Metro), challenges the Commission's policy awarding preferences to minority owners in comparative licensing proceedings. Several applicants, including Metro and Rainbow Broadcasting (Rainbow), were involved in a comparative proceeding to select among three mutually exclusive proposals to construct and operate a new UHF television station in the Orlando, Florida, metropolitan area. After an evidentiary hearing, an Administrative Law Judge (ALJ) granted Metro's application. Metro Broadcasting, Inc. 96 FCC2d 1073 (1983). The ALJ disqualified Rainbow from consideration because of "misrepresentations" in its application. Id., at 1087. On review of the ALJ's decision, however, the Commission's Review Board disagreed with the ALJ's finding regarding Rainbow's candor and concluded that Rainbow was qualified. Metro Broadcasting, Inc. 99 FCC2d 688 (1984). The Board proceeded to consider Rainbow's comparative showing and found it superior to Metro's. In so doing, the Review Board awarded Rainbow a substantial enhancement

on the ground that it was 90 percent Hispanic owned, whereas Metro had only one minority partner who owned 19.8 percent of the enterprise. The Review Board found that Rainbow's minority credit outweighed Metro's local residence and civic participation advantage. Id. at 704. The Commission denied review of the Board's decision largely without discussion, stating merely that it "agree[d] with the Board's resolution of this case." No. 85-558 (Oct. 18, 1985), p 2, App to Pet for Cert in No. 89-453, p 61a.

Metro sought review of the Commission's order in the United States Court of Appeals for the District of Columbia Circuit, but the appeal's disposition was delayed; at the Commission's request, the court granted a remand of the record for further consideration in light of a separate ongoing inquiry at the Commission regarding the validity of its minority and female ownership policies, including the minority enhancement credit. See Notice of Inquiry on Racial, Ethnic or Gender Classifications, 1 FCC Rcd 1315 (1986) (Docket 86-484).[8] The Commission deter-

---

gender preference policy, see Gainesville Media, Inc. 70 FCC2d 143, 149 (Rev Bd 1978); Mid-Florida Television Corp. 69 FCC2d 607, 651-652 (Rev Bd 1978), set aside on other grounds, 87 FCC2d 203 (1981), is not before us today. See Winter Park Communications, Inc. v FCC, 277 US App DC 134, 139-140, n 5, 873 F2d 347, 352-353, n 5 (1989); Metro Broadcasting, Inc. 3 FCC Rcd 866, 867, n 1 (1988).

[8] That inquiry grew out of the Court of Appeals' decision in Steele v FCC, 248 US App DC 279, 770 F2d 1192 (1985), in which a panel of the Court of Appeals held that the FCC lacks statutory authority to grant enhancement credits in comparative license proceedings to women owners. Although the panel expressly stated that "[u]nder our decisions, the Commission's authority to adopt minority preferences . . . is clear," id., at 283, 770 F2d, at 1196, the Commission believed that the court's opinion nevertheless raised questions concerning its minority ownership policies. After the en banc court vacated the panel opinion and set the case for rehearing, the FCC requested that the Court of Appeals remand the case without considering the merits to allow the FCC to reconsider the basis of its preference policy. The request was granted. The Commission, "despite its prior misgivings, has now indicated clearly that it supports the distress sale" and other minority ownership policies, Shurberg Broadcasting of Hartford, Inc. v FCC, 278 US App DC 24, 81, 876 F2d 902, 959 (1989) (Wald, C. J., dissent-

mined that the outcome in the licensing proceeding between Rainbow and Metro might depend on whatever the Commission concluded

in its general evaluation of minority ownership policies, and accordingly it held the licensing proceeding in abeyance pending further developments in the Docket 86-484 review. See Metro Broadcasting, Inc. 2 FCC Rcd 1474, 1475 (1987).

Prior to the Commission's completion of its Docket 86-484 inquiry, however, Congress enacted and the President signed into law the FCC appropriations legislation for fiscal year 1988. The measure prohibited the Commission from spending any appropriated funds to examine or change its minority ownership policies.[9] Complying with this directive, the Commission closed its Docket 86-484 inquiry. See Reexamination of Racial, Ethnic or Gender Classifications, Order, 3 FCC Rcd 766 (1988). The FCC also reaffirmed its grant of the license in this case to Rainbow Broadcasting. See Metro Broadcasting, Inc. 3 FCC Rcd 866 (1988).

The case returned to the Court of Appeals, and a divided panel affirmed the Commission's order awarding the license to Rainbow. The court concluded that its decision was controlled by prior Circuit precedent and noted that the Commission's action was supported by " 'highly relevant congressional action that showed clear recognition of the extreme underrepresentation of minorities and their perspectives in

the broadcast mass media.' " Winter Park Communications, Inc. v FCC, 277 US App DC 134, 140, 873 F2d 347, 353 (1989), quoting West Michigan, 236 US App DC, at 347, 735 F2d, at 613. After petitions for rehearing and suggestions for rehearing en banc were denied, we granted certiorari. 493 US 1017, 107 L Ed 2d 735, 110 S Ct 715 (1990).

2

The dispute in No. 89-700 emerged from a series of attempts by Faith Center, Inc., the licensee of a Hartford, Connecticut television station, to execute a minority distress sale. In December 1980, the FCC designated for a hearing Faith Center's application for renewal of its license. See Faith Center, Inc. FCC 80-680 (Dec. 21, 1980). In February 1981, Faith Center filed with the FCC a petition for special relief seeking permission to transfer its license under the distress sale policy. The Commission granted the request, see Faith Center, Inc. 88 FCC2d 788 (1981), but the proposed sale was not completed, apparently due to the purchaser's inability to obtain ade-

---

ing from denial of rehearing en banc), and has defended them before this Court.

[9] The appropriations legislation provided: "That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 USC § 1071 [26 USCS § 1071], to expand minority and women ownership of broadcasting licenses, including those established in Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC2d 979 and 69 FCC2d 1591, as amended, 52 RR2d [1301] (1982) and Mid-Florida Television Corp. [69] FCC2d 607 Rev Bd (1978) which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry." Continuing Appropriations Act for Fiscal Year 1988, Pub L 100-202, 101 Stat 1329-31.

quate financing. In September 1983, the Commission granted a second request by Faith Center to pursue a distress sale to another minority-controlled buyer. The FCC rejected objections to the distress sale raised by Alan Shurberg, who at that time was acting in his individual capacity.[10] See Faith Center, Inc. 54 Radio Reg 2d (P&F) 1286, 1287-1288 (1983); Faith Center, Inc. 55 Radio Reg 2d (P&F) 41, 44-46 (Mass Media Bur 1984). This second distress sale also was not consummated, apparently because of similar financial difficulties on the buyer's part.

In December 1983, respondent Shurberg Broadcasting of Hartford, Inc. (Shurberg), applied to the Commission for a permit to build a television station in Hartford. The application was mutually exclusive with Faith Center's renewal

[497 US 562]

application, then still pending. In June 1984, Faith Center again sought the FCC's approval for a distress sale, requesting permission to sell the station to Astroline Communications Company Limited Partnership (Astroline), a minority applicant. Shurberg opposed the sale to Astroline on a number of grounds, including that the FCC's distress sale program violated Shurberg's right to equal protection. Shurberg therefore urged the Commission to deny the distress sale request and to schedule a comparative hearing to examine the application Shurberg had tendered alongside Faith Center's renewal request. In December 1984, the FCC approved Faith Center's petition for permission to assign its broadcast license to Astroline pursuant to the distress sale policy. See Faith Center, Inc. 99 FCC2d 1164 (1984). The FCC rejected Shurberg's equal protection challenge to the policy as "without merit." Id., at 1171.

Shurberg appealed the Commission's order to the United States Court of Appeals for the District of Columbia Circuit, but disposition of the appeal was delayed pending completion of the Commission's Docket 86-484 inquiry into the minority ownership policies. See supra, at 559, 111 L Ed 2d, at 459. After Congress enacted and the President signed into law the appropriations legislation prohibiting the FCC from continuing the Docket 86-484 proceeding, see supra, at 560, 111 L Ed 2d, at 460, the Commission reaffirmed its order granting Faith Center's request to assign its Hartford license to Astroline pursuant to the minority distress sale policy. See Faith Center, Inc. 3 FCC Rcd 868 (1988).

A divided Court of Appeals invalidated the Commission's minority distress sale policy. Shurberg Broadcasting of Hartford, Inc. v FCC, 278 US App DC 24, 876 F2d 902 (1989). In a per curiam opinion, the panel majority held that the policy "unconstitutionally deprives Alan Shurberg and Shurberg Broadcasting of their equal protection rights under the Fifth Amendment because the program is not narrowly tailored to remedy past discrimination or to promote

[497 US 563]

programming diversity" and that "the program unduly burdens Shurberg, an innocent nonminority, and is not reasonably related to the interests it seeks to vindicate." Id., at 24-25, 876 F2d, at 902-903. Petitions for rehearing and suggestions for rehearing en banc were denied, and we granted certiorari. 493 US 1018, 107 L Ed 2d 736, 110 S Ct 715 (1990).

---

[10] Mr. Shurberg is the sole owner of Shurberg Broadcasting of Hartford, Inc., respondent in No. 89-700.

II

[1c] It is of overriding significance in these cases that the FCC's minority ownership programs have been specifically approved—indeed, mandated—by Congress. In Fullilove v Klutznick, 448 US 448, 65 L Ed 2d 902, 100 S Ct 2758 (1980), Chief Justice Burger, writing for himself and two other Justices, observed that although "[a] program that employs racial or ethnic criteria . . . calls for close examination," when a program employing a benign racial classification is adopted by an administrative agency at the explicit direction of Congress, we are "bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States' and 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment." Id., at 472, 65 L Ed 2d 902, 100 S Ct 2758; see also id., at 491, 65 L Ed 2d 902, 100 S Ct 2758; id., at 510, and 515-516, n 14, 65 L Ed 2d 902, 100 S Ct 2758 (Powell, J., concurring); id., at 517-520, 65 L Ed 2d 902, 100 S Ct 2758 (Marshall, J., concurring in judgment). We explained that deference was appropriate in light of Congress' institutional competence as the National Legislature, see id., at 490, 65 L Ed 2d 902, 100 S Ct 2758 (opinion of Burger, C. J.); id., at 498, 65 L Ed 2d 902, 100 S Ct 2758 (Powell, J., concurring), as well as Congress' powers under the Commerce Clause, see id., at 475-476, 65 L Ed 2d 902, 100 S Ct 2758 (opinion of Burger, C. J.); id., at 499, 65 L Ed 2d 902, 100 S Ct 2758 (Powell, J., concurring), the Spending Clause, see id., at 473-475, 478, 65 L Ed 2d 902, 100 S Ct 2758 (opinion of Burger, C. J.), and the Civil War Amendments, see id., at 476-478, 65 L Ed 2d 902, 100 S Ct 2758 (opinion of Burger, C. J.); id., at 500, 508-509, 65 L Ed 2d 902, 100 S Ct 2758 (Powell, J., concurring).[11]

[1d, 2, 3a] A majority of the Court in Fullilove did not apply strict scrutiny to the race-based classification at issue. Three Members inquired "whether the *objectives* of th[e] legislation are within the power of Congress" and "whether the limited use of racial and ethnic criteria . . . is a constitutionally permissible *means* for achieving the congressional objectives." Id., at 473, 65 L Ed 2d 902, 100 S Ct 2758 (opinion of Burger, C. J.) (emphasis in original). Three other Members would have upheld benign racial classifications that "serve important governmental objectives and are substantially related to achievement of those objectives." Id., at 519, 65 L Ed 2d 902, 100 S Ct 2758 (Marshall, J., concurring in judgment). We apply that standard today. We hold that benign race-conscious measures mandated by Congress[12]—even if those

measures are

---

[11] Justice O'Connor's suggestion that the deference to Congress described in Fullilove rested entirely on Congress' powers under § 5 of the Fourteenth Amendment, post, at 606-607, 111 L Ed 2d, at 489-490, is simply incorrect. The Chief Justice expressly noted that in enacting the provision at issue, "Congress employed an amalgam of its specifically delegated powers." 448 US, at 473, 65 L Ed 2d 902, 100 S Ct 2758.

[12] **[3b]** We fail to understand hcw Justice Kennedy can pretend that examples of "benign" race-conscious measures include South African apartheid, the "separate-but-equal"

not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.

[4] Our decision last Term in Richmond v J. A. Croson Co. 488 US 469, 102 L Ed 2d 854, 109 S Ct 706 (1989), concerning a minority set-aside program adopted by a municipality, does not prescribe the level of scrutiny to be applied to a benign racial classification employed by Congress. As Justice Kennedy noted, the question of congressional action was not before the Court, id., at 518, 102 L Ed 2d 854, 109 S Ct 706 (opinion concurring in part and concurring in judgment), and so Croson cannot be read to undermine our decision in Fullilove. In fact, much of the language and reasoning in Croson reaffirmed the lesson of Fullilove that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments. For example, Justice O'Connor, joined by two other Members of this Court, noted that "Congress may identify and redress the effects of society-wide discrimination," 488 US, at 490, 102 L Ed 2d 854, 109 S Ct 706, and that Congress "need not make specific findings of discrimination to engage in race-conscious relief." Id., at 489, 102 L Ed 2d 854, 109 S Ct 706.[13] Echoing Fullilove's emphasis on Congress

as a National Legislature that stands above factional politics, Justice Scalia argued that as a matter of "social reality and governmental theory," the Federal Government is unlikely

---

law at issue in Plessy v Ferguson, 163 US 537, 41 L Ed 256, 16 S Ct 1138 (1896), and the internment of American citizens of Japanese ancestry upheld in Korematsu v United States, 323 US 214, 89 L Ed 194, 65 S Ct 193 (1944). We are confident that an "examination of the legislative scheme and its history," Weinberger v Wiesenfeld, 420 US 636, 648, n 16, 43 L Ed 2d 514, 95 S Ct 1225 (1975), will separate benign measures from other types of racial classifications. See, e.g., Mississippi Univ. for Women v Hogan, 458 US 718, 728-730, 73 L Ed 2d 1090, 102 S Ct 3331 (1982). Of course, "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." Weinberger, supra, at 648, 43 L Ed 2d 514, 95 S Ct 1225; see also Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv L Rev 1, 21-22 (1976); Strauss, The Myth of Colorblindness, 1986 Sup Ct Rev 99, 128-129. The concept of benign race-conscious measures—even those with at least some nonremedial purposes—is as old as the Fourteenth Amendment. For example, the Freedman's Bureau Acts authorized the provision of land, education, medical care, and other assistance to Afro-Americans. See, e.g., Cong Globe, 39th Cong, 1st Sess, 630 (1866) (statement of Rep Hubbard) ("I think that the nation will be a great gainer by encouraging the policy of the Freedman's Bureau, in the cultivation of its wild lands, in the increased wealth which industry brings and in the restoration of law and order in the insurgent States"). See generally Sandalow, Racial Preferences in Higher Education: Political Responsibility and the Judicial Role, 42 U Chi L Rev 653, 664-666 (1975); Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va L Rev 753, 754-783 (1985).

[13] Justice O'Connor, in a passage joined by The Chief Justice and Justice White, observed that the decision in Fullilove had been influenced by the fact that the set-aside program at issue was "*'congressionally* mandated.'" 488 US, at 491, 102 L Ed 2d 854, 109 S Ct 706 (citation omitted; emphasis in original). Justice O'Connor's opinion acknowledged that our decision in Fullilove regarding a congressionally approved preference "did not employ 'strict scrutiny.'" 488 US, at 487, 102 L Ed 2d 854, 109 S Ct 706.

to be captured by minority racial or ethnic groups and used as an instrument of discrimination. 488 US, at 522, 102 L Ed 2d 854, 109 S Ct 706 (opinion concurring in judgment). Justice Scalia explained that "[t]he struggle for racial justice has historically been a struggle by the national society against oppression in the individual States," because of the "heightened danger of oppression from political factions in small, rather than large, political units." Id., at 522, 523, 102 L Ed 2d 854, 109 S Ct 706.[14]

[1e] We hold that the FCC minority ownership policies pass muster under the test we announce today. First, we find that they serve the important governmental objective of broadcast diversity. Second, we conclude that they are substantially related to the achievement of that objective.

A

Congress found that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications." HR Conf Rep No. 97-765, p 43 (1982). Congress and the Commission do not justify the minority ownership policies strictly as remedies for victims of this discrimination, however. Rather, Congress and the FCC have selected the minority ownership policies primarily to promote programming diversity, and they urge that such diversity is an important governmental objective that can serve as a constitutional basis for the preference policies. We agree.

[5-8] We have long recognized that "[b]ecause of the scarcity of [electromagnetic] frequencies, the Government is permitted to put restraints on licensees in favor of others whose views

should be expressed on this unique medium." Red Lion Broadcasting Co. v FCC, 395 US 367, 390, 23 L Ed 2d 371, 89 S Ct 1794 (1969). The Government's role in distributing the limited number of broadcast licenses is not merely that of a "traffic officer," National Broadcasting Co. v United States, 319 US 190, 215, 87 L Ed 1344, 63 S Ct 997 (1943); rather, it is axiomatic that broadcasting may be regulated in light of the rights of the viewing and listening audience and that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." Associated Press v United States, 326 US 1, 20, 89 L Ed 2013, 65 S Ct 1416 (1945). Safeguarding the public's right to receive a diversity of views and information over the airwaves is therefore an integral component of the FCC's mission. We have observed that " 'the "public interest" standard necessarily invites reference to First Amendment principles,' " FCC v National Citizens Committee for Broadcasting, 436 US 775, 795, 56 L Ed 2d 697, 98 S Ct 2096 (1978), quoting Columbia Broadcasting System, Inc. v Democratic National Committee, 412 US 94, 122, 36 L Ed 2d 772, 93 S Ct 2080 (1973), and that the Communications Act of 1934 has designated broadcasters as "fiduciaries for the public." FCC v League of Women Voters of Cal., 468 US 364, 377, 82 L Ed 2d 278, 104 S Ct 3106 (1984).

---

[14] See also id., at 495-496, 102 L Ed 2d 854, 109 S Ct 706 (opinion of O'Connor, J.); Ely, The Constitutionality of Reverse Racial Discrimination, 41 U Chi L Rev 723, 728-735 (1974), cited with approval in Croson, 488 US at 496, 102 L Ed 2d 854, 109 S Ct 706.

"[T]he people as a whole retain their interest in free speech by radio [and other forms of broadcast] and their collective right to have the medium function consistently with the ends and purposes of the First Amendment," and "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." Red Lion, supra, at 390, 23 L Ed 2d 371, 89 S Ct 1794. "Congress may . . . seek to assure that the public receives through this medium a balanced presentation of information on issues of public importance that otherwise might not be addressed if control of the medium were left entirely in the hands of those who own and operate broadcasting stations." League of Women Voters, supra, at 377, 82 L Ed 2d 278, 104 S Ct 3106.

[1f, 9] Against this background, we conclude that the interest in enhancing broadcast diversity is, at the very least, an important governmental objective and is therefore a sufficient

basis for the Commission's minority ownership policies. Just as a "diverse student body" contributing to a "'robust exchange of ideas'" is a "constitutionally permissible goal" on which a race-conscious university admissions program may be predicated, Regents of University of California v Bakke, 438 US 265, 311-313, 57 L Ed 2d 750, 98 S Ct 2733 (1978) (opinion of Powell, J.), the diversity of views and information on the airwaves serves important First Amendment values. Cf. Wygant v Jackson Board of Education, 476 US 267, 314-315, 90 L Ed 2d 260, 106 S Ct 1842 (1986) (Stevens, J., dissenting).[15] The benefits of such diversity are not limited to the members of minority groups who gain access to the broadcasting industry by virtue of the ownership policies; rather, the benefits redound to all members of the viewing and listening audience. As Congress found, "the American public will benefit by having access to a wider diversity of information sources." HR Conf Rep No. 97-765, supra, at 45; see also Minority Ownership of Broadcast Stations: Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, 101st Cong, 1st Sess, 66 (1989) (testimony of Roderick Porter, Deputy Chief, Mass Media Bureau of the FCC) ("[T]he FCC's minority policies are based on our conclusion that the entire broadcast audience, regardless of its racial composition, will benefit").

B

[1g, 10] We also find that the minority ownership policies are substantially related to the achievement of the Government's interest. One component of this inquiry concerns the relationship between expanded minority ownership and greater broadcast diversity; both the FCC and Congress have determined that such a relationship exists. Although we do not "'defer' to the judgment of the Congress and the Commission on a constitutional question," and would not "hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity" to equal protection principles, Columbia Broadcasting System, Inc. v Democratic National Committee, 412 US, at 103, 36 L Ed 2d 772, 93 S Ct 2080, we must pay close attention to the expertise of the Commission and the factfinding of Congress when analyzing the nexus between minority ownership and programming diversity. With respect to this "complex" empirical question, ibid., we are required to give "great weight to the decisions of Congress and the experience of the Commission." Id., at 102, 36 L Ed 2d 772, 93 S Ct 2080.

---

[15] In Wygant v Jackson Board of Education, Justice O'Connor noted that, "although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." 476 US, at 286, 90 L Ed 2d 260, 106 S Ct 1842 (opinion concurring in part and concurring in judgment). She further stated that "nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies." Ibid. Compare post, at 612, 111 L Ed 2d, at 493-494 (O'Connor, J., dissenting).

1

[1h] The FCC has determined that increased minority participation in broadcasting promotes programming diversity. As the Commission observed in its 1978 Statement of Policy on Minority Ownership of Broadcasting Facilities, "ownership of broadcast facilities by minorities is [a] significant way of fostering the inclusion of minority views in the area of programming," and "[f]ull minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming." 68 FCC2d, at 981. Four years later, the FCC explained that it had taken "steps to enhance the ownership and participation of minorities in the media" in order to "increas[e] the diversity in the control of the media and thus diversity in the selection of available programming, benefitting the public and serving the principle of the First Amendment." Minority Ownership in Broadcasting, 92 FCC2d, at 849-850. See also Radio Jonesboro, Inc. 100 FCC2d 941, 945, n 9 (1985) ("'[T]here is a critical underrepresentation of minorities in broadcast ownership, and full minority participation in the ownership and management of broadcast facilities is essential to realize the fundamental goals of programming diversity and diversification of ownership'") (citation omitted). The FCC's conclusion that there is an empirical nexus between minority ownership and broadcasting diversity is a product of its expertise, and we accord its judgment deference.

Furthermore, the FCC's reasoning with respect to the minority ownership policies is consistent with longstanding practice under the Communications Act. From its inception, public regulation of broadcasting has been premised on the assumption that diversification of ownership will broaden the range of programming available to the broadcast audience.[16]

---

[16] For example, in 1953, the Commission promulgated the first of its multiple ownership rules, the "fundamental purpose" of which is "to promote diversification of ownership in order to maximize diversification of program and service viewpoints." Amendment of Sections 3.35, 3.240, and 3.636 of Rules and Regulations Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations, Report and Order, 18 FCC 288, 291. Initially, the multiple ownership rules limited only the common control of broadcast stations. The Commission's current rules include limitations on broadcast/newspaper cross-ownership, cable/television cross-ownership, broadcast service cross-ownership, and com-

Thus, "it is upon *ownership* that public policy places

[497 US 571]

primary reliance with respect to diversification of content, and that historically has proved to be significantly influential with respect to editorial comment and the presentation of news." TV 9, Inc. 161 US App DC, at 358, 495 F2d, at 938 (emphasis added). The Commission has never relied on the market alone to ensure that the needs of the audience are met. Indeed, one of the FCC's elementary regulatory assumptions is that broadcast content is not purely market-driven; if it were, there would be little need for consideration in licensing decisions of such factors as integration of ownership and management, local residence, and civic participation. In this vein, the FCC has compared minority preferences to local residence and other integration credits:

> "[B]oth local residence and minority ownership are fundamental considerations in our licensing scheme. Both policies complement our concern with diversification of control of broadcast ownership. Moreover, similar assumptions underlie both policies. We award enhancement credit for local residence because . . . [i]t is expected that [an] increased knowledge of the community of license will be reflected in a station's programming. Likewise, credit for minority ownership and participation is awarded in a comparative proceeding [because] 'minority ownership is likely to increase diversity of content, especially of opinion and viewpoint.'" Radio Jonesboro, Inc., supra, at 945 (footnotes omitted).

[497 US 572]

2

[1i, 11] Congress also has made clear its view that the minority ownership policies advance the goal of diverse programming. In recent years, Congress has specifically required the Commission, through appropriations legislation, to maintain the minority ownership policies without alteration. See n 9, supra. We would be remiss, however, if we ignored the long history of congressional support for those policies prior to the passage of the appropriations Acts because, for the past two decades, Congress has consistently recognized the barriers encountered by minorities in entering the broadcast industry and has expressed emphatic support for the Commission's attempts to promote programming

---

mon control of broadcast stations. See 47 CFR §§ 73.3555, 76.501 (1989). The Commission has always focused on ownership, on the theory that "ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation, all of which are a critical aspect of the Commission's concern with the public interest." Amendment of Sections 73.34, 73.240, and 73.636 of Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order, 50 FCC2d 1046, 1050 (1975); see also Amendment of Sections 73.35, 73.240, and 73.636 of Commission Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, First Report and Order, 22 FCC2d 306, 307 (1970) (multiple ownership rules "promot[e] diversification of programming sources and viewpoints"); Amendment of Sections 73.35, 73.240, and 73.636 of Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Report and Order, 45 FCC 1476, 1477, 1482 (1964) ("[T]he greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have 'an inordinate effect in a . . . programming sense, on public opinion at the regional level'"); Editorializing by Broadcast Licensees, 13 FCC 1246, 1252 (1949) (ownership enables licensee "to insure that his personal viewpoint on any particular issue is presented in his station's broadcasts").

diversity by increasing minority ownership. Limiting our analysis to the immediate legislative history of the appropriations Acts in question "would erect an artificial barrier to [a] full understanding of the legislative process." Fullilove v Klutznick, 448 US, at 502, 65 L Ed 2d 902, 100 S Ct 2758 (Powell, J., concurring). The "special attribute [of Congress] as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." Id., at 502-503, 65 L Ed 2d 902, 100 S Ct 2758; see also id., at 478, 65 L Ed 2d 902, 100 S Ct 2758 (opinion of Burger, C. J.) ("Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings").

[1j] Congress' experience began in 1969, when it considered a bill that would have eliminated the comparative hearing in license renewal proceedings, in order to avoid "the filing of a

multiplicity of competing applications, often from groups unknown" and to restore order and predictability to the renewal process to "give the current license holder the benefit of the doubt warranted by his previous investment and experience." 115 Cong Rec 14813 (1969) (letter of Sen. Scott). Congress heard testimony that, because the most valuable broadcast licenses were assigned many years ago, comparative hearings at the renewal stage afford an important opportunity for excluded groups, particularly minorities, to gain entry into the industry.[17] Opponents warned that the bill would "exclude minority groups from station ownership in important markets" by "fr[eezing]" the distribution of existing licenses.[18]

Congress confronted the issue again in 1973 and 1974, when congressional committees held extensive hearings on proposals to extend the broadcast license period from three to five years and to modify the comparative hearing process for license renewals. Witnesses reiterated that renewals provided a valuable opportunity for minorities to obtain a foothold in the industry.[19] The proposals were never enacted, and the renewal process was left intact.

---

[17] See Amend the Communications Act of 1934: Hearings on S 2004 before the Subcommittee on Communications of the Senate Committee on Commerce, 91st Cong, 1st Sess, pt 1, p 128 (1969) (testimony of Earle Moore, National Citizens Committee for Broadcasting); id., pt 2, at 520-521 (testimony of John Pamberton, American Civil Liberties Union); id., at 566-567 (testimony of David Batzka, United Christian Missionary Society); id., at 626-627 (testimony of William Hudgins, Freedom National Bank).

[18] Id., at 642 (testimony of John McLaughlin, then associate editor of America magazine).

[19] See Broadcast License Renewal: Hearings on HR 5546 et al. before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce, 93d Cong, 1st Sess, pt 1, pp 495-

[497 US 574]

During 1978, both the FCC and the Office of Telecommunications Policy presented their views to Congress as it considered a bill to deregulate the broadcast industry. The proposed Communications Act of 1978 would have, among other things, replaced comparative hearings with a lottery and created a fund for minorities who sought to purchase stations. As described by Representative Markey, the measure was intended to increase "the opportunities for blacks and women and other minorities in this country to get into the communications systems in this country so that their point of view and their interests can be represented." The Communications Act of 1978: Hearings on HR 13015 before the Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce, 95th Cong, 2d Sess, vol 5, pt 1, p 59 (1978). The bill's sponsor, Representative Van Deerlin, stated: "It was the hope, and with some reason the expectation of the framers of the bill, that the most effective way to reach the inadequacies of the broadcast industry in employment and programming would be by doing something at the top, that is, increasing minority ownership and management and control in broadcast stations." Id., vol 3, at 698.

The Executive Branch objected to the lottery proposal on the ground that it would harm minorities by eliminating the credit granted under the comparative hearing scheme as developed by the FCC. See id., at 50. Although it acknowledged that a lottery could be structured to alleviate that concern by attributing a weight to minority ownership, see id., at 85, the Executive Branch explained that it preferred to

[497 US 575]

grant credit for minority ownership during comparative hearings as a more finely tuned way of achieving the Communication Act's goal of broadcast diversity. See ibid. (contending that a lottery would not take into account the individual needs of particular communities).

Although no lottery legislation was enacted that year, Congress continued to explore the idea,[20] and when in 1981 it ultimately authorized a lottery procedure, Congress

---

497 (1973) (testimony of William E. Hanks, Pittsburgh Community Coalition for Media Change); id., at 552-559 (testimony of Rev. George Brewer, Greater Dallas-Fort Worth Coalition for the Free Flow of Information); id., at 572-594 (testimony of James McCuller, Action for a Better Community, inc.); id., pt 2, at 686-689 (testimony of Morton Hamburg, adjunct assistant professor of communications law, New York University); Broadcast License Renewal Act: Hearings on S 16 et al. before the Subcommittee on Communications of the Senate Committee on Commerce, 93d Cong, 2d Sess, pt 1, pp 325-329 (1974) (testimony of Ronald H. Brown, National Urban League); id., at 376-381 (testimony of Gladys T. Lindsay, Citizens Committee on Media); id., at 408-411 (testimony of Joseph L. Rauh, Jr., Leadership Conference on Civil Rights and Americans for Democratic Action); id., pt 2, at 785-800 (testimony of Manuel Fierro, Raza Association of Spanish Surnamed Americans).

[20] For example, the proposed Communications Act of 1979 would have provided that any minority applicant for a previously unassigned license would be counted twice in the lottery pool. See Staff of the Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce, HR 3333, "The Communications Act of 1979" Section-by-Section Analysis, 96th Cong, 1st Sess, 39-41 (Comm Print 1979).

established a concomitant system of minority preferences. See Omnibus Budget Reconciliation Act of 1981, Pub L 97-35, 95 Stat 357, 736-737. The Act provided that where more than one application for an initial license or construction permit was received, the Commission could grant the license or permit to a qualified applicant "through the use of a system of random selection," 47 USC § 309(i)(1) (1982 ed) [47 USCS § 309(i)(1)], so long as the FCC adopted rules to ensure "significant preferences" in the lottery process to groups underrepresented in the ownership of telecommunications facilities. § 309(i)(3)(A). The accompanying Conference Report announced Congress's "firm intention" to award a lottery preference to minorities and other historically underrepresented groups, so that "the objective of increasing the number of media outlets owned by such persons or groups [would] be met." HR Conf Rep No. 97-208, p 897 (1981). After the FCC complained of the difficulty of defining "underrepresented" groups and raised other problems concerning the statute,[21] Congress enacted a second lottery statute reaffirming its intention in unmistakable terms. Section 115 of the Communications Amendments **[497 US 576]** Act of 1982, Pub L 97-259, 96 Stat 1094 (amending 47 USC § 309(i) (1982 ed) [47 USCS § 309(i)]), directs that in any random selection lottery conducted by the FCC, a preference is to be granted to every applicant whose receipt of a license would increase the diversification of mass media ownership and that, "[t]o further diversify the ownership of the media of mass communications, an additional significant preference [is to be given] to any applicant controlled by a member or members of a minority group." § 309(i)(3)(A). Observing that the nexus between ownership and programming "has been repeatedly recognized by both the Commission and the courts," Congress explained that it sought "to promote the diversification of media ownership and consequent diversification of programming content," a principle that "is grounded in the First Amendment." HR Conf Rep No. 97-765, p 40 (1982). With this new mandate from Congress, the Commission adopted rules to govern the use of a lottery system to award licenses for low power television stations.[22]

The minority ownership issue returned to the Congress in October 1986,[23] when a House subcommittee held a hearing to examine the Commission's inquiry into the validity of its minority ownership policies. The subcommittee chair expressed his view that "[t]he most important message of this

---

[21] See Amendment of Part 1 of Commission's Rules to Allow Selection from Among Mutually Exclusive Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings, 89 FCC2d 257, 277-284 (1982).

[22] See Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings, 93 FCC2d 952 (1983).

[23] The issue had surfaced briefly in the 98th Congress, where proposals to codify and expand the FCC's minority ownership policies were the subject of extensive hearings in the House. See Minority Participation in the Media: Hearings before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce, 98th Cong, 1st Sess (1983); Parity for Minorities in the Media: Hearing on HR 1155 before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce, 98th Cong, 1st Sess (1983); Broadcast Regulation and Station Ownership: Hearings on HR 6122 and HR 6134 before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Com-

hearing today, is that the Commission must not dismantle these longstanding diversity policies, which Congress has repeatedly endorsed, until such time as Congress or the courts direct otherwise." Minority-Owned Broadcast Stations: Hearing on HR 5373 before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce, 99th Cong, 2d Sess, 13 (1986) (Rep. Wirth). After the Commission issued an order holding in abeyance, pending completion of the inquiry, actions on licenses and distress sales in which a minority preference would be dispositive,[24] a number of bills proposing codification of the minority ownership policies were introduced in Congress.[25] Members of Congress questioned representatives of the FCC during hearings over a span of six months in 1987 with respect to the FCC appropriation for fiscal year 1988,[26] legislation to reauthorize the Commission for fiscal years 1988 and 1989,[27] and legislation to codify the Commission's minority ownership policies.[28]

[1k, 12a] Ultimately, Congress chose to employ its appropriations power to keep the FCC's minority ownership policies in place for fiscal year 1988.[29] See supra, at 560, 111 L Ed 2d, at 460. The Report of the originating Committee on Appropriations explained: "The Congress has expressed its support for such poli-

---

merce, 98th Cong, 2nd Sess (1984). No legislation was passed.

[24] See Notice of Inquiry on Racial Ethnic or Gender Classifications, 1 FCC Rcd 1315, 1319 (1986), as amended, 2 FCC Fcd 2377 (1987).

[25] These bills recognized the link between minority ownership and diversity. In introducing S 1095, for example, Senator Lautenberg explained that "[d]iversity of ownership does promote diversity of views. Minority . . . broadcasters serve a need that is not as well served as others. They address issues that others do not." 133 Cong Rec 9745 (1987); see also id., at 860 (HR 293); id., at 3300 (HR 1090); id., at 13742-13745 (S 1277).

[26] See Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1988: Hearings on HR 2763 before a Subcommittee of the Senate Committee on Appropriations, 100th Cong, 1st Sess (1987).

[27] See FCC Authorization: Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, 100th Cong, 1st Sess, 55 (1987); FCC and NTIA Authorizations: Hearings on HR 2472 before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, 100th Cong, 1st Sess, 130-131, 211-212 (1987).

[28] See Broadcasting Improvements Act of 1987: Hearings on S 1277 before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, 100th Cong, 1st Sess, 51 (1987).

[29] **[12b]** Congress did not simply direct a "kind of mental standstill," Winter Park, 277 US App DC, at 151, 873 F2d, at 364 (Williams, J., concurring in part dissenting in part), but rather in the appropriations legislation expressed its unqualified support for the minority ownership policies and instructed the Commission in no uncertain terms that in Congress' view there was no need to study the topic further. Appropriations Acts, like any other laws, are binding because they are "passe[d] [by] both Houses and . . . signed by the President." United States v Munoz-Flores, 495 US 385, 396, 109 L Ed 2d 384, 110 S Ct 1964 (1990); id., at 401, 109 L Ed 2d 384, 110 S Ct 1964 (Stevens, J., concurring in judgment). See also United States v Will, 449 US 200, 222, 66 L Ed 2d 392, 101 S Ct 471 (1980); United States v Dickerson, 310 US 554, 555, 84 L Ed 1356, 60 S Ct 1034 (1940).

cies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority and women audiences." S Rep No. 100-182, p 76 (1987). The Committee recognized the continuity of congressional action in the field of minority ownership policies, noting that "[i]n approving a lottery system for the selection of certain broadcast licensees, Congress explicitly approved the use of preferences to promote minority and women ownership." Id., at 76-77.

Congress has twice extended the prohibition on the use of appropriated funds to modify or repeal minority ownership policies[30] and has continued to focus upon the issue. For example, in the debate on the fiscal year 1989 legislation, Senator Hollings, chair of both the authorizing committee and the appropriations subcommittee for the FCC, presented to the Senate a summary of a June 1988 report prepared by the Congressional Research Service (CRS), entitled, Minority

Broadcast Station Ownership and Broadcast Programming: Is There a Nexus? The study, Senator Hollings reported, "clearly demonstrates that minority ownership of broadcast stations does increase the diversity of viewpoints presented over the airwaves." 134 Cong Rec 18982 (1988).

[1l] As revealed by the historical evolution of current federal policy, both Congress and the Commission have concluded that the minority ownership programs are critical means of promoting broadcast diversity. We must give great weight to their joint determination.

C

[1m] The judgment that there is a link between expanded minority ownership and broadcast diversity does not rest on impermissible stereotyping. Congressional policy does not assume that in every case minority ownership and management will lead to more minority-oriented programming or to the expression of a discrete "minority viewpoint" on the airwaves. Neither does it pretend that all programming that appeals to minority audiences can be labeled "minority programming" or that programming that might be described as "minority" does not appeal to nonminorities. Rather, both Congress and the FCC maintain simply that expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity. A broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogeneous group. The predictive judgment about the overall result of minority entry into broadcasting is not a rigid assumption about how minority owners will behave in every case but rather is akin to Justice Powell's conclusion in Bakke that greater admission of minorities would contribute, on average, "to the 'robust exchange of ideas.' " 438 US, at 313, 57 L Ed 2d 750, 98 S Ct 2733. To be sure, there is no ironclad guarantee that each minority owner will contribute to diversity. But neither was there an

---

[30] See Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub L 100-459, 102 Stat 2216; Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1990, Pub L 101-162, 103 Stat 1020.

[497 US 580]

assurance in Bakke that minority students would interact with nonminority students or that the particular minority students admitted would have typical or distinct "minority" viewpoints. See id., at 312, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Powell, J.) (noting only that educational excellence is "*widely believed* to be promoted by a diverse student body") (emphasis added); id., at 313, n 48, 57 L Ed 2d 750, 98 S Ct 2733 (" 'In the nature of things, it is hard to know how, and when, and even if, this informal "learning through diversity" actually occurs' ") (citation omitted).

Although all station owners are guided to some extent by market demand in their programming decisions, Congress and the Commission have determined that there may be important differences between the broadcasting practices of minority owners and those of their nonminority counterparts. This judgment—and the conclusion that there is a nexus between minority ownership and broadcasting diversity—is corroborated by a host of empirical evidence.[31] Evidence

[497 US 581]

suggests that an owner's minority status influences the selection of topics for news coverage and the presentation of editorial viewpoint, especially on matters of particular concern to minorities. "[M]inority ownership does appear to have specific impact on the presentation of minority images in local news,"[32] inasmuch as minority-owned stations tend to devote more news time to topics of minority interest and to avoid racial and ethnic stereotypes in portraying minorities.[33] In addition, studies show that a minority owner is more likely to employ minorities in managerial and other important roles

---

[31] For example, the CRS analyzed data from some 8,720 FCC-licensed radio and television stations and found a strong correlation between minority ownership and diversity of programming. See CRS, Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus? (June 29, 1988). While only 20 percent of stations with no Afro-American ownership responded that they attempted to direct programming at Afro-American audiences, 65 percent of stations with Afro-American ownership reported that they did so. See id., at 13. Only 10 percent of stations without Hispanic ownership stated that they targeted programming at Hispanic audiences, while 59 percent of stations with Hispanic owners said they did. See id., at 13, 15. The CRS concluded:

"[A]n argument can be made that FCC policies that enhanced minority . . . station ownership may have resulted in more minority and other audience targeted programming. To the degree that increasing minority programming across audience markets is considered adding to programming diversity, then, based on the FCC survey data, an argument can be made that the FCC preference policies contributed, in turn, to programming diversity." Id., at cover page.

Other surveys support the FCC's determination that there is a nexus between ownership and programming. A University of Wisconsin study found that Afro-American-owned, Afro-American-oriented radio stations have more diverse playlists than white-owned, Afro-American-oriented stations. See J. Jeter, A Comparative Analysis of the Programming Practices of Black-Owned Black-Oriented Radio Stations and White-Owned Black-Oriented Radio Stations 130, 139 (1981) (University of Wisconsin-Madison). See also M. Spitzer, Justifying Minority Preferences in Broadcasting, California Institute of Technology Working Paper No. 718, pp 19-29 (March 1990) (explaining why minority status of owner might affect programming behavior).

[32] Fife, The Impact of Minority Ownership on Minority Images in Local TV News, in Communications: A Key to Economic and Political Change, Selected Proceedings from the 15th Annual Howard University Communications Conference 113 (1986) (survey of four Standard Metropolitan Statistical Areas); see also M. Fife, The Impact of Minority Ownership on Broadcast News Content: A Multi-Market Study 52 (June 1986) (report submitted to National Association of Broadcasters).

where they can have an impact on station policies.[34] If the FCC's equal employment policies "ensure that . . . licensees' programming fairly reflects the tastes and viewpoints of minority groups," NAACP v FPC, 425 US, at 670, n 7, 48 L Ed 2d 284, 96 S Ct 1806, it is difficult to deny that minority-owned stations that follow such employment policies on their own will also contribute to diversity. While we are under no illusion that members of a particular minority group share some cohesive, collective viewpoint, we believe it a legitimate inference for Congress and the Commission to draw that as more minorities gain ownership and policymaking roles in the media, varying perspectives will be more fairly represented on the airwaves. The policies are thus a product of " 'analysis' " rather than

a " 'stereotyped reaction' " based on " '[h]abit.' " Fullilove, 448 US, at 534, n 4, 65 L Ed 2d 902, 100 S Ct 2758 (Stevens, J., dissenting) (citation omitted).

Our cases demonstrate that the reasoning employed by the Commission and Congress is permissible. We have recognized, for example, that the fair-cross-section requirement of the Sixth Amendment forbids the exclusion of groups on the basis of such characteristics as race and gender from a jury venire because "[w]ithout that requirement, the State could draw up jury lists in such manner as to produce a pool of prospective jurors disproportionately ill disposed towards one or all classes of defendants, and thus more likely to yield petit juries with similar disposition." Holland v Illinois, 493 US 474, 480-481, 107 L Ed 2d 905, 110 S Ct 803 (1990). It is a small step from this logic to the conclusion that including minorities in the electromagnetic spectrum will be more likely to produce a "fair cross section" of diverse content. Cf. Duren v Missouri, 439 US 357, 358-359, 363-364, 58 L Ed 2d 579, 99 S Ct 664 (1979); Taylor v Louisiana, 419 US 522, 531-533, 42 L Ed 2d 690, 95 S Ct 692 (1975).[35] In addition, many of our voting rights cases operate on the assumption that minorities have particular viewpoints and interests worthy of protection. We have held, for example, that in safeguarding the "'effective exercise of the electoral franchise'" by racial minorities, United Jewish Organizations of Williamsburgh, Inc. v Carey, 430 US 144, 159, 51 L Ed 2d 229, 97 S Ct 996 (1977) (plurality opinion), quoting Beer v United States, 425 US 130, 141, 47 L Ed 2d 629, 96 S Ct 1357 (1976), "[t]he permissible use of racial criteria is not confined to eliminating

---

[33] For example, a University of Massachusetts at Boston survey of 3,000 local Boston news stories found a statistically significant difference in the treatment of events, depending on the race of ownership. See K. Johnson, Media Images of Boston's Black Community 16-29 (Jan. 28, 1987) (William Monroe Trotter Institute). A comparison between an Afro-American-owned television station and a white-owned station in Detroit concluded that "the overall mix of topic and location coverage between the two stations is statistically different, and with its higher use of blacks in newsmaker roles and its higher coverage of issues of racial significance, [the Afro-American-owned station's] content does represent a different perspective on news than [that of the white-owned station]." M. Fife, The Impact of Minority Ownership On Broadcast Program Content: A Case Study of WGPR-TV's Local News Content, Report to the National Association of Broadcasters, Office of Research and Planning 45 (Sept. 1979). See also R. Wolseley, The Black Press, USA 3-4, 11 (2d ed 1990) (documenting importance of minority ownership).

[34] Afro-American-owned radio stations, for example, have hired Afro-Americans in top management and other important job categories at far higher rates than have white-owned stations, even those with Afro-American-oriented formats. The same has been true of Hispanic hiring at Hispanic-owned stations, compared to Anglo-owned stations with Spanish-language formats. See Honig, Relationships Among EEO, Program Service, and Minority Ownership in Broadcast Regulation, in Proceedings from the Tenth Annual Telecommunications Policy Research Conference 88-89 (O. Gandy, P. Espinoza, & J. Ordover eds 1983). As of September 1986, half of the 14 Afro-American or Hispanic general managers at TV stations in the United States worked at minority-owned or controlled stations. See National Association of Broadcasters, Minority Broadcasting Facts 9-10, 55-57 (Sept. 1986). In 1981, 13 of the 15 Spanish-language radio stations in the United States owned by Hispanics also had a majority of Hispanics in management positions, while only a third of Anglo-owned Spanish-language stations had a majority of Hispanic managers, and 42 percent of the Anglo-owned Spanish-language stations had no Hispanic managers at all. See Schement & Singleton, The Onus of Minority Ownership: FCC Policy and Spanish-Language Radio, 31 J Communication 78, 80-81 (1981). See generally Johnson, supra, at 5 ("Many observers agree that the single largest reason for the networks' poor coverage of racial news is related to the racial makeup of the networks' own staffs"); Wimmer, supra n 2, at 426-427 ("[M]inority-owned broadcast outlets tend to hire more minority employees. . . . A policy of minority ownership could, over time, lead to a growth in minority employment, which has been shown to produce minority-responsive programming") (footnotes omitted).

the effects of past discriminatory districting or apportionment." 430 US, at 161, 51 L Ed 2d 229, 97 S Ct 996. Rather, a State subject to § 5 of the Voting Rights Act of 1965, 79 Stat 439, as amended, 42 USC § 1973c [42 USCS § 1973c], may "deliberately creat[e] or preserv[e] black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5"; "neither the Fourteenth nor the Fifteenth Amendment mandates any per se rule against using racial factors in districting and apportionment." 430 US, at 161, 51 L Ed 2d 229, 97 S Ct 996.

D

[1n, 13a] We find that the minority ownership policies are in other relevant respects substantially related to the goal of promoting broadcast diversity. First, the Commission adopted and Congress endorsed minority ownership preferences only after long study and painstaking consideration of all available alternatives. See Fullilove, 448 US, at 463-467, 65 L Ed 2d 902, 100 S Ct 2758 (opinion of Burger, C. J.); id., at 511, 65 L Ed 2d 902, 100 S Ct 2758 (Powell, J., concurring). For many years, the FCC attempted to encourage diversity of programming content without consideration of the race of station owners.[36] When it

---

[35] See also Peters v Kiff, 407 US 493, 503-504, 33 L Ed 2d 83, 92 S Ct 2163 (1972) (opinion of Marshall, J.) ("[W]e are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented").

[36] **[13b]** The Commission has eschewed direct federal control over discrete programming decisions by radio and television stations. See, e. g., Network Programming Inquiry, Report and Statement of Policy, 25 Fed Reg 7293 (1960) ("[W]hile the Commission

first addressed the issue, in a 1946 report entitled Public Service Responsibility of Broadcast Licensees (Blue Book), the Commission stated that although licensees bore primary responsibility for program service, "[i]n issuing and in renewing the licenses of broadcast stations, the Commission [would] give particular consideration to four program service factors relevant to the public interest." Id., at 55.[37] In 1960, the Commission altered course somewhat, announcing that "the principal ingredient of the licensee's obligation to operate his station in the public interest is the diligent, positive and continuing effort . . . to discover and fulfill the tastes, needs, and desires of his community or service area, for broadcast service." Network Programming Inquiry, Report and Statement of Policy, 25 Fed Reg 7295 (1960). Licensees were advised that they could meet this obligation in two ways: by canvassing members of the listening public who could receive the station's signal, and by meeting with "leaders in community life . . . and others who bespeak the interests which make up the community." Id., at 7296.

By the late 1960's, it had become obvious that these efforts had failed to produce sufficient diversity in programming. The Kerner Commission, for example, warned that the various elements of the media "have not communicated to whites a feeling for the difficulties and frustrations of being a Negro in the United States. They have not shown understanding or appreciation of—and thus have not communicated—a sense of Negro culture, thought, or history. . . . The world that television and newspapers offer to their black audience is almost totally white . . . ." Report of the National Advisory Commission on Civil Disorders 210 (1968). In response, the Commission promulgated equal employment opportunity

---

may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear"). In order to ensure diversity by means of administrative decree, the Commission would have been required to familiarize itself with the needs of every community and to monitor the broadcast content of every station. Such a scheme likely would have presented insurmountable practical difficulties, in light of the thousands of broadcast outlets in the United States and the myriad local variations in audience tastes and interests. Even were such an ambitious policy of central planning feasible, it would have raised "serious First Amendment issues" if it denied a broadcaster the ability to "carry a particular program or to publish his own views," if it risked "government censorship of a particular program," or if it led to "the official government view dominating public broadcasting." Red Lion Broadcasting Co. v FCC, 395 US 367, 396, 23 L Ed 2d 371, 89 S Ct 1794 (1969); cf. FCC v Sanders Brothers Radio Station, 309 US 470, 475, 84 L Ed 869, 60 S Ct 693 (1940). The Commission, with the approval of this Court, has therefore "avoid[ed] unnecessary restrictions on licensee discretion" and has interpreted the Communications Act of 1934 as "seek[ing] to preserve journalistic discretion while promoting the interests of the listening public." FCC v WNCN Listeners Guild, 450 US 582, 596, 67 L Ed 2d 521, 101 S Ct 1266 (1981).

[37] **37.** One factor was the extent to which a station carried programs unsponsored by commercial advertisers during hours "when the public is awake and listening." Blue Book 55-56. The Commission believed that this would expand diversity by permitting the broadcast of less popular programs that would appeal to particular tastes and interests in the listening audience that might otherwise go unserved. See id., at 12. Second, the Commission called for local live programs to encourage local self-expression. See id., at 56. Third, the Commission expected "program[ming] devoted to the discussion of public issues." Ibid. The final factor was the amount of advertising aired by the licensee. Ibid.

regulations, see supra, at 554-555, 111 L Ed 2d, at 456-457, and formal "ascertainment" rules requiring a broadcaster as a condition of license "to ascertain the problems, needs and interests of the residents of his community of license and other areas he undertakes to serve," and to specify "what broadcast matter he proposes to meet those problems, needs and interests." Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 FCC2d 650, 682 (1971).[38] The Commission explained that although it recognized there was "no single answer for all stations," it expected each licensee to devote a " 'significant proportion' " of a station's programming to community concerns. Id., at 686 (citation omitted).[39] The Commission

expressly included "minority and ethnic groups" as segments of the community that licensees were expected to consult. See, e. g., Ascertainment of Community Problems by Broadcast Applicants, 57 FCC2d 418, 419, 442 (1976); Ascertainment of Community Problems by Noncommercial Educational Broadcast Applicants, 54 FCC2d 766, 767, 775, 776 (1975). The FCC held that a broadcaster's failure to ascertain and serve the needs of sizable minority groups in its service area was, in itself, a failure of licensee responsibility regardless of any intent to discriminate and was a sufficient ground for the nonrenewal of a license. See, e. g., Chapman Radio and Television Co. 24 FCC2d 282, 286 (1970). The Commission observed that "[t]he problems of minorities must be taken into consideration by broadcasters in planning their program schedules to meet the needs and interests of the communities they are licensed to serve." Time-Life Broadcast, Inc. 33 FCC2d 1081, 1093 (1972); see also Mahoning Valley Broadcasting Corp. 39 FCC2d 52, 58 (1972); WKBN Broadcasting Corp. 30 FCC2d 958, 970 (1971). Pursuant to this policy, for example, the Commission refused to renew licenses for eight educational stations in Alabama and denied an application for a construction permit for a ninth, all on the ground that the licensee "did not take the trouble to inform itself of the needs and interests of a minority group consisting of 30 percent of the population of the State of Alabama" and that such a failure was "fundamentally irreconcilable with the obligations which the Communications Act places upon those who receive authorizations to use the airwaves." Alabama Educational Television Comm'n, 50 FCC2d 461,

---

[38] The Commission also devised policies to guard against discrimination in programming. For example, it determined that "arbitrar[y] refus[al] to present members of an ethnic group, or their views" in programming, or refusal to present members of such groups "in integrated situations with members of other groups," would constitute a ground for license nonrenewal. Citizens Communications Center, 25 FCC2d 705, 707 (1970).

[39] In addition, the Commission developed nonentertainment guidelines, which called for broadcasters to devote a certain percentage of their programming to nonentertainment subjects such as news, public affairs, public service announcements, and other topics. See WNCN Listeners Guild, supra, at 598-599, n 41, 67 L Ed 2d 521, 101 S Ct 1266; Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 FCC2d 1076, 1078 (1984) (hereinafter Deregulation of Television); Deregulation of Radio, 84 FCC2d 968, 975 (1981). Applicants proposing less than the guideline amounts of nonentertainment programming could not have their applications routinely processed by the Commission staff; rather, such applications were brought to the attention of the Commission itself.

472, 473 (1975), citing Red Lion Broadcasting Co. v FCC, 395 US 367, 23 L Ed 2d 371, 89 S Ct 1794 (1969). The Commission's ascertainment policy was not static; in order to facilitate application of the ascertainment requirement, the Commission devised a community leader checklist consisting

of 19 groups and institutions commonly found in local communities, see 57 FCC2d, at 418-419, and it continued to consider improvements to the ascertainment system. See, e. g., Amendment of Primers on Ascertainment of Community Problems by Commercial Broadcast Renewal Applicants and Noncommercial Educational Broadcast Applicants, Permittees and Licensees, 47 Radio Reg 2d (P&F) 189 (1980).

By 1978, however, the Commission had determined that even these efforts at influencing broadcast content were not effective means of generating adequate programming diversity. The FCC noted that "[w]hile the broadcasting industry has on the whole responded positively to its ascertainment obligations and has made significant strides in its employment practices, we are compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media." Minority Ownership Statement, 68 FCC2d, at 980 (footnotes omitted). As support, the Commission cited a report by the United States Commission on Civil Rights, which found that minorities "are underrepresented on network dramatic television programs and on the network news. When they do appear they are frequently seen in token or stereotyped roles." Window Dressing on the Set 3 (Aug. 1977). The Commission concluded that "despite the importance of our equal employment opportunity rules and ascertainment policies in assuring diversity of programming it appears that additional measures are necessary and appropriate. In this regard, the Commission believes that ownership of broadcast facilities by minorities is another significant way of fostering the inclusion of minority views in the area of programming." 68 FCC2d, at 981; see also Commission Policy Regarding Advancement of Minority Ownership in Broadcasting, 92 FCC2d 849, 850 (1982) ("[I]t became apparent that in order to broaden minority voices and spheres of influence over the airwaves, additional

measures were necessary" beyond the equal employment and ascertainment rules).[40]

[1o] In short, the Commission established minority ownership preferences only after long experience demonstrated that race-neutral means could not produce adequate broadcasting diversity.[41] The FCC did not act precipitately in devising the programs we uphold today; to the contrary, the Commission undertook thorough evaluations of its policies *three* times—in 1960, 1971, and 1978—before adopting the minority ownership programs.[42] In endorsing the

---

[40] The Commission recently eliminated its ascertainment policies for commercial radio and television stations, together with its nonentertainment programming guidelines. See Deregulation of Radio, supra, at 975-999, reconsideration denied, 87 FCC2d 797 (1981), rev'd on other grounds sub nom. Office of Communication of the United Church of Christ v FCC, 228 US App DC 8, 707 F2d 1413 (1983); Deregulation of Television, supra, at 1096-1101, reconsideration denied, 104 FCC2d 358 (1986), remanded on other grounds sub nom. Action for Children's Television v FCC, 261 US App DC 253, 821 F2d 741 (1987). The Commission found that the ascertainment rules imposed significant burdens on licensees without producing corresponding benefits in terms of responsiveness to community issues. See 98 FCC2d, at 1098 ("Ascertainment procedures . . . were intended as a means of ensuring that licensees actively discovered the problems, needs and issues facing their communities . . . . Yet, we have no evidence that these procedures have had such an effect") (footnote omitted).

---

41. Although the Commission has concluded that "the growth of traditional broadcast facilities" and "the development of new electronic information technologies" have rendered "the fairness doctrine unnecessary," Report Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 FCC2d 143, 197 (1985), the Commission has not made such a finding with respect to its minority ownership policies. To the contrary, the Commission has expressly noted that its decision to abrogate the fairness doctrine does not in its view call into question its "regulations designed to promote diversity." Syracuse Peace Council (Reconsideration), 3 FCC Rcd 2035, 2041, n 56 (1988).

42. Justice O'Connor offers few race-neutral alternatives to the policies that the FCC has already employed and found wanting. She insists that "[t]he FCC could directly advance its interest by requiring licensees to provide programming that the FCC believes would add to diversity." Post, at 622, 111 L Ed 2d, at 500. But the Commission's efforts to use the ascertainment policy to determine the programming needs of each community and the comparative licensing procedure to provide licensees incentives to address their programming to these needs met with failure. A system of FCC-mandated "diverse" programming would have suffered the same fate, while introducing new problems as well. See n 36, supra.

Justice O'Connor's proposal that "[t]he FCC . . . evaluate applicants upon their ability to provide, and commitment to offer, whatever programming the FCC believes would reflect underrepresented viewpoints," post, at 623, 111 L Ed 2d, at 500, similarly ignores the practical difficulties in determining the "underrepresented viewpoints" of each community. In addition, Justice O'Connor's proposal is in tension with her own view of equal protection. On the one hand, she criticizes the Commission for failing to develop specific definitions of "minority viewpoints" so that it might implement her suggestion. Ibid.; see also post, at 629, 111 L Ed 2d, at 504 (noting that the FCC has declined to identify "any *particular* deficiency in the *viewpoints* contained in the broadcast spectrum") (emphasis added). On the other hand, she implies that any such effort would violate equal protection principles, which she interprets as prohibiting the FCC from "identifying what constitutes a 'Black viewpoint,' an 'Asian viewpoint,' an 'Arab viewpoint,' and so on [and] determining which viewpoints are underrepresented." Post, at 615, 111 L Ed 2d, at 495. In this light, Justice O'Connor should perceive as a virtue rather than a vice the FCC's decision to enhance broadcast diversity by means of the minority ownership policies rather than by defining a specific "Black" or "Asian" viewpoint.

Justice O'Connor maintains that the FCC should have experimented with "[r]ace-neutral financial and informational measures," post, at 623, 111 L Ed 2d, at 500, in order to promote minority ownership. This suggestion is so vague that it is difficult to evaluate. In any case, both Congress, see supra, at 574, 111 L Ed 2d, at 469 (describing minority financing fund that would have accompanied lottery system), and the Commission considered steps to address directly financial and informational barriers to minority ownership. After the Minority Ownership Task Force identified the requirement that licensees demonstrate the availability of sufficient funds to construct and operate a station for one year, see Ultravision Broadcasting, Co., 1 FCC2d 544, 547 (1965), as an obstacle to minority ownership, see Task Force Report 11-12, that requirement was subsequently reduced to three months. See Financial Qualifications Standards, 72 FCC2d 784 (1979) (television applicants); Financial Qualifications for Aural Applicants, 69 FCC2d 407, 407-408 (1978) (radio applicants). In addition, the Commission noted that minority broadcasters are eligible for assistance from the Small Business Administration and other federal agencies. See Task Force Report 17-22. The Commission also disseminated information about potential minority buyers of broadcast properties. See, e.g., FCC EEO-Minority Enterprise Division, Minority Ownership of Broadcast Facilities: A Report 8-9 (Dec. 1979). Despite these race-neutral initiatives, the Commission concluded in 1982 that the " 'dearth of minority ownership' in the telecommunications industry" remained a matter of "serious concern." Commission Policy Regarding Advancement of Minority Ownership in Broadcasting, 92 FCC2d 849, 852 (1982).

minority ownership

[497 US 590]

preferences, Congress agreed with the Commission's assessment that race-neutral alternatives had failed to achieve the necessary programming diversity.[43]

[497 US 591]

Moreover, the considered nature of the Commission's judgment in selecting the particular minority ownership policies at issue today is illustrated by the fact that the Commission

[497 US 592]

has rejected other types of minority preferences. For example, the Commission has studied but refused to implement the more expansive alternative of setting aside certain frequencies for minority broadcasters. See Nighttime Operations on Clear Channels, 3 FCC Rcd 3597, 3599-3600 (1988); Deletion of AM Acceptance Criteria, 102 FCC2d 548, 555-558 (1985); Clear Channel Broadcasting, 78 FCC2d 1345, reconsideration denied, 83 FCC2d 216, 218-219 (1980), aff'd sub nom. Loyola University v FCC, 216 US App DC 403, 670 F2d 1222 (1982). In addition, in a ruling released the day after it adopted the comparative hearing credit and the distress sale preference, the FCC declined to adopt a plan to require 45-day advance public notice before a station could be sold, which had been advocated on the ground that it would ensure minorities a chance to bid on stations that might otherwise be sold to industry insiders without ever coming on the market. See 43 Fed Reg 24560 (1978).[44] Soon afterward, the

---

The Commission has continued to employ race-neutral means of promoting broadcast diversity. For example, it has worked to expand the number of broadcast outlets within workable technological limits, see, e.g., Implementation of BC Docket No. 80-90 To Increase Availability of FM Broadcast Assignments, 100 FCC2d 1332 (1985), to develop strict cross-ownership rules, see n 16, supra, and to encourage issue-oriented programming by recognizing a licensee's obligation to present programming responsive to issues facing the community of license. See, e.g., Deregulation of Television, 104 FCC2d, at 359; Deregulation of Radio, 84 FCC2d, at 982-983. The Commission has nonetheless concluded that these efforts cannot substitute for its minority ownership policies. See, e.g., id., at 977.

[43] Congress followed closely the Commission's efforts to increase programming diversity, see supra, at 572-579, 111 L Ed 2d, at 467-472, including the development of the ascertainment policy. See, e.g., S Rep No. 93-1190, pp 6-7 (1974); Broadcast License Renewal Act: Hearings on S 16 et al. before the Subcommittee on Communications of the Senate Committee on Commerce, 93d Cong, 2d Sess, pt 1, p 63 (1974) (testimony of Sen. Scott); id., at 65 (testimony of Rep. Brown). Congress heard testimony from the chief of the Commission's Mass Media Bureau that the ascertainment rules were "seriously flawed" because they "became highly ritualistic and created unproductive unseemly squabbling over administrative trivia." Broadcast Regulation and Station Ownership: Hearings on HR 6122 and HR 6134 before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce, 98th Cong, 2d Sess, 165 (1984). Other witnesses testified that the minority ownership policies were adopted "only after specific findings by the Commission that ascertainment policies, and equal opportunity rules fell far short of increasing minority participation in programming and ownership." Minority Ownership of Broadcast Stations: Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, 101st Cong, 1st Sess, p 157 (1989) (testimony of J. Clay Smith, Jr., National Bar Association). In enacting the lottery statute, Congress explained the "current comparative hearing process" had failed to produce adequate programming diversity and that "[t]he policy of encouraging diversity of information sources is best served . . . by assuring that minority and ethnic groups that have been unable to acquire any significant degree of media ownership are provided an increased opportunity to do so." HR Conf Rep No. 97-765, p 43 (1982). Only in this way would "the American public [gain] access to a wider diversity of information sources." Id., at 45.

[44] The proposal was withdrawn after vocif-

Commission rejected [497 US 593] other minority ownership proposals advanced by the Office of Telecommunications Policy and the Department of Commerce that sought to revise the FCC's time brokerage, multiple ownership, and other policies.[45]

The minority ownership policies, furthermore, are aimed directly at the barriers that minorities face in entering the broadcasting industry. The Commission's task force identified as key factors hampering the growth of minority ownership a lack of adequate financing, paucity of information regarding license availability, and broadcast inexperience. See Task Force Report 8-29; Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications, Final Report, Strategies for Advancing Minority Ownership Opportunities 25-30 (May 1982). The Commission assigned a preference to minority status in the comparative licensing proceeding, reasoning that such an enhancement might help to compensate for a dearth of broadcasting experience. Most license acquisitions, however, are by necessity purchases of existing stations, because only a limited number of new stations are available, and those are often in less desirable markets or on less profitable portions [497 US 594] of spectrum, such as the UHF band.[46] Congress and the FCC therefore found a need for the minority distress sale policy, which helps to overcome the problem of inadequate access to capital by lowering the sale price and the problem of lack of information by providing existing licensees with an incentive to seek out minority buyers. The Commission's choice of minority ownership policies thus addressed the very factors it had isolated as being responsible for minority underrepresentation in the broadcast industry.

The minority ownership policies

---

erous opposition from broadcasters, who maintained that a notice requirement "would create a burden on stations by causing a significant delay in the time it presently takes to sell a station" and that it might require the disclosure of confidential financial information. 43 Fed Reg 24561 (1978).

[45] See Public Papers of the Presidents, supra n 4, at 253; Petition for Issuance of Policy Statement or Notice of Inquiry by National Telecommunications and Information Administration, 69 FCC2d 1591, 1593 (1978). The petition advanced such proposals as a blanket exemption for minorities from certain then-existing Commission policies, such as a rule restricting assignments of stations by owners who had held their stations for less than three years, see 47 CFR § 1.597 (1978); multiple ownership regulations that precluded an owner from holding more than one broadcast facility in a given service that overlapped with another's signal, see id., §§ 73.35, 73.240, and 73.636; and the "Top 50" policy, which required a showing of compelling public interest before the same owner was allowed to acquire a third VHF or fourth (either VHF or UHF) television station in the 50 largest television markets. The Commission rejected these proposals on the ground that while minorities might qualify for waivers on a case-by-case basis, a blanket exception for minorities "would be inappropriate." 69 FCC2d, at 1597.

[46] As of mid-1973, licenses for 66.6 percent of the commercial television stations—and 91.4 percent of the VHF stations—that existed in mid-1989 had already been awarded. Sixty-eight and one-half percent of the AM and FM radio station licenses authorized by the FCC as of mid-1989 had already been issued by mid-1973, including 85 percent of the AM stations. See Brief for Capital Cities/ABC, Inc., as Amicus Curiae in No. 89-453, p 11, n 19. See also n 2, supra; Honig, The FCC and Its Fluctuating Commitment to Minority Ownership of Broadcast Facilities, 27 How LJ 859, 875, n 87 (1984) (reporting 1980 statistics that Afro-Americans "tended to own the least desirable AM properties"—those with the lowest power and highest frequencies, and hence those with the smallest areas of coverage).

are "appropriately limited in extent and duration, and subject to reassessment and reevaluation by the Congress prior to any extension or re-enactment." Fullilove, 448 US, at 489, 65 L Ed 2d 902, 100 S Ct 2758 (opinion of Burger, C. J.) (footnote omitted). Although it has underscored emphatically its support for the minority ownership policies, Congress has manifested that support through a series of appropriations acts of finite duration, thereby ensuring future reevaluations of the need for the minority ownership program as the number of minority broadcasters increases. In addition, Congress has continued to hold hearings on the subject of minority ownership.[47] The FCC has noted with

respect to the minority preferences contained in the lottery statute, 47 USC § 309(i)(3)(A) (1982 ed) [47 USCS § 309(i)(3)(A)], that Congress instructed the Commission to "report annually on the effect of the preference system and whether it is serving the purposes intended. Congress will be able to further tailor the program based on that information, and may eliminate the preferences when appropriate." Amendment of Commission's Rules to Allow Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings, 93 FCC2d 952, 974 (1983). Furthermore, there is provision for administrative and judicial review of all Commission decisions, which guarantees both that the minority ownership policies are applied correctly in individual cases,[48] and that there will be frequent

opportunities to revisit the merits of those policies. Congress and the Commission have adopted a policy of minority ownership not as an end in itself, but rather as a means of achieving greater programming diversity. Such a goal carries its own natural limit, for there will be no need for further minority preferences once sufficient diversity has been achieved. The FCC's plan, like the Harvard admissions program discussed in Bakke, contains the seed of its own termination. Cf. Johnson v Transportation Agency, Santa Clara County, 480 US 616, 640, 94 L Ed 2d 615, 107 S Ct 1442 (1987) (agency's "express commitment to 'attain' a balanced work force" ensures that plan will be of limited duration).

---

[47] See, e.g., Minority Ownership of Broadcast Stations: Hearing Before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, 101st Cong, 1st Sess (1989). See also supra, at 578-579, 111 L Ed 2d, at 472.

[48] As in Fullilove v Klutznick, 448 US 448, 65 L Ed 2d 902, 100 S Ct 2758 (1980), the FCC minority preferences are subject to "administrative scrutiny to identify and eliminate from participation" those applicants who are not bona fide. Id., at 487-488, 65 L Ed 2d 902, 100 S Ct 2758. See Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants and Other Participants to Comparative Renewal Process and to Prevention of Abuses of the Renewal Process, 3 FCC Rcd 5179 (1988). The FCC's Review Board, in supervising the comparative hearing process, seeks to detect sham integration credits claimed by all applicants, including minorities. See, e.g., Silver Springs Communications, 5 FCC Rcd 469, 479 (1990); Metroplex Communications, Inc., 4 FCC Rcd 8149, 8149-8150, 8159-8160 (1989); Northampton Media Associates, 3 FCC Rcd 5164, 5170-5171 (Rev Bd 1988); Washoe Shoshone Broadcasting, 3 FCC Rcd 3948, 3955 (Rev Bd 1988); Mulkey, 3 FCC Rcd 590, 590-593 (Rev Bd 1988), modified, 4 FCC Rcd 5520, 5520-5521 (1989); Newton Television Limited, 3 FCC Rcd 553, 558-559, n 2 (Rev Bd 1988); Magdelene Gunden Partnership, 3 FCC Rcd 488, 488-489 (Rev Bd 1988); Tulsa Broadcasting Group, 2 FCC Rcd 6124, 6129-6130 (Rev Bd 1987); Pacific Television, Ltd., 2 FCC Rcd 1101, 1102-1104 (Rev Bd 1987), review denied, 3 FCC Rcd 1700 (1988); Payne Communications, Inc. 1 FCC Rcd 1052, 1054-1057 (Rev Bd 1986); N. E. O. Broadcasting Co., 103 FCC2d 1031, 1033 (Rev Bd 1986); Hispanic Owners, Inc. 99 FCC2d 1180, 1190-1191 (Rev Bd 1985); KIST Corp. 99 FCC2d 173, 186-190 (Rev Bd 1984), aff'd as modified, 102 FCC2d 288, 292-293, and n 11 (1985), aff'd sub nom. United American Telecasters, Inc. v FCC 255 US App DC 397, 801 F2d 1436 (1986).

As evidenced by respondent Shurberg's own unsuccessful attack on the credentials of Astroline, see 278 US App DC, at 31, 876 F2d, at 906, the FCC also entertains challenges to the bona fide nature of distress sale participants. See 1982 Policy Statement, 92 FCC2d, at 855.

[1p, 14] Finally, we do not believe that the minority ownership policies at issue impose impermissible burdens on nonminorities.[49] Although the nonminority challengers in these cases concede that they have not suffered the loss of an already-awarded broadcast license, they claim that they have been handicapped in their ability to obtain one in the first instance. But just as we have determined that "[a]s part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy," Wygant, 476 US, at 280-281, 90 L Ed 2d 260, 106 S Ct 1842 (opinion of Powell, J.), we similarly find that a congressionally mandated, benign,

[497 US 597]

race-conscious program that is substantially related to the achievement of an important governmental interest is consistent with equal protection principles so long as it does not impose *undue* burdens on nonminorities. Cf. Fullilove, 448 US, at 484, 65 L Ed 2d 902, 100 S Ct 2758 (opinion of Burger, C. J.) ("It is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such 'a sharing of the burden' by innocent parties is not impermissible") (citation omitted); id., at 521, 65 L Ed 2d 902, 100 S Ct 2758 (Marshall, J., concurring in judgment).

[1q, 15] In the context of broadcasting licenses, the burden on nonminorities is slight. The FCC's responsibility is to grant licenses in the "public interest, convenience, or necessity," 47 USC §§ 307, 309 (1982 ed) [47 USCS §§ 307, 309], and the limited number of frequencies on the electromagnetic spectrum means that "[n]o one has a First Amendment right to a license." Red Lion, 395 US, at 389, 23 L Ed 2d 371, 89 S Ct 1794. Applicants have no settled expectation that their applications will be granted without consideration of public interest factors such as minority ownership. Award of a preference in a comparative hearing or transfer of a station in a distress sale thus contravenes "no legitimate firmly rooted expectation[s]" of competing applicants. Johnson, supra, at 638, 94 L Ed 2d 615, 107 S Ct 1442.

[1r] Respondent Shurberg insists that because the minority distress sale policy operates to exclude nonminority firms completely from consideration in the transfer of certain stations, it is a greater burden than the comparative hearing preference for minorities, which is simply a "plus" factor considered together with other characteristics of the applicants.[50] Cf. Bakke, 438 US, at 317-318, 57 L Ed 2d 750, 98 S Ct 2733; Johnson, supra, at 638, 94 L Ed 2d 615, 107 S Ct 1442. We disagree that the distress sale policy imposes an undue burden on nonminorities. By its terms, the policy may be invoked at the Commission's discretion only with respect to a small fraction of broadcast licenses—those designated for revocation or renewal hearings to examine basic qualification issues—and only when the licensee chooses to sell out at a distress price rather than to go through with the hearing. The distress sale policy is not a quota or fixed quantity set-aside. Indeed, the nonminority firm exercises control over whether a distress sale will ever occur at all, because the policy operates only where the qualifications of an existing licensee to continue broadcasting have been designated for hearing and no other applications for the station in question have been filed with the Commission at the time of the designation. See Clarification of Distress Sale Policy, 44 Radio Reg 2d (P&F) 479 (1978). Thus, a nonminority can prevent the distress sale procedures from ever being invoked by filing a competing application in a timely manner.[51]

---

[49] Minority broadcasters, both those who obtain their licenses by means of the minority ownership policies and those who do not, are not stigmatized as inferior by the Commission's programs. Audiences do not know a broadcaster's race and have no reason to speculate about how he or she obtained a license; each broadcaster is judged on the merits of his or her programming. Furthermore, minority licensees must satisfy otherwise applicable FCC qualifications requirements. Cf. Fullilove, supra, at 521, 65 L Ed 2d 902, 100 S Ct 2758 (Marshall, J., concurring in judgment).

---

[50] Petitioner Metro contends that, in practice, the minority enhancement credit is not part of a multifactor comparison of applicants but rather amounts to a per se preference for a minority applicant in a comparative licensing proceeding. But experience has shown that minority ownership does not guarantee that an applicant will prevail. See, e.g., Radio Jonesboro, Inc., 100 FCC2d 941, 945-946 (1985); Lamprecht, 99 FCC2d 1219, 1223 (Rev Bd 1984), review denied, 3 FCC Rcd 2527 (1988), appeal pending, Lamprecht v FCC, No. 88-1395 (CADC); Horne Industries, Inc., 98 FCC2d 601, 603 (1984); Vacationland Broadcasting Co. 97 FCC2d 485, 514-517 (Rev Bd 1984), modified, 58 Radio Reg 2d (P&F) 439 (1985); Las Misiones de Bejar Television Co., 93 FCC2d 191, 195 (Rev Bd 1983), review denied, FCC 84-97 (May 16, 1984); Waters Broadcasting Corp., 88 FCC2d 1204, 1211-1212 (Rev Bd 1981).

In many cases cited by Metro, even when the minority applicant prevailed, the enhancement for minority status was not the dispositive factor in the Commission's decision to award the license. See, e.g., Silver Springs Communications, Inc., 5 FCC Rcd 469, 479 (ALJ 1990); Richardson Broadcasting Group, 4 FCC Rcd 7989, 7999 (ALJ 1989); Pueblo Radio Broadcasting Service, 4 FCC Rcd 7802, 7812 (ALJ 1989); Poughkeepsie Broadcasting Limited Partnership, 4 FCC Rcd 6543, 6551, and n 4 (ALJ 1989); Barden, 4 FCC Rcd 7043, 7045 (ALJ 1989); Perry Television, Inc., 4 FCC Rcd 4603, 4618, 4620 (ALJ 1989); Corydon Broadcasting, Ltd., 4 FCC Rcd 1537, 1539 (ALJ 1989), remanded, Order of Dec. 6, 1989 (Rev Bd); Breaux Bridge Broadcasters Limited Partnership, 4 FCC Rcd 581, 585 (ALJ 1989); Key Broadcasting Corp., 3 FCC Rcd 6587, 6600 (ALJ 1988); 62 Broadcasting, Inc., 3 FCC Rcd 4429, 4450 (ALJ 1988), aff'd, 4 FCC Rcd 1768, 1774 (Rev Bd 1989), review denied, 5 FCC Rcd 830 (1990); Gali Communications, Inc., 2 FCC Rcd 6967, 6994 (ALJ 1987); Bogner Newton Corp. 2 FCC Rcd 4792, 4805 (ALJ 1987); Garcia, 2 FCC Rcd 4166, 4168, n 1 (ALJ 1987), aff'd, 3 FCC Rcd 1065 (Rev Bd), review denied, 3 FCC Rcd 4767 (1988); Magdalene Gunden Partnership, 2 FCC Rcd 1223, 1238 (ALJ 1987), aff'd, 2 FCC Rcd 5513 (Rev Bd 1987), reconsideration denied, 3 FCC Rcd 488 (Rev Bd), review denied, 3 FCC Rcd 7186 (1988); Tulsa Broadcasting Group, 2 FCC Rcd 1149, 1162 (ALJ), aff'd, 2 FCC Rcd 6124 (Rev Bd 1987), review denied, 3 FCC Rcd 4541 (1988); Tomko, 2 FCC Rcd 206, 209, n 3 (ALJ 1987).

[51] Faith Center also held broadcast licenses for three California stations, and in 1978, the FCC designated for a hearing Faith Center's renewal application for its San Bernadino station because of allegations of fraud in connection with over-the-air solicitation for funds and for failure to cooperate with an FCC investigation. Although respondent Shurberg did not file a competing application prior to the Commission's decision to designate for hearing Faith Center's renewal application for its Hartford station, timely filed compet-

In practice, distress sales have represented a tiny fraction—less than 0.4 percent—of all broadcast sales since 1979. See Brief for Federal Communications Commission in No. 89-700, p 44. There have been only 38 distress sales since the policy was commenced in 1978. See A. Barrrett, Federal Communications Commission, Minority Employment and Ownership in the Communications Market: What's Ahead in the 90's?, p 7 (Address to the Bay Area Black

[497 US 600]

Media Conference, San Francisco, April 21, 1990). This means that, on average, only about 0.20 percent of renewal applications filed each year have resulted in distress sales since the policy was commenced in 1978. See 54 FCC Ann Rep 33 (1988).[52] Nonminority firms are free to compete for the vast remainder of license opportunities available in a market that contains over 11,000 broadcast properties. Nonminorities can apply for a new station, buy an existing station, file a competing application against a renewal application of an existing station, or seek financial participation in enterprises that qualify for distress sale treatment. See Task Force Report 9-10. The burden on nonminority firms is at least as "relatively light" as that created by the program at issue in Fullilove, which set aside for minorities 10 percent of federal funds granted for local public works projects. 448 US, at 484, 65 L Ed 2d 902, 100 S Ct 2758 (opinion of Burger, C. J.); see also id., at 485, n 72, 65 L Ed 2d 902, 100 S Ct 2758.

III

[1s] The Commission's minority ownership policies bear the imprimatur of longstanding congressional support and direction and are substantially related to the achievement of the important governmental objective of broadcast diversity. The judgment in No. 89-453 is affirmed, the judgment in

[497 US 601]

No. 89-700 is reversed, and the cases are remanded for proceedings consistent with this opinion.

It is so ordered.

---

ing applications against two of Faith Center's California stations prevented their transfer under the distress sale policy. See Faith Center, Inc., 89 FCC2d 1054 (1982), and Faith Center, Inc., 90 FCC2d 519 (1982).

Of course, a competitor may be unable to foresee that the FCC might designate a license for a revocation or renewal hearing, and so might neglect to file a competing application in timely fashion. But it is precisely in such circumstances that the minority distress sale policy would least disrupt any of the competitor's settled expectations. From the competitor's perspective, it has been denied an opportunity only at a windfall; it expected the current licensee to continue broadcasting indefinitely and did not anticipate that the license would become available.

[52] Even for troubled licensees, distress sales are relatively rare phenomena; most stations presented with the possibility of license revocation opt not to utilize the distress sale policy. Many seek and are granted special relief from the FCC enabling them to transfer the license to another concern as part of a negotiated settlement with the Commission, see Coalition for the Preservation of Hispanic Broadcasting v FCC, 282 US App DC 200, 203-204, 893 F2d 1349, 1352-1353 (1990); bankrupt licensees can effect a sale for the benefit of innocent creditors under the *"Second Thursday"* doctrine, see Second Thursday Corp., 22 FCC2d 515, 520-521 (1970), reconsideration granted, 25 FCC2d 112, 113-115 (1970); Northwestern Indiana Broadcasting Corp. (WLTH), 65 FCC2d 66, 70-71 (1977); and still others elect to defend their practices at hearing.

SEPARATE OPINIONS

Justice **Stevens,** concurring.

Today the Court squarely rejects the proposition that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong. Ante, at 564-565, 111 L Ed 2d, at 462-463. I endorse this focus on the future benefit, rather than the remedial justification, of such decisions.[1]

I remain convinced, of course, that racial or ethnic characteristics provide a relevant basis for disparate treatment only in extremely rare situations and that it is therefore "especially important that the reasons for any such classification be clearly identified and unquestionably legitimate." Fullilove v Klutznick, 448 US 448, 534-535, 65 L Ed 2d 902, 100 S Ct 2758 (1980) (dissenting opinion). The Court's opinion explains how both elements of that standard are satisfied. Specifically, the reason for the classification—the recognized interest in broadcast diversity—is clearly identified and does not imply any judgment concerning the abilities of owners of different races or the merits of different kinds of programming. Neither the favored nor the disfavored class is stigmatized in any way.[2] In addition, the Court demonstrates that this case falls within the extremely narrow category of governmental decisions for which racial or ethnic heritage may provide a rational basis for differential treatment.[3] The public interest in broadcast diversity—

like the interest in an integrated police force,[4] diversity in the composition of a public school faculty[5] or diversity in the student body of a professional school[6]—is in my view unquestionably legitimate.

Therefore, I join both the opinion and the judgment of the Court.

Justice **O'Connor,** with whom The **Chief Justice,** Justice **Scalia,** and Justice **Kennedy** join, dissenting.

At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens "as *individuals,* not 'as simply components of a racial, religious, sexual or national class.'" Arizona Governing Comm. for Tax Deferred Annuity and Defered Compensation Plans v Norris, 463 US 1073, 1083, 77 L Ed 2d 1236, 103 S Ct 3492 (1983). Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think. To uphold the challenged programs, the Court departs from these fundamental principles and from our traditional requirement that racial classifications are permissible only if necessary and narrowly tailored to achieve a compelling interest. This departure marks a renewed toleration of racial classifications and a repudiation of our recent affirmation that the Constitution's equal protection guarantees extend equally to all citizens.

---

[1] See Richmond v J. A. Croson, Co. 488 US 469, 511-513, 102 L Ed 2d 854, 109 S Ct 706 (1989) (Stevens, J., concurring in part and concurring in judgment); Wygant v Jackson Board of Education, 476 US 267, 313-315, 90 L Ed 2d 260, 106 S Ct 1842 (1986) (Stevens, J., dissenting).

[2] Cf. Croson, 488 US, at 516-517, 102 L Ed 2d 854, 109 S Ct 706; Fullilove, 448 US, at 545, and n 17, 65 L Ed 2d 902, 100 S Ct 2758.

[3] See Cleburne v Cleburne Living Center, Inc. 473 US 432, 452-454, 87 L Ed 2d 313, 105 S Ct 3249 (1985) (Stevens, J., concurring) (in examining the "rational basis" for a classification, the "term 'rational,' of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class"); Michael M. v Superior Court of Sonoma County, 450 US 464, 497, n 4, 67 L Ed 2d 437, 101 S Ct 1200 (1981) (Stevens, J., dissenting) (discussing the level of scrutiny appropriate in equal protection cases).

[4] See Wygant, 476 US, at 314, 90 L Ed 2d 260, 106 S Ct 1842 (Stevens, J., dissenting).

[5] See id., at 315-316, 90 L Ed 2d 260, 106 S Ct 1842. See also Justice O'Connor's opinion concurring in part and concurring in the judgment in Wygant, recognizing that the "goal of providing 'role models' discussed by the courts below should not be confused with the very different goal of promoting racial diversity among the faculty." Id., at 288, n*, 90 L Ed 2d 260, 106 S Ct 1842.

[6] See Justice Powell's opinion announcing the judgment in Regents of University of California v Bakke, 438 US 265, 311-319, 57 L Ed 2d 750, 98 S Ct 2733 (1978).

[497 US 603]

The Court's application of a lessened equal protection standard to congressional actions finds no support in our cases or in the Constitution. I respectfully dissent.

I

As we recognized last Term, the Constitution requires that the Court apply a strict standard of scrutiny to evaluate racial classifications such as those contained in the challenged FCC distress sale and comparative licensing policies. See Richmond v J. A. Croso Co. 488 US 469, 102 L Ed 2d 854, 109 S Ct 706 (1989); see also Bolling v Sharpe, 347 US 497, 98 L Ed 884, 74 S Ct 693 (1954). "Strict scrutiny" requires that, to be upheld, racial classifications must be determined to be necessary and narrowly tailored to achieve a compelling state interest. The Court abandons this traditional safeguard against discrimination for a lower standard of review, and in practice applies a standard like that applicable to routine legislation. Yet the Government's different treatment of citizens according to race is no routine concern. This Court's precedents in no way justify the Court's marked departure from our traditional treatment of race classifications and its conclusion that different equal protection principles apply to these federal actions.

In both the challenged policies, the Federal Communications Commission (FCC) provides benefits to some members of our society and denies benefits to others based on race or ethnicity. Except in the narrowest of circumstances, the Constitution bars such racial classifications as a denial to particular individuals, of any race or ethnicity, of "the equal protection of the laws." US Const Amdt 14, § 1; cf. Croson, supra, at 493-494, 102 L Ed 2d 854, 109 S Ct 706. The dangers of such classifications are clear. They endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict. See Croson, supra, at 493-494, 102 L Ed 2d 854, 109 S Ct 706; Korematsu v United States, 323 US 214, 240, 89 L Ed 194, 65 S Ct 193 (1944) (Murphy, J., dissenting) (upholding treatment of individual based on inference from race is "to destroy the

[497 US 604]

dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow"). Such policies may embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution. Accord, Mississippi University for Women v Hogan, 458 US 718, 725-726, 73 L Ed 2d 1090, 102 S Ct 3331 (1982). Racial classifications, whether providing benefits to or burdening particular racial or ethnic groups, may stigmatize those groups singled out for different treatment and may create considerable tension with the Nation's widely shared commitment to evaluating individuals upon their individual merit. Cf. Regents of University of California v Bakke, 438 US 265, 358-362, 57 L Ed 2d 750, 98 S Ct 2733 (1978) (opinion of Brennan, J.). "Because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classifications be clearly identified and unquestionably legitimate." Fullilove v Klutznick, 448 US 448, 533-535, 65 L Ed 2d 902, 100 S Ct 2758 (1980) (Stevens, J., dissenting) (footnotes omitted).

The Constitution's guarantee of equal protection binds the Federal Government as it does the States, and no lower level of scrutiny applies to the Federal Government's use of race classifications. In Bolling v Sharpe, supra, the companion case to Brown v Board of Education, 347 US 483, 98 L Ed 873, 74 S Ct 686, 38 ALR2d 1180 (1954), the Court held that equal protection principles embedded in the Fifth Amendment's Due Process Clause prohibited the Federal Government from maintaining racially segregated schools in the District of Columbia: "[I]t would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." Id., at 500, 98 L Ed 873, 74 S Ct 686, 38 ALR2d 1180. Consistent with this view, the Court has repeatedly indicated that "the reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth." United States v

Paradise, 480 US 149, 166, n 16, 94 L Ed 2d 203, 107 S Ct 1053 (1987) (plurality opinion) (considering remedial race classification); id., at 196, 94 L Ed 2d 203, 107 S Ct 1053 (O'Connor, J., dissenting); see also, e.g., Buckley v Valeo, 424 US 1, 93, 46 L Ed 2d 659, 96 S Ct 612 (1976); Weinberger v Wiesenfeld, 420 US 636, 638, n 2, 43 L Ed 2d 514, 95 S Ct 1225 (1975).

Nor does the congressional role in prolonging the FCC's policies justify any lower level of scrutiny. As with all instances of judicial review of federal legislation, the Court does not lightly set aside the considered judgment of a coordinate branch. Nonetheless, the respect due a coordinate branch yields neither less vigilance in defense of equal protection principles nor any corresponding diminution of the standard of review. In Weinberger v Wiesenfeld, for example, the Court upheld a widower's equal protection challenge to a provision of the Social Security Act, found the assertedly benign congressional purpose to be illegitimate, and noted that "[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." 420 US, at 638, n 2, 43 L Ed 2d 514, 95 S Ct 1225. The Court has not varied its standard of review when entertaining other equal protection challenges to congressional measures. See, e.g., Heckler v Mathews, 465 US 728, 79 L Ed 2d 646, 104 S Ct 1387 (1984); Califano v Webster, 430 US 313, 51 L Ed 2d 360, 97 S Ct 1192 (1977) (per curiam); Califano v Goldfarb, 430 US 199, 210-211, 51 L Ed 2d 270, 97 S Ct 1021 (1977) (traditional equal protection standard applies despite deference to congressional benefit determinations) (opinion of Brennan, J.); Buckley v Valeo, supra, at 93, 46 L Ed 2d 659, 96 S Ct 612; Frontiero v Richardson, 411 US 677, 684-691, 36 L Ed 2d 583, 93 S Ct 1764 (1973) (opinion of Brennan, J.). And Bolling v Sharpe, supra, itself involved extensive congressional regulation of the segregated District of Columbia public schools.

Congress has considerable latitude, presenting special concerns for judicial review, when it exercises its "unique remedial powers . . . under § 5 of the Fourteenth Amendment," see Croson, supra, at 488, 102 L Ed 2d 854, 109 S Ct 706 (opinion of O'Connor, J.), but this case does not implicate those powers. Section 5 empowers

Congress to act respecting the States, and of course this case concerns only the administration of federal programs by federal officials. Section 5 provides to Congress the "power to enforce, by appropriate legislation, the provisions of this article," which in part provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." US Const, Amdt 14, § 1. Reflecting the Fourteenth Amendment's "dramatic change in the balance between congressional and state power over matters of race," Croson, 488 US, at 490, 102 L Ed 2d 854, 109 S Ct 706 (opinion of O'Connor, J.), that section provides to Congress a particular, structural role in the oversight of certain of the States' actions. See id., at 488-491, 504, 102 L Ed 2d 854, 109 S Ct 706; Hogan, supra, at 732, 73 L Ed 2d 1090, 102 S Ct 3331 (§ 5 grants power to enforce Amendment " 'to secure . . . equal protection of the laws against State denial or invasion,' " quoting Ex parte Virginia, 100 US 339, 346, 25 L Ed 676 (1880)); Fullilove, supra, at 476-478, 483-484, 65 L Ed 2d 902, 100 S Ct 2758.

The Court asserts that Fullilove supports its novel application of intermediate scrutiny to "benign" race conscious measures adopted by Congress. Ante, at 564, 111 L Ed 2d, at 462. Three reasons defeat this claim. First, Fullilove concerned an exercise of Congress' powers under § 5 of the Fourteenth Amendment. In Fullilove, the Court reviewed an act of Congress that had required States to set aside a percentage of federal construction funds for certain minority-owned businesses to remedy past discrimination in the award of construction contracts. Although the various opinions in Fullilove referred to several sources of congressional authority, the opinions make clear that it was § 5 that led the Court to apply a different form of review to the challenged program. See, e.g., 448 US, at 483, 65 L Ed 2d 902, 100 S Ct 2758 (opinion of Burger, C. J., joined by White, J., and Powell, J.) ("[I]n no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees"); id., at 508-510, 516, 65 L Ed 2d 902, 100 S Ct 2758 (Powell, J., concurring).

Last Term, Croson resolved any doubt that might remain regarding this point. In Croson, we invalidated a local set-aside for minority contractors. We distinguished Fullilove, in which we upheld a similar set-aside enacted by Congress, on the ground that in Fullilove "Congress was exercising its powers under § 5 of the Fourteenth Amendment." Croson, 488 US, at 504, 102 L Ed 2d 854, 109 S Ct 706 (opinion of the Court); id., at 490, 102 L Ed 2d 854, 109 S Ct 706 (opinion of O'Connor, J., joined by Rehnquist, C. J., and White, J.). Croson indicated that the decision in Fullilove turned on "the unique remedial powers of Congress under § 5," id., at 488, 102 L Ed 2d 854, 109 S Ct 706 (opinion of O'Connor, J.), and that the latitude afforded Congress in identifying and redressing past discrimination rested on § 5's "specific constitutional mandate to enforce the dictates of the Fourteenth Amendment." Id., at 490, 102 L Ed 2d 854, 109 S Ct 706. Justice Kennedy's concurrence in Croson likewise provides the majority with no support, for it questioned whether the Court should, as it had in Fullilove, afford any particular latitude even to measures undertaken pursuant to § 5. See id., at 518, 102 L Ed 2d 854, 109 S Ct 706.

Second, Fullilove applies at most only to congressional measures that seek to remedy identified past discrimination. The Court upheld the challenged measures in Fullilove only because Congress had identified discrimination that had particularly affected the construction industry and had carefully constructed corresponding remedial measures. See Fullilove, 448 US, at 456-467, 480-489, 65 L Ed 2d 902, 100 S Ct 2758 (opinion of Burger, C. J.); id., at 498-499, 65 L Ed 2d 902, 100 S Ct 2758 (Powell, J., concurring). Fullilove indicated that careful review was essential to ensure that Congress acted solely for remedial rather than other, illegitimate purposes. See id., at 486-487, 65 L Ed 2d 902, 100 S Ct 2758 (opinion of Burger, C. J.); id., at 498-499, 65 L Ed 2d 902, 100 S Ct 2758 (Powell, J., concurring). The FCC and Congress are clearly not acting for any remedial purpose, see infra, at 611-612, 111 L Ed 2d, at 493, and the Court today expressly extends its standard to racial classifications that are not remedial in any sense. See ante, at 564-565, 111 L Ed 2d, at 462-463. This case does not present "a considered decision of the Congress and the President," Fullilove,

supra, at 473, 65 L Ed 2d 902, 100 S Ct 2758; see infra, at 628-629, 111 L Ed 2d, at 504, nor does it present a remedial effort or exercise of § 5 powers.

Finally, even if Fullilove applied outside a remedial exercise of Congress' § 5 power, it would not support today's adoption of the intermediate standard of review proffered by Justice Marshall, but rejected, in Fullilove. Under his suggested standard, the Government's use of racial classifications need only be " 'substantially related to achievement' " of important governmental interests. Ante, at 565, 111 L Ed 2d, at 463. Although the Court correctly observes that a majority did not apply strict scrutiny, six Members of the Court rejected intermediate scrutiny in favor of some more stringent form of review. Three Members of the Court applied strict scrutiny. See 448 US, at 496, 65 L Ed 2d 902, 100 S Ct 2758 (Powell, J., concurring) (challenged statute "employs a racial classification that is constitutionally prohibited unless it is a necessary means of advancing a compelling governmental interest"); id., at 498, 65 L Ed 2d 902, 100 S Ct 2758 ("means selected must be narrowly drawn"). Id., at 523, 65 L Ed 2d 902, 100 S Ct 2758 (Stewart, J., joined by Rehnquist, J., dissenting). Chief Justice Burger's opinion, joined by Justice White and Justice Powell, declined to adopt a particular standard of review but indicated that the Court must conduct "a most searching examination," Fullilove, 448 US, at 491, 65 L Ed 2d 902, 100 S Ct 2758, and that courts must ensure that "any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal." Id., at 480, 65 L Ed 2d 902, 100 S Ct 2758. Justice Stevens indicated that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." Id., at 537-538, 65 L Ed 2d 902, 100 S Ct 2758 (dissenting opinion). Even Justice Marshall's opinion concurring in the judgment, joined by Justice Brennan and Justice Blackmun, undermines the Court's course today: That opinion expressly drew its lower standard of review from the plurality opinion in Regents of University of California v Bakke, 438 US 265, 57 L Ed 2d 750, 98 S Ct 2733 (1978), a case that did not involve congressional

action, and stated that the appropriate standard of review for the congressional measure challenged in Fullilove "is the same as that under the Fourteenth Amendment." 448 US, at 517-518, n 2, 65 L Ed 2d 902, 100 S Ct 2758 (internal quotation omitted). And, of course, Fullilove preceded our determination in Croson that strict scrutiny applies to preferences that favor members of minority groups, including challenges considered under the Fourteenth Amendment.

The guarantee of equal protection extends to each citizen, regardless of race: The Federal Government, like the States, may not "deny to any person within its jurisdiction the equal protection of the laws." As we observed only last Term in Croson, "[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." Croson, 488 US, at 493, 102 L Ed 2d 854, 109 S Ct 706 (opinion of O'Connor, J.); see also id., at 500, 494, 102 L Ed 2d 854, 109 S Ct 706 ("[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification").

The Court's reliance on "benign racial classifications," ante, at 564, 111 L Ed 2d, at 462, is particularly troubling. " 'Benign' racial classification" is a contradiction in terms. Governmental distinctions among citizens based on race or ethnicity, even in the rare circumstances permitted by our cases, exact costs and carry with them substantial dangers. To the person denied an opportunity or right based on race, the classification is hardly benign. The right to equal protection of the laws is a personal right, see Shelley v Kraemer, 334 US 1, 22, 92 L Ed 1161, 68 S Ct 836, 3 ALR2d 441 (1948), securing to each individual an immunity from treatment predicated simply on membership in a particular racial or ethnic group. The Court's emphasis on "benign racial classifications" suggests confidence in its ability to distinguish good from harmful governmental uses of racial criteria. History should teach greater humility. Untethered to narrowly

[497 US 610]

confined remedial notions, "benign" carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable. The Court provides no basis for determining when a racial classification fails to be "benevolent." By expressly distinguishing "benign" from remedial race-conscious measures, the Court leaves the distinct possibility that any racial measure found to be substantially related to an important governmental objective is also, by definition, "benign." See ante, at 564-565, 111 L Ed 2d, at 462-463. Depending on the preference of the moment, those racial distinctions might be directed expressly or in practice at any racial or ethnic group. We are a Nation not of black and white alone, but one teeming with divergent communities knitted together by various traditions and carried forth, above all, by individuals. Upon that basis, we are governed by one Constitution, providing a single guarantee of equal protection, one that extends equally to all citizens.

This dispute regarding the appropriate standard of review may strike some as a lawyers' quibble over words, but it is not. The standard of review establishes whether and when the Court and Constitution allow the Government to employ racial classifications. A lower standard signals that the Government may resort to racial distinctions more readily. The Court's departure from our cases is disturbing enough, but more disturbing still is the renewed toleration of racial classifications that its new standard of review embodies.

II

Our history reveals that the most blatant forms of discrimination have been visited upon some members of the racial and ethnic groups identified in the challenged programs. Many have lacked the opportunity to share in the Nation's wealth and to participate in its commercial enterprises. It is undisputed that minority participation in the broadcasting industry falls markedly below the demographic representation

[497 US 611]

of those groups, see, e.g., Congressional Research Service, Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus? 42 (June 29, 1988) (minority owners possess an interest in 13.3 percent of stations and a controlling interest in 3.5 percent of stations), and this shortfall may be traced in part to the discrimination and the patterns of exclusion that have widely affected our society. As a Nation we aspire to create a society untouched by that history of exclusion, and to ensure that equality defines all citizens' daily experience and opportunities as well as the protection afforded to them under law.

For these reasons, and despite the harms that may attend the Government's use of racial classifications, we have repeatedly recognized that the Government possesses a compelling interest in remedying the effects of identified race discrimination. We subject even racial classifications claimed to be remedial to strict scrutiny, however, to ensure that the Government in fact employs any race-conscious measures to further this remedial interest and employs them only when, and no more broadly than, the interest demands. See, e.g., Croson, supra, at 493-495, 498-502, 102 L Ed 2d 854, 109 S Ct 706; Wygant v Jackson Bd. of Ed. 476 US 267, 90 L Ed 2d 260, 106 S Ct 1842 (1986) (plurality opinion). The FCC or Congress may yet conclude after suitable examination that narrowly tailored race-conscious measures are required to remedy discrimination that may be identified in the allocation of broadcasting licenses. Such measures are clearly within the Government's power.

Yet it is equally clear that the policies challenged in these cases were not designed as remedial measures and are in no sense narrowly tailored to remedy identified discrimination. The FCC appropriately concedes that its policies embodied no remedial purpose, Tr of Oral Arg 40-42, and has disclaimed the possibility that discrimination infected the allocation of licenses. The congressional action at most simply endorsed a policy designed to further the interest in achieving diverse programming. Even if the appropriations

measure could transform the purpose of the challenged policies, its text reveals no remedial purpose, and the accompanying legislative material confirms that Congress acted upon the same diversity rationale that led the FCC to formulate the challenged policies. See S Rep No. 100-182, p 76 (1987). The Court refers to the bare suggestion, contained in a Report addressing different legislation passed in 1982, that "past inequities" have led to "underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well." HR Conf Rep No. 97-765, p 43 (1982); ante, at 566, 111 L Ed 2d, at 464. This statement indicates nothing whatever about the purpose of the relevant appropriations measures, identifies no discrimination in the broadcasting industry, and would not sufficiently identify discrimination even if Congress were acting pursuant to its § 5 powers. Cf. Fullilove, 448 US, at 456-467, 65 L Ed 2d 902, 100 S Ct 2758 (opinion of Burger, C. J.) (surveying identification of discrimination affecting contracting opportunities); id., at 502-506, 65 L Ed 2d 902, 100 S Ct 2758 (Powell, J., concurring). The Court evaluates the policies only as measures designed to increase programming diversity. Ante, at 566-568, 111 L Ed 2d, at 464-465. I agree that the racial classifications cannot be upheld as remedial measures.

III

Under the appropriate standard, strict scrutiny, only a compelling interest may support the Government's use of racial classifications. Modern equal protection doctrine has recognized only one such interest: remedying the effects of racial discrimination. The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications. The Court does not claim otherwise. Rather, it employs its novel standard and claims that this asserted interest need only be, and is, "important." This conclusion twice compounds the Court's initial error of reducing its level

[497 US 613]

of scrutiny of a racial classification. First, it too casually extends the justifications that might support racial classifications, beyond that of remedying past discrimination. We have recognized that racial classifications are so harmful that "[u]nless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." Croson, 488 US, at 493, 102 L Ed 2d 854, 109 S Ct 706. As Chief Justice Burger warned in Fullilove: "The history of governmental tolerance of practices using racial or ethnic criteria for the purpose or with the effect of imposing an invidious discrimination must alert us to the deleterious effects of even benign racial or ethnic classifications when they stray from narrow remedial justifications." 448 US, at 486-487, 65 L Ed 2d 902, 100 S Ct 2758. Second, it has initiated this departure by endorsing an insubstantial interest, one that is certainly insufficiently weighty to justify tolerance of the Government's distinctions among citizens based on race and ethnicity. This endorsement trivializes the constitutional command to guard against such discrimination and has loosed a potentially far-reaching principle disturbingly at odds with our traditional equal protection doctrine.

An interest capable of justifying race-conscious measures must be sufficiently specific and verifiable, such that it supports only limited and carefully defined uses of racial classifications. In Croson, we held that an interest in remedying societal discrimination cannot be considered compelling. See 488 US, at 505, 102 L Ed 2d 854, 109 S Ct 706 (because the city of Richmond had presented no evidence of identified discrimination, it had "failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race"). We determined that a "generalized assertion" of past discrimination "has no logical stopping point" and would support unconstrained uses of race classifications. See id., at 498, 102 L Ed 2d 854, 109 S Ct 706 (internal quotation marks omitted). In Wygant, we rejected the asserted interest in "providing minority role models for [a public school system's] minority students, as an attempt to alleviate

[497 US 614]

the effects of societal discrimination," 476 US, at 274, 90 L Ed 2d 260, 106 S Ct 1842 (plurality opinion), because "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy" and would allow "remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." Id., at 276, 90 L Ed 2d 260, 106 S Ct 1842. Both cases condemned those interests because they would allow distribution of goods essentially according to the demographic representation of particular racial and ethnic groups. See Croson, supra, at 498, 505-506, 507, 102 L Ed 2d 854, 109 S Ct 706; Wygant, 476 US, at 276, 90 L Ed 2d 260, 106 S Ct 1842 (plurality opinion).

The asserted interest in this case suffers from the same defects. The interest is certainly amorphous: The FCC and the majority of this Court understandably do not suggest how one would define or measure a particular viewpoint that might be associated with race, or even how one would assess the diversity of broadcast viewpoints. Like the vague assertion of societal discrimination, a claim of insufficiently diverse broadcasting viewpoints might be used to justify equally unconstrained racial preferences, linked to nothing other than proportional representation of various races. And the interest would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the broadcasting spectrum continues to reflect that mixture. We cannot deem to be constitutionally adequate an interest that would support measures that amount to the core constitutional violation of "outright racial balancing." Croson, supra, at 507, 102 L Ed 2d 854, 109 S Ct 706.

The asserted interest would justify discrimination against members of any group found to contribute to an insufficiently diverse broadcasting spectrum, including those groups currently favored. In Wygant, we rejected as insufficiently weighty the interest in achieving role models in public schools, in part because that rationale could as readily be used to limit the hiring of teachers who belonged to particular minority groups. See Wygant, supra, at 275-276, 90 L Ed 2d 260, 106 S Ct 1842 (plurality

[497 US 615]

opinion). The FCC's claimed interest could similarly justify limitations on minority members' participation in broadcasting. It would be unwise to depend upon the Court's restriction of its holding to "benign" measures to forestall this result. Divorced from any remedial purpose and otherwise undefined, "benign" means only what shifting fashions and changing politics deem acceptable. Members of any racial or ethnic group, whether now preferred under the FCC's policies or not, may find themselves politically out of fashion and subject to disadvantageous but "benign" discrimination.

Under the majority's holding, the FCC may also advance its asserted interest in viewpoint diversity by identifying what constitutes a "black viewpoint," an "Asian viewpoint," an "Arab viewpoint," and so on; determining which viewpoints are underrepresented; and then using that determination to mandate particular programming or to deny licenses to those deemed by virtue of their race or ethnicity less likely to present the favored views. Indeed, the FCC has, if taken at its word, essentially pursued this course, albeit without making express its reasons for choosing to favor particular groups or for concluding that the broadcasting spectrum is insufficiently diverse. See Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC2d 979 (1978) (1978 Policy Statement).

We should not accept as adequate for equal protection purposes an interest unrelated to race, yet capable of supporting measures so difficult to distinguish from proscribed discrimination. The remedial interest may support race classifications because that interest is necessarily related to past racial discrimination; yet the interest in diversity of viewpoints provides no legitimate, much less important, reason to employ race classifications apart from generalizations impermissibly equating race with thoughts and behavior. And it will prove impossible to distinguish naked preferences for members of particular races from preferences for members of particular races because they possess certain valued

[497 US 616]

views: No matter what its purpose, the Government will be able to claim that it has favored certain persons for their ability, stemming from race, to contribute distinctive views or perspectives.

Even considered as other than a justification for using race classifications, the asserted interest in viewpoint diversity falls short of being weighty enough. The Court has recognized an interest in obtaining diverse broadcasting viewpoints as a legitimate basis for the FCC, acting pursuant to its "public interest" statutory mandate, to adopt limited measures to increase the number of competing licensees and to encourage licensees to prevent varied views on issues of public concern. See, e. g., FCC v National Citizens Committee for Broadcasting, 436 US 775, 56 L Ed 2d 697, 98 S Ct 2096 (1978); Red Lion Broadcasting Co. v FCC, 395 US 367, 23 L Ed 2d 371, 89 S Ct 1794 (1969); United States v Storer Broadcasting Co. 351 US 192, 100 L Ed 1081, 76 S Ct 763 (1956); Associated Press v United States, 326 US 1, 89 L Ed 2013, 65 S Ct 1416 (1945); National Broadcasting Co. v United States, 319 US 190, 87 L Ed 1344, 63 S Ct 997 (1943). We have also concluded that these measures do not run afoul of the First Amendment's usual prohibition of Government regulation of the marketplace of ideas, in part because First Amendment concerns support limited but inevitable Government regulation of the peculiarly constrained broadcasting spectrum. See, e. g., Red Lion, supra, at 389-390, 23 L Ed 2d 371, 89 S Ct 1794. But the conclusion that measures adopted to further the interest in diversity of broadcasting viewpoints are neither beyond the FCC's statutory authority nor contrary to the First Amendment hardly establishes the interest as important for equal protection purposes.

The FCC's extention of the asserted interest in diversity of views in these cases presents, at the very least, an unsettled First Amendment issue. The FCC has concluded that the American broadcasting public receives the incorrect mix of ideas and claims to have adopted the challenged policies to supplement programming content with a particular set of views. Although we have approved limited measures designed **[497 US 617]** to increase information and views generally, the Court has never upheld a broadcasting measure designed to amplify a distinct set of views or the views of a particular class of speakers. Indeed, the Court has suggested that the First Amendment prohibits allocating licenses to further such ends. See National Broadcasting Co. v United States, supra, at 226, 87 L Ed 1344, 63 S Ct 997 ("But Congress did not authorize the Commission to choose among [license] applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Commission by these Regulations proposed a choice among applicants upon some such basis, the [First Amendment] issue before us would be wholly different"). Even if an interest is determined to be legitimate in one context, it does not suddenly become important enough to justify distinctions based on race.

IV

Our traditional equal protection doctrine requires, in addition to a compelling state interest, that the Government's chosen means be necessary to accomplish, and narrowly tailored to further, the asserted interest. See Wygant, 476 US, at 274, 90 L Ed 2d 260, 106 S Ct 1842 (plurality opinion); Palmore v Sidoti, 466 US 429, 432-433, 80 L Ed 2d 421, 104 S Ct 1879 (1984). This element of strict scrutiny is designed to "ensur[e] that the means chosen 'fit' [the] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." Croson, 488 US, at 493, 102 L Ed 2d 854, 109 S Ct 706 (opinion of O'Connor, J.). The chosen means, resting as they do on stereotyping and so indirectly furthering the asserted end, could not plausibly be deemed narrowly tailored. The Court instead finds the racial classifications to be "substantially related" to achieving the Government's interest, ante, at 569, 111 L Ed 2d, at 465, a far less rigorous fit requirement. The FCC's policies fail even this requirement.

1

The FCC claims to advance its asserted interest in diverse viewpoints by singling out race and ethnicity as peculiarly linked to distinct views that require enhancement. The FCC's choice to employ a racial criterion embodies the related notions that a particular and distinct viewpoint inheres in certain racial groups, and that a particular applicant, by virtue of race or ethnicity alone, is more valued than other applicants because "likely to provide [that] distinct perspective." Brief for FCC in No. 89-453, p 17; see 1978 Policy Statement, 68 FCC2d, at 981 (policies seek "representation of minority viewpoints in programming"); Brief for FCC in No. 89-700, p 20 (current ownership structure creates programming deficient in "minorities['] . . . tastes and viewpoints"). The policies directly equate race with belief and behavior, for they establish race as a necessary and sufficient condition of securing the preference. The FCC's chosen means rest on the "premise that differences in race, or in the color of a person's skin, reflect real differences that are relevant to a person's right to share in the blessings of a free society. [T]hat premise is utterly irrational and repugnant to the principles of a free and democratic society." Wygant, supra, at 316, 90 L Ed 2d 260, 106 S Ct 1842 (Stevens, J., dissenting) (internal quotation marks omitted; citation omitted). The policies impermissibly value individuals because they presume that persons think in a manner associated with their race. See Steele v FCC, 248 US App DC 279, 285, 770 F2d 1192, 1198 (1985) (minority preference contrary to "one of our most cherished constitutional and societal principles . . . that an individual's tastes, beliefs, and abilities should be assessed on their own merits rather than by categorizing that individual as a member of a racial group presumed to think and behave in a particular way"), vacated, No. 84-1176 (Oct. 31, 1985), remanded (CADC, Oct. 9, 1986).

The FCC assumes a particularly strong correlation of race and behavior. The FCC justifies its conclusion that insufficiently diverse viewpoints are broadcast by reference to the percentage of minority owned stations. This assumption is correct only to the extent that minority owned stations provide the desired additional views, and that stations owned by individuals not favored by the preferences cannot, or at least do not, broadcast underrepresented programming. Additionally, the FCC's focus on ownership to improve programming assumes that preferences linked to race are so strong that they will dictate the owner's behavior in operating the station, overcoming the owner's personal inclinations and regard for the market. This strong link between race and behavior, especially when mediated by market forces, is the assumption that Justice Powell rejected in his discussion of health care service in Bakke. See 438 US, at 310-311, 57 L Ed 2d 750, 98 S Ct 2733. In that case, the state medical school argued that it could prefer members of minority groups because they were more likely to serve communities particularly needing medical care. Justice Powell rejected this rationale, concluding that the assumption was unsupported and that such individual choices could not be presumed from ethnicity or race. Ibid.

The majority addresses this point by arguing that the equation of race with distinct views and behavior is not "impermissible" in this particular case. Ante, at 579, 111 L Ed 2d, at 472. Apart from placing undue faith in the Government and courts' ability to distinguish "good" from "bad" stereotypes, this reasoning repudiates essential equal protection principles that prohibit racial generalizations. The Court embraces the FCC's reasoning that an applicant's race will likely indicate that the applicant possesses a distinct perspective, but notes that the correlation of race to behavior is "not a rigid assumption about how minority owners will behave in every case." Ibid. The corollary to this notion is plain: Individuals of unfavored racial and ethnic backgrounds are unlikely to possess the unique experiences and background that contribute to viewpoint diversity. Both the reasoning and its corollary reveal but disregard what is objectionable about a stereotype:

The racial generalization inevitably does not apply to certain individuals, and those persons may legitimately claim that they have been judged according to their race rather than upon a relevant criterion. See Los Angeles Dept. of Water and Power v Manhart, 435 US 702, 708, 55 L Ed 2d 657, 98 S Ct 1370 (1978) ("Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply"). Similarly disturbing is the majority's reasoning that different treatment on the basis of race is permissible because efficacious "in the aggregate." Ante, at 579, 111 L Ed 2d, at 472. In Wiesenfeld, we rejected similar reasoning: "Obviously, the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support. But such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support." 420 US, at 645, 43 L Ed 2d 514, 95 S Ct 1225 (citation omitted). Similarly in this case, even if the Court's equation of race and programming viewpoint has some empirical basis, equal protection principles prohibit the Government from relying upon that basis to employ racial classifications. See Manhart, supra, at 709, 55 L Ed 2d 657, 98 S Ct 1370 ("Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals"). This reliance on the "aggregate" and on probabilities confirms that the Court has abandoned heightened scrutiny, which requires a direct rather than approximate fit of means to ends. We would not tolerate the Government's claim that hiring persons of a particular race leads to better service "in the aggregate," and we should not accept as legitimate the FCC's claim in this case that members of certain races will provide superior programming, even if "in the aggregate." The Constitution's text, our cases, and our Nation's history foreclose such premises.

2

Moreover, the FCC's selective focus on viewpoints associated with race illustrates a particular tailoring difficulty. The asserted interest is in advancing the Nation's different "social, political, esthetic, moral, and other ideas and experiences," Red Lion, 395 US, at 390, 23 L Ed 2d 371, 89 S Ct 1794, yet of all the varied traditions and ideas shared among our citizens, the FCC has sought to amplify only those particular views it identifies through the classifications most suspect under equal protection doctrine. Even if distinct views could be associated with particular ethnic and racial groups, focusing on this particular aspect of the Nation's views calls into question the Government's genuine commitment to its asserted interest. See Bakke, 438 US, at 314, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Powell, J.) (race-conscious measures might be employed to further diversity only if race were one of many aspects of background sought and considered relevant to achieving a diverse student body).

Our equal protection doctrine governing intermediate review indicates that the Government may not use race and ethnicity as "a 'proxy for other, more germane bases of classification.'" Hogan, 458 US, at 726, 73 L Ed 2d 1090, 102 S Ct 3331, quoting Craig v Boren, 429 US 190, 198, 50 L Ed 2d 397, 97 S Ct 451 (1976). The FCC has used race as a proxy for whatever views it believes to be underrepresented in the broadcasting spectrum. This reflexive or unthinking use of a suspect classification is the hallmark of an unconstitutional policy. See, e. g., Wengler v Druggists Mutual Ins. Co. 446 US 142, 151-152, 64 L Ed 2d 107, 100 S Ct 1540 (1980); Craig, supra, at 198-199, 50 L Ed 2d 397, 97 S Ct 451; Wiesenfeld, supra, at 643-645, 43 L Ed 2d 514, 95 S Ct 1225. The ill fit of means to ends is manifest. The policy is overinclusive: Many members of a particular racial or ethnic group will have no interest in advancing the views the FCC believes to be underrepresented, or will find them utterly foreign. The policy is underinclusive: It awards no preference to disfavored individuals who may be particularly well versed in and committed to presenting those views. The FCC has failed to implement a case-by-case determination, and that failure is particularly unjustified

when individualized hearings already occur, as in the comparative licensing process. See Orr v Orr, 440 US 268, 281, 59 L Ed 2d 306, 99 S Ct 1102 (1979). Even in the remedial context, we have required that the Government adopt means to ensure that the award of a particular preference advances the asserted interest. In Fullilove, even reviewing an exercise of § 5 powers, the Court upheld the challenged set-aside only because it contained a waiver provision that ensured that the program served its remedial function in particular cases. See Fullilove, 448 US, at 487-488, 65 L Ed 2d 902, 100 S Ct 2758 (opinion of Burger, C. J.); see also Croson, 488 US, at 488-489, 102 L Ed 2d 854, 109 S Ct 706 (opinion of O'Connor, J.).

Moreover, the FCC's programs cannot survive even intermediate scrutiny because race-neutral and untried means of directly accomplishing the governmental interest are readily available. The FCC could directly advance its interest by requiring licensees to provide programming that the FCC believes would add to diversity. The interest the FCC asserts is in programming diversity, yet in adopting the challenged policies, the FCC expressly disclaimed having attempted *any* direct efforts to achieve its asserted goal. See 1978 Policy Statement, 68 FCC2d, at 981; ante, at 584-585, n 36, 111 L Ed 2d, at 475-476. The Court suggests that administrative convenience excuses this failure, ibid., yet intermediate scrutiny bars the Government from relying upon that excuse to avoid measures that directly further the asserted interest. See, e. g., Orr v Orr, supra, at 281, 59 L Ed 2d 306, 99 S Ct 1102; Craig v Boren, supra, at 198, 50 L Ed 2d 397, 97 S Ct 451. The FCC and the Court suggest that First Amendment interests in some manner should exempt the FCC from employing this direct, race-neutral means to achieve its asserted interest. They essentially argue that we may bend our equal protection principles to avoid more readily apparent harm to our First Amendment values. But the FCC cannot have it both ways: Either the First Amendment bars the FCC from seeking to accomplish indirectly what it may not accomplish directly; or the FCC may pursue the goal, but must do so in a manner that comports with equal protection principles. And if the

FCC can direct programming in any fashion, it must employ that direct means before resorting to indirect race-conscious means.

Other race-neutral means also exist, and all are at least as direct as the FCC's racial classifications. The FCC could evaluate applicants upon their ability to provide, and commitment to offer, whatever programming the FCC believes would reflect underrepresented viewpoints. If the FCC truly seeks diverse programming rather than allocation of goods to persons of particular racial backgrounds, it has little excuse to look to racial background rather than programming to further the programming interest. Additionally, if the FCC believes that certain persons by virtue of their unique experiences will contribute as owners to more diverse broadcasting, the FCC could simply favor applicants whose particular background indicates that they will add to the diversity of programming, rather than rely solely upon suspect classifications. Also, race-neutral means exist to allow access to the broadcasting industry for those persons excluded for financial and related reasons. The Court reasons that various minority preferences, including those reflected in the distress sale, overcome barriers of information, experience, and financing that inhibit minority ownership. Ante, at 593-594, 111 L Ed 2d, at 481-482. Race-neutral financial and informational measures most directly reduce financial and informational barriers.

The FCC could develop an effective ascertainment policy, one guaranteeing programming that reflects underrepresented viewpoints. The Court's discussion of alternatives nearly exclusively focuses on the FCC's ascertainment policy. Ante, at 585-589, 111 L Ed 2d, at 476-478. Yet that policy applied only to existing licensees, addressed not viewpoints but issues of concern to often relatively homogeneous local communities, and, by the FCC's own admission, was toothless and ineffective. According to the FCC, the ascertainment policies altered programming little more than the market already did, and provided "no guarantee that once a concern is ascertained by

[497 US 624]

formal or informal means, programming responsive to that concern will be presented." Commercial TV Stations, 98 FCC2d 1076, 1098 (1984), reconsideration denied, 104 FCC2d 358 (1986), remanded on other grounds sub nom. Action for Children's Television v FCC, 261 US App DC 253, 821 F2d 741 (1987); see also 98 FCC2d, at 1098-1101. Unsurprisingly, the FCC has concluded that this limited ascertainment policy has not proved to be effective, and has eliminated it throughout most media. See id., at 1097-1101; id., at 1099, and nn 78-80 (surveying proceedings abandoning ascertainment requirements).

The FCC has posited a relative absence of "minority viewpoints," yet it has never suggested what those views might be or what other viewpoints might be absent from the broadcasting spectrum. It has never identified any particular deficiency in programming diversity that should be the subject of greater programming or that necessitates racial classifications.

The FCC has never attempted to assess what alternatives to racial classifications might prove effective. The 1978 Policy Statement referred to only two alternatives that the Commission had undertaken: a minority hiring policy and the ascertainment policy. 68 FCC2d, at 979-980. Relying on ownership statistics and cursory evaluations of what viewpoints the broadcasting spectrum contained, the FCC asserted that insufficient programming diversity existed and that racial classifications were necessary. Id., at 980-981. Not until 1986 did the FCC attempt to determine the nature of the viewpoints that might be underrepresented or to determine whether effective race-neutral measures might achieve the FCC's asserted interest. See, e. g., Notice of Inquiry on Racial, Ethnic, or Gender Classiciations, 1 FCC Rcd 1315 (1986), modified, 2 FCC Rcd 2377 (1987). The FCC solicited comment about a range of potential race-neutral alternatives: It asked what race-neutral means might effectively increase program diversity,

[497 US 625]

whether it should require an individualized showing of ability to contribute to program diversity, whether it should allow nonminority members to demonstrate their ability to contribute to diverse programming, and whether it should select applicants based on demonstrated commitment to particular issues rather than according to race. See 1 FCC Rcd, at 1318. It was this inquiry, of course, that the congressional appropriations measures halted. See Continuing Appropriations Act for Fiscal Year 1988, Pub L 100-202, 101 Stat 1329. Thus the record is clear: The FCC has never determined that it has any need to resort to racial classifications to achieve its asserted interest, and it has employed race-conscious means before adopting readily available race-neutral, alternative means.

The FCC seeks to avoid the tailoring difficulties by focusing on minority ownership rather than the asserted interest in diversity of broadcast viewpoints. The Constitution clearly prohibits allocating valuable goods such as broadcast licenses simply on the basis of race. See Bakke, 438 US, at 307, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Powell, J.). Yet the FCC refers to the lack of minority ownership of stations to support the existence of a lack of diversity of viewpoints, and has fitted its programs to increase ownership. See 1978 Policy Statement, supra; Commission Policy Regarding Advancement of Minority Ownership in Broadcasting, 92 FCC2d 849 (1982). This repeated focus on ownership supports the inference that the FCC seeks to allocate licenses based on race, an impermissible end, rather than to increase diversity of viewpoints, the asserted interest. And this justification that links the use of race preferences to minority ownership rather than to diversity of viewpoints ensures that the FCC's programs, like that at issue in Croson, "cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." Croson, 488 US, at 507, 102 L Ed 2d 854, 109 S Ct 706.

[497 US 626]

3

Even apart from these tailoring defects in the FCC's policies, one particular flaw underscores the Government's ill fit of means to ends. The FCC's policies assume, and rely upon, the existence of a tightly bound "nexus" between the owners' race and the resulting programming. The Court's lengthy discussion of this issue, ante, at 569-579, 111 L Ed 2d, at 465-472, purports to establish only that some relation exists between owners' race and programming: i. e., that the FCC's choice to focus on allocation of licenses is rationally related to the asserted end. The Court understandably makes no stronger claims, because the evidence provides no support and because the requisite deference would so obviously abandon heightened scrutiny. For argument's sake, we can grant that the Court's review of congressional hearings and social science studies establishes the existence of some rational nexus. But even assuming that to be true, the Court's discussion does not begin to establish that the programs are directly and substantially related to the interest in diverse programming. That equal protection issue turns on the degree owner's race is related to programming, rather than whether any relation exists. To the extent that the FCC cannot show the nexus to be nearly complete, that failure confirms that the chosen means do not directly advance the asserted interest, that the policies rest instead upon illegitimate stereotypes, and that individualized determinations must replace the FCC's use of race as a proxy for the desired programming.

Three difficulties suggest that the nexus between owners' race and programming is considerably less than substantial. First, the market shapes programming to a tremendous extent. Members of minority groups who own licenses might be thought, like other owners, to seek to broadcast programs that will attract and retain audiences, rather than programs that reflect the owner's tastes and preferences. See Winter Park Communications, Inc. v FCC, 277 US App DC 134, 145-148, 873 F2d 347, 358-361 (1989) (case below) (Williams,

[497 US 627]

J., concurring in part and dissenting in part) (surveying evidence suggesting programming geared to audience taste). Second, station owners have only limited control over the content of programming. The distress sale presents a particularly acute difficulty of this sort. Unlike the comparative licensing program, the distress sale policy provides preferences to minority owners who neither intend nor desire to manage the station in any respect. See ante, at 557-558, 111 L Ed 2d, at 458, Commission Policy Regarding Advancement of Minority Ownership in Broadcasting, supra. Whatever distinct programming may attend the race of an owner actively involved in managing the station, an absentee owner would have far less effect on programming.

Third, the FCC had absolutely no factual basis for the nexus when it adopted the policies and has since established none to support its existence. Until the mid-1970's, the FCC believed that its public interest mandate and 1965 Policy Statement precluded it from awarding preference based on race and ethnicity, and instead required applicants to demonstrate particular entitlement to an advantage in a comparative hearing. Policy Statement on Comparative Broadcast Hearings, 1 FCC2d 393 (1965). See, e.g., Mid-Florida Television Corp. 33 FCC2d 1 (Rev Bd), review denied, 37 FCC2d 559 (1972), rev'd, TV 9, Inc. v FCC, 161 US App DC 349, 495 F2d 929 (1973), cert denied, 419 US 986, 42 L Ed 2d 194, 95 S Ct 245 (1974). The Court of Appeals for the District of Columbia Circuit rejected the FCC's position on statutory grounds. See TV 9, 161 US App DC, at 356-358, 495 F2d, at 936-938. The court rejected the FCC's arguments that "the Communications Act, like the Constitution, is color-blind," and that a race preference was incompatible with the FCC's governing statute. Ibid. Instead, based on nothing other than its conception of the public interest, that court required that an applicant's membership in a minority group be presumed to lead to greater diversity of programming. Id., at 357-358, 495 F2d, at

[497 US 628]

937-938; see Garrett v FCC, 168 US App DC 266, 272-273, 513 F2d 1056, 1062-1063 (1975). Principally relying on the panel's presumed nexus between race and programming, the FCC in its 1978 Policy Statement acquiesced and established the policies challenged in these cases. See 1978 Policy Statement, supra, at 981-982. In the mid-1980's, the FCC, prompted by this Court's decisions indicating that a factual predicate must be established to support use of race classifications, unanimously sought to examine whether, and to what extent, any nexus existed between an owner's race and programming. See Notice of Inquiry on Racial, Ethnic, or Gender Classifications, 1 FCC Rcd 1315 (1986), modified, 2 FCC Rcd 2377 (1987). As the Chairman of the FCC explained to Congress:

> "To the extent that heightened scrutiny requires certain factual predicates, we discovered that notwithstanding our statements in the past regarding the assumed nexus between minority or female ownership and program diversity, a factual predicate has never been established.

> "For example, the Commission has at no time has examined whether there is a nexus between a broadcast owner's race or gender and program diversity, either on a case-by-case basis or generically. We had no reason to, because the court in TV 9 told us we could, indeed must, assume such a nexus." Minority-Owned Broadcast Stations, Hearing on HR 5373 before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Comm on Energy and Commerce, 99th Cong, 2d Sess, 16 (1986).

Through the appropriations measures, Congress barred the FCC's attempt to initiate that examination. See Continuing Appropriations Act for Fiscal Year 1988, 101 Stat 1329-31.

Even apart from the limited nature of the Court's claims, little can be discerned from the congressional action. First, the Court's survey does not purport to establish that the

FCC or Congress has identified any particular deficiency in the viewpoints contained in the broadcast spectrum. Second, no degree of congressional endorsement may transform the equation of race with behavior and thoughts into a permissible basis of governmental action. Even the most express and lavishly documented congressional declaration that members of certain races will as owners produce distinct and superior programming would not allow the Government to employ such reasoning to allocate benefits and burdens among citizens on that basis. Third, we should hesitate before accepting as definitive any declaration regarding even the existence of a nexus. The two legislative reports that claim some nexus to exist refer to sources that provide no support for the proposition. See S Rep No. 100-182, p 76 (1987); HR Conf Rep No. 97-765 p 43 (1982). Congress, through appropriations measures, sought to foreclose examination of an issue that the FCC believed to be entirely unresolved. See Continuing Appropriations Act for Fiscal Year 1988, supra. Especially where Congress rejects the considered judgment of the executive officials possessing particular expertise regarding the matter in issue, courts are hardly bound to accept the congressional declaration. See, e.g., Rostker v Goldberg, 453 US 57, 83-85, 69 L Ed 2d 478, 101 S Ct 2646 (1981) (White, J., dissenting). Additionally, the FCC created the challenged policies. Congress has, through the appropriations process, frozen those policies in place by preventing the FCC from reexamining or altering them. That congressional action does not amount to an endorsement of the reasoning and empirical claims originally asserted and then abandoned by the FCC, and does not reflect the same considered judgment embodied in measures crafted through the legislative process and subject to the hearings and deliberation accompanying substantive legislation. Cf. TVA v Hill, 437 US 153, 57 L Ed 2d 117, 98 S Ct 2279 (1978); Andrus v Sierra Club, 442 US 347, 359-361, 60 L Ed 2d 943, 99 S Ct 2335 (1979).

4

Finally, the Government cannot employ race classifications that unduly burden individuals who are not members of the favored racial and ethnic groups. See, e.g., Wygant, 476 US, at 280-281, 90 L Ed 2d 260, 106 S Ct 1842 (plurality opinion). The challenged policies fail this independent requirement, as well as the other constitutional requirements. The comparative licensing and distress sale programs provide the eventual licensee with an exceptionally valuable property and with a rare and unique opportunity to serve the local community. The distress sale imposes a particularly significant burden. The FCC has at base created a specialized market reserved exclusively for minority controlled applicants. There is no more rigid quota than a 100% set-aside. This fact is not altered by the observation, see ante, at 598-599, 111 L Ed 2d, at 484, that the FCC and the seller have some discretion over whether stations may be sold through the distress program. For the would-be purchaser or person who seeks to compete for the station, that opportunity depends entirely upon race or ethnicity. The Court's argument that the distress sale allocates only a small percentage of all license sales, ante, at 599, 111 L Ed 2d, at 485, also misses the mark. This argument readily supports complete preferences and avoids scrutiny of particular programs: It is no response to a person denied admission at one school, or discharged from one job, solely on the basis of race, that other schools or employers do not discriminate.

The comparative licensing program, too, imposes a significant burden. The Court's emphasis on the multifactor process should not be confused with the claim that the preference is in some sense a minor one. It is not. The basic nonrace criteria are not difficult to meet, and, given the sums at stake, applicants have every incentive to structure their ownership arrangement to prevail in the comparative process. Applicants cannot alter their race, of course, and race is clearly the dispositive factor in a substantial percentage of comparative proceedings. Petitioner Metro asserts that

[497 US 631]

race is overwhelmingly the dispositive factor. In reply, the FCC admits that it has not assessed the operation of its own program, Brief for FCC in No. 89-453, p 39, and the Court notes only that "minority ownership does not guarantee that an applicant will prevail." Ante, at 597-598, n 50, 111 L Ed 2d, at 484.

In sum, the FCC has not met its burden even under the Court's test that approves of racial classifications that are substantially related to an important governmental objective. Of course, the programs even more clearly fail the strict scrutiny that should be applied. The Court has determined, in essence, that Congress and all federal agencies are exempted, to some ill-defined but significant degree, from the Constitution's equal protection requirements. This break with out precedents greatly undermines equal protection guarantees and permits distinctions among citizens based on race and ethnicity which the Constitution clearly forbids. I respectfully dissent.

Justice **Kennedy,** with whom Justice **Scalia** joins, dissenting.

Almost 100 years ago in Plessy v Ferguson, 163 US 537, 41 L Ed 256, 16 S Ct 1138 (1896), this Court upheld a government-sponsored race-conscious measure, a Louisiana law that required "equal but separate accommodations" for "white" and "colored" railroad passengers. The

Court asked whether the measures were "reasonable," and it stated that "[i]n determining the question of reasonableness, [the legislature] is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort." Id., at 550, 41 L Ed 256, 16 S Ct 1138. The Plessy Court concluded that the "race-conscious measures" it reviewed were reasonable because they served the governmental interest of increasing the riding pleasure of railroad passengers. The fundamental errors in Plessy, its standard of review and its validation of rank racial insult by the State, distorted the law for six decades before the Court announced its apparent demise in Brown v Board of Education, 347 US 483, 98 L Ed 873, 74 S Ct 686, 38 ALR2d 1180 (1954).

Plessy's standard of review and its explication have disturbing parallels to today's majority opinion that should warn us something is amiss here.

Today the Court grants Congress latitude to employ "benign race-conscious measures . . . [that] are not . . . designed to compensate victims of past governmental or societal discrimination," but that "serve important governmental objectives . . . and are substantially related to achievement of those objectives." Ante, at 564-565, 111 L Ed 2d, at 463. The interest the Court accepts to uphold the race-conscious measures of the Federal Communications Commission (Commission or FCC) is "broadcast diversity." Furthering that interest, we are told, is worth the cost of discriminating among citizens on the basis of race because it will increase the listening pleasure of media audiences. In upholding this preference, the majority exhumes Plessy's deferential approach to racial classifications. The Court abandons even the broad societal remedial justification for racial preferences once advocated by Justice Marshall, e.g., Regents of University of California v Bakke, 438 US 265, 396, 57 L Ed 2d 750, 98 S Ct 2733 (1978) (separate opinion), and now will allow the use of racial classifications by Congress untied to any goal of addressing the effects of past race discrimination. All that need be shown under the new approach, which until now only Justice Stevens had advanced, Richmond v J. A. Croson Co. 488 US 469, 511, 102 L Ed 2d 854, 109 S Ct 706 (1989) (opinion concurring in part and concurring in judgment); Wygant v Jackson Board of Education, 476 US 267, 313, 90 L Ed 2d 260, 106 S Ct 1842 (1986) (dissenting opinion), is that the future effect of discriminating among citizens on the basis of race will advance some "important" governmental interest.

Once the Government takes the step, which itself should be forbidden, of enacting into law the stereotypical assumption that the race of owners is linked to broadcast content, it follows a path that becomes ever more tortuous. It must decide which races to favor. While the Court repeatedly refers to the preferences as favoring "minorities," ante, at 554, 111 L Ed 2d, at 456, and

purports to evaluate the burdens imposed on "nonminorities," ante, at 596, 111 L Ed 2d, at 483, it must be emphasized that the discriminatory policies upheld today operate to exclude the many racial and ethnic *minorities* that have not made the Commission's list. The enumeration of the races to be protected is borrowed from a remedial statute, but since the remedial rationale must be disavowed in order to sustain the policy, the race classifications bear scant relation to the asserted governmental interest. The Court's reasoning provides little justification for welcoming the return of racial classifications to our Nation's laws.[1]

I cannot agree with the Court that the Constitution permits the Government to discriminate among its citizens on the basis of race in order to serve interests so trivial as "broadcast diversity." In abandoning strict scrutiny to endorse this interest the Court turns back the clock on the level of scrutiny applicable to federal race-conscious measures. Even strict scrutiny may not have sufficed to invalidate early race-based laws of most doubtful validity, as we learned in Korematsu v United States, 323 US 214, 89 L Ed 194, 65 S Ct 193 (1944). But the relaxed standard of review embraced today would validate that case, and any number of future racial classifications the

Government may find useful. Strict scrutiny is the surest test the Court has yet devised for holding true to the constitutional command of racial equality. Under our modern precedents, as Justice O'Connor explains, strict scrutiny must be applied to this statute. The approach taken to congressional measures under § 5 of the Fourteenth Amendment in Fullilove v Klutznick, 448 US 448, 65 L Ed 2d 902, 100 S Ct 2758 (1980), even assuming its validity, see Croson, supra, at 518, 102 L Ed 2d 854, 109 S Ct 706 (opinion of Kennedy, J.), is not applicable to this case.

As to other exercises of congressional power, our cases following Bolling v Sharpe, 347 US 497, 98 L Ed 884, 74 S Ct 693 (1954), such as Weinberger v Wiesenfeld, 420 US 636, 638, n 2, 43 L Ed 2d 514, 95 S Ct 1225 (1975), until they were in effect overruled today, had held that the Congress is constrained in its actions by the same standard applicable to the States: strict scrutiny of all racial classifications. The majority cannot achieve its goal of upholding the quotas here under the rigor of this standard, and so must devise an intermediate test. Justice O'Connor demonstrates that this statute could not survive even intermediate scrutiny as it had been understood until today. The majority simply says otherwise, providing little reasoning or real attention to past cases in its opinion of 50 pages.

The Court insists that the programs under review are "benign." Justice Stevens agrees. "[T]he reason for the classification—the recognized interest in broadcast diversity—is clearly identified and does not imply any judgment concerning the abilities of owners of different races or the merits of different kinds of programming. Neither the favored nor the disfavored class is stigmatized in any way." Ante, at 601, 111 L Ed 2d, at 486 (Stevens, J., concurring).[2] A fundamental error

---

[1] The Court fails to address the difficulties, both practical and constitutional, with the task of defining members of racial groups that its decision will require. The Commission, for example, has found it necessary to trace an applicant's family history to 1492 to conclude that the applicant was "Hispanic" for purposes of a minority tax certificate policy. See Storer Broadcasting Co. 87 FCC2d 190 (1981). I agree that "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals." Fullilove v Klutznick, 448 US 448, 534, n 5, 65 L Ed 2d 902, 100 S Ct 2758 (1980) (Stevens, J., dissenting); see id., at 531-532, 65 L Ed 2d 902, 100 S Ct 2758 (Stewart, J., dissenting). "If the National Government is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935, translated in 4 Nazi Conspiracy and Aggression, Document No. 1417-PS, pp 8-9 (1946)." Id., at 534, n 5, 65 L Ed 2d 902, 100 S Ct 2758. Other examples are available. See Population Registration Act No. 30 of 1950, Statutes of the Republic of South Africa 71 (1985).

of the Plessy Court was its similar confidence in its ability to identify "benign" discrimination: "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." 163 US, at 551, 41 L Ed 256, 16 S Ct 1138. Although the majority is "confident" that it can determine when racial discrimination is benign, ante, at 564-565, n 12, 111 L Ed 2d, at 462-463, it offers no explanation as to how it will do so.

The Court also justifies its result on the ground that "Congress and the Commission have determined that there may be important differences between the broadcasting practices of minority owners and those of their nonminority counterparts." Ante, at 580, 111 L Ed 2d, at 473. The Court is all too correct that the type of reasoning employed by the Commission and Congress is not novel. Policies of racial separation and preference are almost always justified as benign, even when it is clear to any sensible observer that they are not. The following statement, for example, would fit well among those offered to uphold the Commission's racial preference policy: "The policy is not based on any concept of superiority or inferiority, but merely on the fact that people differ, particularly in their group associations, loyalties, cultures, outlook, modes of life and standards of development." See South Africa and the Rule of Law 37 (1968) (official publication of the South African Government).

The history of governmental reliance on race demonstrates that racial policies defended as benign often are not seen that way by the individuals affected by them. Today's dismissive statements aside, a plan of the type sustained here may impose "stigma on its supposed beneficiaries," Croson, 488

US, at 516-517, 102 L Ed 2d 854, 109 S Ct 706 (opinion of Stevens, J.), and "foster intolerance and antagonism against the entire membership of the favored classes," Fullilove, 448 US, at 547, 65 L Ed 2d 902, 100 S Ct 2758 (Stevens, J., dissenting). Although the majority disclaims it, the FCC policy seems based on the demeaning notion that members of the defined racial groups ascribe to certain "minority views" that must be different from those of other citizens. Special preferences also can foster the view that members of the favored groups are inherently less able to compete on their own. And, rightly or wrongly, special preference programs often are perceived as targets for exploitation by opportunists who seek to take advantage of monetary rewards without advancing the stated policy of minority inclusion.[3]

---

[2] Justice Stevens' assertion that the FCC policy "does not imply any judgment concerning . . . the merits of different kinds of programming," ante, at 601, 111 L Ed 2d, at 486, is curious. If this policy, which is explicitly aimed at the ultimate goal of altering programming content, does not "imply any judgment concerning . . . the merits of different kinds of programming," then it is difficult to see how the FCC's policy serves *any* governmental interest, let alone substantially furthers an important one.

The perceptions of the excluded class must also be weighed, with attention to the cardinal rule that our Constitution protects each citizen as an individual, not as a member of a group. There is the danger that the "stereotypical thinking" that prompts policies such as the FCC rules here "stigmatizes the disadvantaged class with the unproven charge of past racial discrimination." Croson, 488 US, at 516, 102 L Ed 2d 854, 109 S Ct 706 (opinion of Stevens, J.). Whether or not such programs can be described as "remedial," the message conveyed is that it is acceptable to harm a member of the group excluded from the benefit or privilege. If this is to be considered acceptable under the Constitution, there are various possible explanations. One is that the group disadvantaged by the preference should feel no stigma at all, because racial preferences address not the evil of intentional discrimination but the continuing unconscious use of stereotypes that disadvantage

[497 US 637]

minority groups. But this is not a proposition that the many citizens, who to their knowledge "have never discriminated against anyone on the basis of race," ibid., will find easy to accept.

Another explanation might be that the stigma imposed upon the excluded class should be overlooked, either because past wrongs are so grievous that the disfavored class must bear collective blame, or because individual harms are simply irrelevant in the face of efforts to compensate for racial inequalities. But these are not premises that the Court even appears willing to address in its analysis. Until the Court is candid about the existence of stigma imposed by racial preferences on both affected classes, candid about the "animosity and discontent" they create, Fullilove, supra, at 532-533, 65 L Ed 2d 902, 100 S Ct 2758 (Stevens, J., dissenting), and open about defending a theory that explains why the cost of this stigma is worth bearing and why it can consist with the Constitution, no basis can be shown for today's casual abandonment of strict scrutiny.

Though the racial composition of this Nation is far more diverse than the first Justice Harlan foresaw, his warning in dissent is now all the more apposite: "The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law." Plessy, 163 US, at 560, 41 L Ed 256, 16 S Ct 1138 (dissenting opinion). Perhaps the Court can succeed in its assumed role of case-by-case arbiter of when it is desirable and benign for the Government to disfavor some citizens and favor others based on the color of their skin. Perhaps the tolerance and decency to which our people aspire will let the disfavored rise above hostility and the favored escape condescension. But history suggests much peril in this enterprise, and so the Constitution forbids us to undertake it. I regret that after a

---

[3] The record in one of these two cases indicates that Astroline Communications Company, the beneficiary of the distress sale policy in this case, had a total capitalization of approximately $24,000,000. Its sole minority principal was a Hispanic-American who held 21% of Astroline's overall equity and 71% of its voting equity. His total cash contribution was $210. See App in No. 89-700, pp 68-69.

century of judicial opinions we interpret the Constitution to do no more than move us from "separate but equal" to "unequal but benign."

WALTON v ARIZONA

(1990) 497 US 639, 111 L Ed 2d 511, 110 S Ct 3047

[497 US 639]

JEFFREY ALAN WALTON, Petitioner

v

ARIZONA

497 US 639, 111 L Ed 2d 511, 110 S Ct 3047, reh den 497 US 1050, 111 L Ed 2d 828, 111 S Ct 14

[No. 88-7351]

Argued January 17, 1990. Decided June 27, 1990.

Decision: Arizona capital sentencing statute providing for finding of aggravating and mitigating circumstances by trial court held valid; statutory aggravating circumstance held not unconstitutionally vague.

SUMMARY

Under Arizona capital sentencing statutes, the sentence to be imposed upon a person convicted of first-degree murder is determined by the trial court at a separate sentencing hearing, at which the court determines the existence or nonexistence of aggravating or mitigating factors. The relevant statute defines 10 aggravating circumstances that may be considered, and defines mitigating circumstances as any factors which are relevant in determining whether to impose a sentence less than death. The burden of establishing the existence of any aggravating circumstances is on the prosecution, while the burden of establishing mitigating circumstances is on the defendant. The court must return a special verdict setting forth its findings as to aggravating and mitigating circumstances, and must impose a sentence of death if the court finds one or more aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency. The accused was convicted by a jury in an Arizona state court of first-degree murder. The evidence showed that (1) the accused and his two codefendants robbed the victim at gunpoint; (2) they forced him into his car and drove out into the desert; (3) the victim was frightened; (4) the accused took a gun, went off with the victim into the desert, and shot him once in the head; and (5) the accused told his codefendants that he had shot the victim and that he had "never seen a man pee in his pants before." At the accused's sentencing hearing, the prosecution argued that two statutory aggravating circumstances were present, in that the murder was committed (1) "in an especially heinous, cruel or depraved manner," and (2) for pecuniary gain.

SUBJECT OF ANNOTATION

Beginning on page 947, infra

Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances

Briefs of Counsel, p 945, infra.

In mitigation, the accused (1) offered testimony from a psychiatrist to the effect that the accused had a long history of substance abuse which impaired his judgment and might have been sexually abused as a child, and (2) argued his age (20 years at the time of sentencing). At the conclusion of the hearing, the trial court (1) found that the two aggravating circumstances asserted by the prosecution were present; (2) stated that it had considered the accused's capacity to appreciate the wrongfulness of his conduct, as well as all of the mitigating factors urged by his counsel; (3) concluded that there were no mitigating circumstances sufficiently substantial to call for leniency; and accordingly, (4) sentenced the accused to death. The Supreme Court of Arizona, in affirming the accused's conviction and sentence, conducted an independent review of the sentence in which it (1) noted, with reference to the "especially heinous, cruel or depraved" circumstance, that it had determined in prior cases that (a) a murder is committed in an especially cruel manner when the perpetrator inflicts mental anguish or physical abuse before the victim's death, (b) mental anguish includes a victim's uncertainty as to his ultimate fate, and (c) a depraved murder is one where the perpetrator relishes the murder, evidencing debasement or perversion; (2) found that there was sufficient evidence to conclude that the victim suffered mental anguish before his death, and that the accused had relished the murder; (3) found that the pecuniary gain circumstance was present; (4) examined the mitigating evidence and concluded that there were no mitigating circumstances sufficient to call for leniency; and (5) determined that the accused's death sentence was proportional to sentences imposed in similar cases (159 Ariz 571, 769 P2d 1017).

On certiorari, the United States Supreme Court affirmed. In that part of an opinion by White, J., which constituted the opinion of the court and was joined by Rehnquist, Ch. J., and O'Connor, Scalia, and Kennedy, JJ., it was held that (1) Arizona's statutory provision calling for the trial judge, rather than the jury, to make factual findings as to the existence of mitigating or aggravating circumstances does not violate the Federal Constitution's Sixth Amendment, because (a) under Arizona's capital sentencing scheme, aggravating circumstances are not separate penalties or offenses, and the judge's finding of any particular aggravating circumstance does not "convict" a defendant, that is, require the death penalty, nor does failure to find any particular aggravating circumstance "acquit" a defendant, that is, preclude the death penalty, and (b) if, as the court has said before, the Constitution does not require that a finding—made as a prerequisite for imposition of the death penalty—that the accused killed, attempted to kill, or intended to kill be proved as an element of the offense of capital murder or be found by a jury, then it cannot be concluded that a state is required to denominate aggravating circumstances as "elements" of the offense or to permit only a jury to determine the existence of such circumstances; (2) Arizona's "heinous, cruel or depraved" aggravating circumstance does not fail to channel the sentencer's discretion as required by the Federal Constitution's Eighth and Fourteenth Amendments, because the Arizona Supreme Court has sought to give substance to the operative terms of the statute, and its construction meets constitutional requirements; and (3) the contention that the "heinous, cruel or depraved" aggravating circumstance was applied in an arbitrary manner, and that as applied it did not distinguish the accused's case from cases in which the death sentence was not imposed, was in effect a challenge to the proportionality review of the Arizona Supreme Court and would be rejected, inasmuch as proportionality review by the United States Supreme Court was not constitutionally required where (a) the challenged aggravating circumstance had been construed by the Arizona courts in a manner that furnished sufficient guidance to the sentencer, and (b) the Arizona Supreme Court had plainly undertaken its proportionality review in good faith and found that the accused's sentence was proportional to that imposed in similar cases. Also, WHITE, J., joined by REHNQUIST, Ch. J., and O'CONNOR and KENNEDY, JJ., expressed the view that (1) Arizona's requirement that the accused must establish, by a preponderance of the evidence, the existence of mitigating circumstances sufficiently substantial to call for leniency, does not violate the Eighth or Fourteenth Amendment, given that this rule does not lessen the prosecution's burden of proving the existence of aggravating circumstances; and (2) the requirement that the court "shall" impose the death penalty if one or more aggravating circumstances are found and the mitigating circumstances are held insufficient to call for leniency does not create an unconstitutional presumption, in violation of the Eighth and Fourteenth Amendments, that death is the proper sentence.

SCALIA, J., concurring in part and concurring in the judgment, expressed the view that (1) the principle stated in Furman v Georgia (1972) 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726—that channeling and limiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement—is inconsistent with the principle stated in Woodson v North Carolina (1976) 428 US 280, 49 L Ed 2d 944, 96 S Ct 2978, and Lockett v Ohio (1978) 438 US 586, 57 L Ed 2d 973, 98 S Ct 2954, that the Eighth Amendment requires that the sentencer in a capital case not be precluded from considering as mitigating factors any aspect of an accused's character or record and any of the circumstances of the offense that the accused proffers as a basis for a sentence less than death; (2) the Woodson-Lockett principle lacks support in the text of the Eighth Amendment and is unworthy of respect under the doctrine of stare decisis; and (3) for these reasons, the accused's claim that the Arizona sentencing procedure deprives the sentencer of discretion to consider all mitigating circumstances—by (a) imposing on the accused the burden of establishing, by a preponderance of the evidence, the existence of mitigating circumstances sufficiently substantial to call for leniency, and (b) providing that the court shall impose the death penalty if one or more aggravating circumstances are found and mitigating circumstances are held insufficient to call for leniency—did not state a violation of the Eighth Amendment.

BRENNAN, J., joined by MARSHALL, J., dissented, expressing the view that (1) the death penalty is in all circumstances a cruel and unusual punishment; and (2) the concern for human dignity lying at the core of the Eighth

Amendment requires that a decision to impose the death penalty be made only after an assessment of its propriety in each individual case.

Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissented, expressing the view that (1) Arizona's requirement that the sentencer in a capital case consider only those mitigating circumstances which are proved by a preponderance of the evidence violates the Eighth Amendment; (2) the provision that the accused bears the burden of establishing mitigating circumstances sufficiently substantial to call for leniency violates the Eighth Amendment; (3) the "heinous, cruel or depraved" aggravating circumstance, as construed by the Arizona Supreme Court, provides no meaningful guidance to the sentencing authority and is therefore unconstitutional; and (4) contrary to the opinion of Scalia, J., stare decisis supports the continued application of the rule of Lockett v Ohio and its progeny, and this rule is not so patently irrational that it should be abruptly discarded.

Stevens, J., dissented, expressing the view that (1) the Sixth Amendment requires a jury determination of facts that must be established before the death penalty may be imposed; and (2) contrary to the opinion of Scalia, J., Woodson v North Carolina, Lockett v Ohio, and other cases adopting their reasoning are not irreconcilable with the central holding of Furman v Georgia.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Jury § 33 — capital sentencing — right to jury trial — aggravating or mitigating circumstances

1a, 1b. A state capital-sentencing statute—which provides that factual findings with regard to the existence of mitigating or aggravating circumstances shall be made at a separate sentencing hearing by the trial judge, rather than by the jury—does not violate the Federal Constitution's Sixth Amendment, because (1) aggravating circumstances are not separate penalties or offenses, and thus, under the state's capital-sentencing scheme, the judge's finding of any particular aggravating circumstance does not "convict" a defendant, that is, require the death penalty, nor does failure to find any

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

21 Am Jur 2d, Criminal Law §§ 609-612, 628; 21A Am Jur 2d, Criminal Law § 673; 47 Am Jur 2d, Jury § 50

9 Federal Procedure, L Ed, Criminal Procedure § 22:925

7 Am Jur Trials 477, Homicide

USCS, Constitution, Amendments 6, 8, 14

US L Ed Digest, Appeal § 1348.5; Criminal Law §§ 82, 83; Jury § 33

Index to Annotations, Capital Offenses and Punishment; Cruel and Unusual Punishment; Jury and Jury Trial; Mitigation or Aggravation of Punishment; Sentence and Punishment

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed or carried out. 90 L Ed 2d 1001.

Federal constitutional guaranty against cruel and unusual punishment—Supreme Court cases. 33 L Ed 2d 932.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed for pecuniary gain, as consideration or in expectation of receiving something of monetary value, and the like—post-Gregg cases. 66 ALR4th 417.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstances that murder was heinous, cruel, depraved, or the like—post-Gregg cases. 63 ALR4th 478.

particular aggravating circumstance "acquit" a defendant, that is, preclude the death penalty; and (2) if, as the court has said before, the Constitution does not require that a finding—made as a prerequisite for imposition of the death penalty—that the accused killed, attempted to kill, or intended to kill be proved as an element of the offense of capital murder or be found by a jury, then it cannot be concluded that a state is required to denominate aggravating circumstances as "elements" of the offense or to permit only a jury to determine the existence of such circumstances. (Brennan, Marshall, Blackmun, and Stevens, JJ., dissented from this holding.)

[See annotation p 947, infra]

Criminal Law §§ 82, 83 — death penalty — Eighth Amendment — mitigating circumstances

2a-2c. A state capital-sentencing statute—which imposes upon an accused convicted of first-degree murder the burden of establishing, by a preponderance of the evidence, the existence of mitigating circumstances sufficiently substantial to call for leniency, but does not lessen the state's burden to prove every element of the offense charged or to prove the existence of aggravating circumstances—does not violate the Federal Constitution's Eighth or Fourteenth Amendment. [Per White, J., Rehnquist, Ch. J., and O'Connor, Kennedy, and Scalia, JJ. Dissenting: Blackmun, Brennan, Marshall, and Stevens, JJ.]

[See annotation p 947, infra]

Criminal Law §§ 82, 83 — Eighth Amendment — presumption of death sentence

3a-3c. A state capital-sentencing statute—which provides that, upon a conviction of first-degree murder, the trial court "shall" impose the death penalty if, at a separate sentencing hearing conducted before the trial court alone, one or more aggravating circumstances are found and mitigating circumstances are held insufficient to call for leniency—does not create an unconstitutional presumption, in violation of the Federal Constitution's Eighth and Fourteenth Amendments, that death is the proper sentence, where the statute (1) does not preclude the sentencer from considering any type of mitigating evidence; and (2) does not automatically impose a death sentence upon conviction for certain types of murder. [Per White, J., Rehnquist, Ch. J., and O'Connor, Kennedy, and Scalia, JJ. Dissenting: Blackmun, Brennan, Marshall, and Stevens, JJ.]

[See annotation p 947, infra]

Criminal Law §§ 82, 83 — Eighth Amendment — death penalty — definition of aggravating circumstance

4a-4d. A state capital-sentencing statute—which provides that the court, in determining whether the death penalty shall be imposed upon a conviction of first-degree murder, may consider whether the accused committed the offense in an "especially heinous, cruel or depraved manner"—does not violate the Federal Constitution's Eighth or Fourteenth Amendment by failing to channel the sentencer's discretion, where, although the statutory language is facially vague, the state's highest court has stated, with reference to the operative terms of the aggravating circumstance, that (1) a crime is committed in an especially cruel manner when the perpetrator inflicts mental anguish or physical abuse before the victim's death; (2) mental anguish includes a victim's uncertainty as to his ultimate fate;

and (3) a crime is committed in an especially depraved manner when the perpetrator relishes the murder, evidencing debasement or perversion, or shows an indifference to the suffering of the victim and evidences a sense of pleasure in the killing. (Brennan, Marshall, Blackmun, and Stevens, JJ., dissented from this holding.)

[See annotation p 947, infra]

Criminal Law §§ 82, 83; Trial § 291 — Eighth Amendment — capital case — instructions — vagueness of aggravating circumstance

5. When a jury is the final sentencer in a capital case, it is essential that the jurors be properly instructed regarding all facets of the sentencing process, and it is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face under the Federal Constitution's Eighth and Fourteenth Amendments.

Evidence §§ 147, 273 — presumptions — knowledge of law — grounds of decision

6. Trial judges are presumed to know the law and to apply it in making their decisions.

Appeal § 1289 — presumption — application of narrowing construction

7. In determining on certiorari whether a state capital-sentencing statute—which provides that the trial court, in determining whether the death penalty should be imposed upon a conviction of first-degree murder, may consider whether the accused committed the offense in an "especially heinous, cruel or depraved manner"—violates the Federal Constitution's Eighth and Fourteenth Amendments by failing to channel the sentencer's discretion, the United States Supreme Court will presume, where the state's highest court has narrowed the definition of the "especially heinous, cruel or depraved manner" aggravating circumstance, that state trial judges are applying the narrower definition; it is irrelevant that the statute itself may not narrow the construction of the factor.

Appeal §§ 1379, 1478; Criminal Law §§ 82, 83 — Eighth Amendment — death sentence — vagueness of aggravating circumstance — review of evidence

8. Under the Federal Constitution's Eighth and Fourteenth Amendments, where a death sentence imposed by a state trial court is based on the finding of a statutory aggravating circumstance that is unconstitutionally vague on its face, a state appellate court is not necessarily required to vacate the sentence of death, even if the trial court has failed to apply a narrowing construction or has applied an improper construction; rather, the state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined, or the court may eliminate consideration of the factor altogether and determine whether any remaining aggravating circumstances are sufficient to warrant the death penalty.

Appeal § 1379; Criminal Law §§ 82, 83 — death penalty — Eighth Amendment — aggravating or mitigating circumstance — sufficiency of definition — federal review

9. When a federal court is asked to review, under the Federal Constitution's Eighth and Fourteenth

Amendments, a state court's application of an individual statutory aggravating or mitigating circumstance in a particular capital case, it must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer; if so, then the federal court must attempt to determine whether the state courts have further defined the vague terms, and, if they have done so, whether those definitions are constitutionally sufficient, that is, whether they provide some guidance to the sentencer.

Appeal §§ 806, 1289; Criminal Law §§ 82, 83 — appeal from state court — death penalty — proportionality review — presumption of proportionality

10. The United States Supreme Court will not overturn the proportionality review conducted by a state's highest court in affirming a death sentence, where the Supreme Court has just concluded that the challenged aggravating circumstance has been construed by the state court in a manner that furnishes sufficient guidance, under the Federal Constitution's Eighth and Fourteenth Amendments, to the sentencer; in such a case, proportionality review is not constitutionally required, and the Supreme Court lawfully may presume that the accused's death sentence was not wantonly and freakishly imposed, and thus that the sentence is not disproportionate within any recognized meaning of the Eighth Amendment. (Brennan, Marshall, Blackmun, and Stevens, JJ., dissented from this holding.)

Appeal § 806; Criminal Law §§ 82, 83 — appeal from state court — death sentence — proportionality

11. Under the Federal Constitution's Eighth and Fourteenth Amendments, the United States Supreme Court, on certiorari from a judgment of a state's highest court affirming a death sentence, is not required to engage in a proportionality review of the sentence, where the state court plainly undertook its proportionality review in good faith and found that the accused's sentence was proportional to that imposed in similar cases. (Brennan, Marshall, Blackmun, and Stevens, JJ., dissented from this holding.)

SYLLABUS BY REPORTER OF DECISIONS

Petitioner Walton was found guilty in an Arizona court of first-degree murder and was sentenced in a separate sentencing hearing before the judge, as required by state law. Under that law, the judge, inter alia, determines the existence of aggravating and mitigating circumstances and "shall impose" a death sentence if he finds one or more of several enumerated aggravating circumstances and that there are no mitigating circumstances sufficiently substantial to call for leniency. The burden is on the prosecution to establish the existence of aggravating circumstances and on the defendant to establish mitigating ones. The judge sentenced Walton to death, after finding the presence of two aggravating circumstances—that the murder was committed "in an especially heinous, cruel or depraved manner," and that it was committed for pecuniary gain—and that, considering all of the mitigating factors urged by Walton, the mitigating circumstances did not call for leniency. The State Supreme Court upheld the sentence. In an independent review, the court concluded that the evidence was sufficient to prove the existence of both aggravating factors. As to the first factor, the court noted that it had previously defined "especially cruel" to mean that the victim had suffered mental anguish before his death and had defined "especially depraved" to mean that the perpetrator had relished the murder, evidencing debasement or perversion. The court also agreed that there were no mitigating factors sufficient to call for leniency and determined that the sentence was proportional to sentences imposed in similar cases.

Held: The judgment is affirmed.

159 Ariz 571, 769 P2d 1017, affirmed.

Justice White delivered the opinion of the Court with respect to Parts I, II, and V, concluding:

1. Arizona's capital sentencing scheme does not violate the Sixth Amendment. The Constitution does not require that every finding of fact underlying a sentencing decision be made by a jury rather than by a judge. See Clemons v Mississippi, 494 US 738, 745, 108 L Ed 2d 725, 110 S Ct 1441; Hildwin v Florida, 490 US 638, 104 L Ed 2d 728, 109 S Ct 2055. Since Arizona's aggravating factors are standards to guide the making of the choice between verdicts of death and life imprisonment rather than "elements of the offense," the judge's finding of any particular aggravating circumstance does not require the death penalty, and the failure to find any particular aggravating circumstance does not preclude that penalty. Poland v Arizona, 476 US 147, 90 L Ed 2d 123, 106 S Ct 1749. Moreover, if the Constitution does not require that the finding of Enmund v Florida, 458 US 782, 73 L Ed 2d 1140, 102 S Ct 3368—that the defendant killed, attempted to kill, or intended to kill—be proved as an element of the offense of capital murder and be made by a jury, it cannot be concluded that a State is required to denominate aggravating circumstances "elements" of the offense or permit only a jury to determine such circumstances' existence.

2. The especially heinous, cruel, or depraved aggravating circumstance, as construed by the State Supreme Court, furnishes sufficient guidance to the sentencer to satisfy the Eighth and Fourteenth Amendments. The court's definition of "especially cruel" is virtually identical to the construction approved in Maynard v Cartwright, 486 US 356, 364-365, 100 L Ed 2d 372, 108 S Ct 1853. Similarly, its definition of "depraved" cannot be faulted. Although juries must be instructed in more than bare terms about an aggravating circumstance that is unconstitutionally vague on its face, trial judges are presumed to know the law and to apply narrower definitions in their decisions. Maynard v Cartwright, supra, at 358-359, 363-364, 100 L Ed 2d 372, 108 S Ct 1853; Godfrey v Georgia, 446 US 420, 426, 64 L Ed 2d 398, 100 S Ct 1759, distinguished. Walton's challenge to the State Supreme Court's proportionality review—that it should be overturned because it did not distinguish his case from others in which the death sentence was not imposed—is rejected. Such review is not constitutionally required where, as here, the challenged factor has been construed in a manner to give the sentencer sufficient guidance. Fur-

thermore, the Constitution does not require this Court to look behind the state court's conclusion where it plainly undertook its review in good faith.

Justice White, joined by The Chief Justice, Justice O'Connor, and Justice Kennedy, concluded in Parts III and IV:

1. Walton's Eighth and Fourteenth Amendment rights have not been violated by placing on him the burden of proving by a preponderance of the evidence the existence of mitigating circumstances sufficiently substantial to call for leniency, since Arizona's method of allocating the burdens of proof does not lessen the State's burden to prove the existence of aggravating circumstances. Cf., e.g., Martin v Ohio, 480 US 228, 94 L Ed 2d 267, 107 S Ct 1098. Lockett v Ohio, 438 US 586, 57 L Ed 2d 973, 98 S Ct 2954; Mullaney v Wilbur, 421 US 684, 44 L Ed 2d 508, 95 S Ct 1881; Mills v Maryland, 486 US 367, 100 L Ed 2d 384, 108 S Ct 1860, distinguished.

2. Blystone v Pennsylvania, 494 US 299, 108 L Ed 2d 255, 110 S Ct 1078, and Boyde v California, 494 US 370, 108 L Ed 2d 316, 110 S Ct 1190, foreclose Walton's argument that the state statute creates an unconstitutional presumption under the Eighth and Fourteenth Amendments that death is the proper sentence by requiring that the court "shall impose" the death penalty under the specified circumstances. The statute neither precludes the court from considering any type of mitigating evidence nor automatically imposes a death sentence for certain types of murder. States are free to structure and shape consideration of mitigating evidence in an attempt to achieve a more rational and equitable administration of the death penalty.

Justice Scalia concluded that he will no longer seek to apply, and will not, here or in the future, vote to uphold a claim based upon, the principle of Woodson v North Carolina, 428 US 280, 49 L Ed 2d 944, 96 S Ct 2978 and Lockett v Ohio, 438 US 586, 57 L Ed 2d 973, 98 S Ct 2954, that the sentencer in a capital case may not be precluded from considering any mitigating factor. This principle is rationally irreconcilable with the principle of Furman v Georgia, 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726—that a sentencer's discretion to return a death sentence must be constrained by specific standards, so that the death penalty is not inflicted in a random and capricious fashion. Furman requires constraints on the sentencer's discretion to "impose" the death penalty, while Woodson-Lockett forbids constraints on the sentencer's discretion to "decline to impose" it—which are one and the same. Although the Eighth Amendment's text arguably supports the view in Furman that unfettered discretion makes death sentences so random and infrequent as to make their imposition cruel and unusual, the Woodson-Lockett principle bears no relation to the Amendment's text. Nor does the doctrine of stare decisis require adherence to Woodson-Lockett, since the objectives of the doctrine, certainty and predictability, have been demonstrably undermined rather than furthered by the attempt to rest a jurisprudence upon two incompatible principles. Thus, even if correct, Walton's assertion that in two respects the state procedure deprived the sentencer of discretion to consider all mitigating circumstances cannot state an Eighth Amendment violation.

White, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and V, in which Rehnquist, C.J., and O'Connor, Scalia, and Kennedy, JJ., joined, and an opinion with respect to Parts III and IV, in which Rehnquist, C.J., and O'Connor, and Kennedy, JJ., joined. Scalia, J., filed an opinion concurring in part and concurring in the judgment. Brennan, J., filed a dissenting opinion, in which Marshall, J., joined. Blackmun, J., filed a dissenting opinion, in which Brennan, Marshall, and Stevens, JJ., joined. Stevens, J., filed a dissenting opinion.

APPEARANCES OF COUNSEL

Timothy K. Ford argued the cause for petitioner.
Paul Joseph McMurdie argued the cause for respondent.
Briefs of Counsel, p 945, infra.

OPINION OF THE COURT

Justice **White** announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and V, and an opinion with respect to Parts III and IV, in which The **Chief Justice,** Justice **O'Connor,** and Justice **Kennedy** joined.

[1a, 2a, 3a, 4a] At issue in this case is the validity of the death sentence imposed by an Arizona trial court after a jury found petitioner Jeffrey Walton guilty of committing first-degree murder.

The Arizona statutes provide that a person commits first-degree murder if "[i]ntending or knowing that his conduct will cause death, such person causes the death of another with premeditation" or if in the course of committing certain specified offenses and without any mental state other than what is required for the commission of such offenses, he causes the death of any person. Ariz Rev Stat Ann

§ 13-1105 (1989). After a person has been found guilty of first-degree murder, the sentence for such crime is determined in accordance with the provisions of § 13-703(B). It is there directed that a "separate sentencing hearing . . . shall be conducted before the court alone" to determine whether the sentence shall be death or life imprisonment. In the course of such hearing, the judge is instructed to determine the existence or nonexistence of any of the aggravating or mitigating circumstances defined in subsections (F) and (G) of § 13-703. Subsection (F) defines 10 aggravating circumstances that may be considered. One of them is whether the offense was committed with the expectation of receiving anything of pecuniary value. § 13-703(F)(5). Another is whether the defendant committed the offense in an especially heinous, cruel, or depraved manner. § 13-703(F)(6). Subsection (G) defines mitigating circumstances as any factors "which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to" five specified factors.[1] The burden of establishing the existence of any of the aggravating circumstances is on the prosecution, while the burden of establishing mitigating circumstances is

---

[1] Those factors are as follows:
"1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

on the defendant. § 13-703(C). The court is directed to return a special verdict setting forth its findings as to aggravating and mitigating circumstances and then "shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection (F) of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency." § 13-703(E).

I

Petitioner Walton and his two codefendants, Robert Hoover and Sharold Ramsey, went to a bar in Tucson, Arizona, on the night of March 2, 1986, intending to find and rob someone at random, steal his car, tie him up, and leave him in the desert while they fled the State in the car. In the bar's parking lot, the trio encountered Thomas Powell, a young, off-duty Marine. The three robbed Powell at gunpoint and forced him into his car which they then drove out into the desert. While driving out of Tucson, the three asked Powell questions about where he lived and whether he had any more money. When the car stopped, Ramsey told a frightened Powell that he would not be hurt. Walton and Hoover then forced Powell out of the car and had him lie face down on the ground near the car while they debated what to do with him. Eventually, Walton instructed Hoover and Ramsey to sit in the car and turn the radio up loud. Walton then took a .22 caliber derringer and marched Powell off into the desert. After walking a short distance, Walton forced Powell to lie down on the ground, placed his foot on Powell's neck, and shot Powell once in the head. Walton later told Hoover and Ramsey that he had shot Powell and that he had "never seen a man pee in his pants before." Powell's body was found approximately a week later, after Walton was arrested and led police to the murder site. A medical examiner determined that Powell had been blinded and rendered unconscious by the shot but was not immediately killed. Instead, Powell regained consciousness, apparently floundered about in the

desert, and ultimately died from dehydration, starvation, and pneumonia approximately a day before his body was found.

A jury convicted Walton of first-degree murder after being given instructions on both premeditated and felony murder. See Ariz Rev Stat Ann § 13-1105 (1989). The trial judge then conducted the separate sentencing hearing required by § 13-703(B). The State argued that two aggravating circumstances were present: (1) The murder was committed "in an especially heinous, cruel or depraved manner," § 13-703(F)(6), and (2) the murder was committed

---

"2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

"3. The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

"4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

"5. The defendant's age." Ariz Rev Stat Ann § 13-703(G) (1989).

for pecuniary gain. § 13-703(F)(5). In mitigation Walton presented testimony from a psychiatrist who opined that Walton had a long history of substance abuse which impaired his judgment, see § 13-703(G)(1), and that Walton may have been abused sexually as a child. Walton's counsel also argued Walton's age, 20 at the time of sentencing, as a mitigating circumstance. See § 13-703(G)(5). At the conclusion of the hearing, the trial court found "beyond any doubt" that Walton was the one who shot Powell. The court also found that the two aggravating circumstances pressed by the State were present. The court stated that it had considered Walton's age and his capacity to appreciate the wrongfulness of his conduct, as well as all of the mitigating factors urged by defendant's counsel. The court then concluded that that there were "no mitigating circumstances sufficiently substantial to call for leniency." App 61. See § 13-703 (1988). The court sentenced Walton to death.

The Arizona Supreme Court affirmed Walton's conviction and sentence. 159 Ariz 571, 769 P2d 1017 (1989). Relying on its prior decisions, the court rejected various specific challenges to the constitutionality of the Arizona death penalty statute, some of which are pressed here, and then proceeded to conduct its independent review of Walton's sentence in order to "ensure that aggravating factors were proven beyond a reasonable doubt and all appropriate mitigation was

considered." Id., at 586, 769 P2d, at 1032.[2] The court began by examining the "especially heinous, cruel or depraved" aggravating circumstance found by the trial judge. The court pointed out that it previously had determined that a murder is committed in an especially cruel manner when "the perpetrator inflicts mental anguish or physical abuse before the victim's death," id., at 586, 769 P2d, at 1032, (citations omitted), and that "[m]ental anguish includes a victim's uncertainty as to his ultimate fate." Ibid. In this case, the court concluded that there was ample evidence that Powell suffered mental anguish prior to his death.[3] The Arizona Supreme Court also found the evidence sufficient to conclude that the crime was committed in an especially depraved manner, pointing out that it had defined a depraved murder as one where "the perpetrator relishes the murder, evidencing debasement or perversion," Id., at 587, 769 P2d, at 1033.[4]

---

[2] In the course of its opinion, the court also rejected Walton's challenge, not repeated in this Court, that Hoover and not Walton actually shot Powell. The court pointed out that because the jury was instructed on both felony and premeditated murder but entered only a general verdict, the trial court was required under Arizona law to independently make the determination mandated by Enmund v Florida, 458 US 782, 73 L Ed 2d 1140, 102 S Ct 3368 (1982), and Tison v Arizona, 481 US 137, 95 L Ed 2d 127, 107 S Ct 1676 (1987), that Walton killed, intended to kill, attempted to kill, or as a participant in a felony was recklessly indifferent to the killing of Powell. 159 Ariz, at 585, 769 P2d, at 1031. The court then held that the trial court's Enmund determination was based on substantial evidence. 159 Ariz, at 586, 769 P2d, at 1032.

[3] The court argued that Powell must have realized as he was being driven out of Tucson into the desert that he might be harmed, and the court pointed out that Powell was obviously frightened enough that Ramsey tried to reassure him that he would not be harmed. Then, the court noted, Walton and Hoover forced Powell to lie on the ground while they argued over his fate, and eventually Walton marched Powell off into the desert with a gun but no rope, surely making Powell realize that he was not going to be tied up and left unharmed. The court further observed that Powell was so frightened that he urinated on himself. Id., at 586-587, 769 P2d, at 1032-1033.

[497 US 647]

Additionally, the court found that the pecuniary gain circumstance was present. Id., at 588, 769 P2d, at 1034. After examining Walton's mitigating evidence regarding his substance abuse and his youth, the court concluded that there were "no mitigating circumstances sufficient to call for lenience." Id., at 589, 769 P2d, at 1035. Finally, the court conducted its proportionality review and determined that Walton's death sentence was "proportional to sentences imposed in similar cases." Id., at 590, 769 P2d, at 1036.

Because the United States Court of Appeals for the Ninth Circuit has held the Arizona death penalty statute to be unconstitutional for the reasons submitted by Walton in this case, see Adamson v Ricketts, 865 F2d 1011 (1988) (en banc), we granted certiorari, 493 US 808, 107 L Ed 2d 18, 110 S Ct 49 (1989), to resolve the conflict and to settle issues that are of importance generally in the administration of the death penalty. We now affirm the judgment of the Arizona Supreme Court.

II

[1b] Walton's first argument is that every finding of fact underlying the sentencing decision must be made by a jury, not by a judge, and that the Arizona scheme would be constitutional only if a jury decides what aggravating and mitigating circumstances are present in a given case and the trial judge then imposes sentence based on those findings. Contrary to Walton's assertion, however: "Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court." Clemons v Mississippi, 494 US 738, 745, 108 L Ed 2d 725, 110 S Ct 1441 (1990).

We repeatedly have rejected constitutional challenges to Florida's death sentencing scheme, which provides for sentencing by the judge, not the jury. Hildwin v Florida, 490

[497 US 648]

US 638, 104 L Ed 2d 728, 109 S Ct 2055 (1989) (per curiam); Spaziano v Florida, 468 US 447, 82 L Ed 2d 340, 104 S Ct 3154 (1984); Proffitt v Florida, 428 US 242, 49 L Ed 2d 913, 96 S Ct 2960 (1976). In Hildwin, for example, we stated that "[t]his case presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida," 490 US, at 638, 104 L Ed 2d 728, 109 S Ct 2055, and we ultimately concluded that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." Id., at 640-641, 104 L Ed 2d 728, 109 S Ct 2055.

The distinctions Walton attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

---

[4] The court concluded that Walton's reference to having " 'never seen a man pee in his pants before' " constituted evidence of "callous fascination with the murder" and demonstrated "an indifference to the suffering of the victim and . . . a sense of pleasure" taken "in the killing." Id., at 587, 769 P2d, at 1033.

Walton also suggests that in Florida aggravating factors are only sentencing "considerations" while in Arizona they are "elements of the offense." But as we observed in Poland v Arizona, 476 US 147, 90 L Ed 2d 123, 106 S Ct 1749 (1986), an Arizona capital punishment case: "Aggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment. Thus, under Arizona's capital sentencing scheme, the judge's finding of any particular aggravating circumstance does not of itself 'convict' a defendant (i.e., require the death penalty), and the failure to find any particular aggravating circumstance does not 'acquit' a defendant (i.e., preclude the death penalty)." Id., at 156, 90 L Ed 2d 123, 106 S Ct 1749 (citation omitted).

Our holding in Cabana v Bullock, 474 US 376, 88 L Ed 2d 704, 106 S Ct 689 (1986), provides further support for our conclusion. Cabana held that an appellate court could constitutionally make the Enmund v Florida, 458 US 782, 88 L Ed 2d 704, 106 S Ct 689 (1982), finding—that the

[497 US 649]

defendant killed, attempted to kill, or intended to kill—in the first instance. We noted that "Enmund, 'does not affect the state's definition of any substantive offense, even a capital offense,'" 474 US, at 385, 88 L Ed 2d 704, 106 S Ct 689 (citations omitted), and that "while the Eighth Amendment prohibits the execution of such defendants, it does not supply a new element of the crime of capital murder that must be found by the jury." 474 US, at 385, n 3, 88 L Ed 2d 704, 106 S Ct 689. Enmund only places "a substantive limitation on sentencing, and like other such limits it need not be enforced by the jury." 474 US, at 386, 88 L Ed 2d 704, 106 S Ct 689. If the Constitution does not require that the Enmund finding be proved as an element of the offense of capital murder, and does not require a jury to make that finding, we cannot conclude that a State is required to denominate aggravating circumstances "elements" of the offense or permit only a jury to determine the existence of such circumstances.

We thus conclude that the Arizona capital sentencing scheme does not violate the Sixth Amendment.

III

[2b] Also unpersuasive is Walton's contention that the Arizona statute violates the Eighth and Fourteenth Amendments because it imposes on defendants the burden of establishing, by a preponderance of the evidence, the existence of mitigating circumstances sufficiently substantial to call for leniency. See Ariz Rev Stat Ann §§ 13-703(C) and 13-703(E) (1989). It is true that the Court has refused to countenance state-imposed restrictions on what mitigating circumstances may be considered in deciding whether to impose the death penalty. See, e.g., Lockett v Ohio, 438 US 586, 604, 57 L Ed 2d 973, 98 S Ct 2954 (1978) (plurality opinion). But Walton is not complaining that the Arizona statute or practice excludes from consideration any particular type of mitigating evidence; and it does not follow from Lockett and its progeny that a State is precluded from specifying how mitigating circumstances are to be proved. Indeed, in Lockett itself, we expressly reserved opinion on

whether "it violates the Constitution to require defendants to bear the risk of nonpersuasion as to the existence of mitigating circumstances in capital cases." Id., at 609, and n 16, 57 L Ed 2d 973, 98 S Ct 2954 (plurality opinion).

In Martin v Ohio, 480 US 228, 94 L Ed 2d 267, 107 S Ct 1098 (1987), we upheld the Ohio practice of imposing on a capital defendant the burden of proving by a preponderance of the evidence that she was acting in self-defense when she allegedly committed the murder. In Leland v Oregon, 343 US 790, 96 L Ed 1302, 72 S Ct 1002 (1952), the Court upheld, in a capital case, a requirement that the defense of insanity be proved beyond a reasonable doubt by the defendant, see also Rivera v Delaware, 429 US 877, 50 L Ed 2d 160, 97 S Ct 226 (1976), and in Patterson v New York, 432 US 197, 53 L Ed 2d 281, 97 S Ct 2319 (1977), we rejected the argument that a State violated due process by imposing a preponderance of the evidence standard on a defendant to prove the affirmative defense of extreme emotional disturbance.

The basic principle of these cases controls the result in this case. So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency. Mullaney v Wilbur, 421 US 684, 44 L Ed 2d 508, 95 S Ct 1881 (1975), is not to the contrary. Mullaney struck down on due process grounds a state statute that required a convicted murder defendant to negate an element of the offense of murder in order to be entitled to a sentence for voluntary manslaughter. No such burden is placed on defendants by Arizona's capital sentencing scheme. We therefore, decline to adopt as a constitutional imperative a rule that would require the court to consider the mitigating circumstances claimed by a defendant unless the State negated them by a preponderance of the evidence.

Neither does Mills v Maryland, 486 US 367, 100 L Ed 2d 384, 108 S Ct 1860 (1988), lend support to Walton's position. There this Court reversed a

death sentence because it concluded that the jury instructions given at the sentencing phase likely led the jury to believe that any particular mitigating circumstance could not be considered unless the jurors unanimously agreed that such circumstance was present. The Court's focus was on whether reasonable jurors would have read the instructions to require unanimity and, if so, the possible consequences of such an understanding. Here, of course, the judge alone is the sentencer, and Mills is therefore beside the point.

Furthermore, Mills did not suggest that it would be forbidden to require each individual juror, before weighing a claimed mitigating circumstance in the balance, to be convinced in his or her own mind that the mitigating circumstance has been proved by a preponderance of the evidence. To the contrary, the jury in that case was instructed that it had to find that any mitigating circumstances had been proved by a preponderance of the evidence. Id., at 387, 100 L Ed 2d 384, 108 S Ct 1860. Neither the petitioner in Mills nor the Court in its opinion hinted that there was any constitutional objection to that aspect of the instructions.

We therefore reject Walton's argument that Arizona's allocation of the burdens of proof in a capital sentencing proceeding violates the Constitution.

IV

[3b] Walton insists that because § 13-703(E) provides that the court "shall" impose the death penalty if one or more aggravating circumstances are found and mitigating circumstances are held insufficient to call for leniency, the statute creates an unconstitutional presumption that death is the proper sentence. Our recent decisions in Blystone v Pennsylvania, 494 US 299, 108 L Ed 2d 255, 110 S Ct 1078 (1990), and Boyde v California, 494 US 370, 108 L Ed 2d 316, 110 S Ct 1190 (1990), foreclose this submission. Blystone rejected a challenge to a jury instruction based on a Pennsylvania statute requiring the imposition of the death penalty if aggravating circumstances were found to exist but no mitigating

[497 US 652]

circumstances were present. We pointed out that "[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence," 494 US, at 307, 108 L Ed 2d 255, 110 S Ct 1078 (footnote omitted), and concluded that because the Pennsylvania statute did not preclude the sentencer from considering any type of mitigating evidence, id., at 308, 108 L Ed 2d 255, 110 S Ct 1078 it was consonant with that principle. In addition, the Court concluded that the statute was not "impermissibily 'mandatory' as that term was understood" in Woodson v North Carolina, 428 US 280, 49 L Ed 2d 944, 96 S Ct 2978 (1976), and Roberts v Louisiana, 428 US 325, 49 L Ed 2d 974, 96 S Ct 3001 (1976), because it did not automatically impose death upon conviction for certain types of murder. 494 US, at 305, 108 L Ed 2d 255, 110 S Ct 1078. The same is true of the Arizona statute.

Similarly, Boyde v California, supra, upheld a pattern jury instruction which stated that "[i]f you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death." See 494 US, at 374, 108 L Ed 2d 316, 110 S Ct 1190 (emphasis omitted). The Court specifically noted that "there is no . . . constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.' " Id., at 377, 108 L Ed 2d 316, 110 S Ct 1190 (quoting Franklin v Lynaugh, 487 US 164, 181, 101 L Ed 2d 155, 108 S Ct 2320 (1988) (plurality opinion)).

Walton's arguments in this case are no more persuasive than those made in Blystone and Boyde.

V

[4b] Walton's final contention is

that the especially heinous, cruel, or depraved aggravating circumstance as interpreted by the Arizona courts fails to channel the sentencer's discretion as required by the Eighth and Fourteenth Amendments. Walton contends that the Arizona factor fails to pass constitutional muster for the same reasons this Court found Oklahoma's "especially heinous, atrocious, or cruel" aggravating

circumstance to be invalid in Maynard v Cartwright, 486 US 356, 100 L Ed 2d 372, 108 S Ct 1853 (1988), and Georgia's "outrageously or wantonly vile, horrible or inhuman" circumstance to be invalid in Godfrey v Georgia, 446 US 420, 64 L Ed 2d 398, 100 S Ct 1759 (1980).

Maynard v Cartwright and Godfrey v Georgia, however, are distinguishable in two constitutionally significant respects. First, in both Maynard and Godfrey the defendant was sentenced by a jury and the jury either was instructed only in the bare terms of the relevant statute or in terms nearly as vague. See 486 US, t 358-359, 363-364, 100 L Ed 2d 372, 108 S Ct 1853; 446 US, at 426, 64 L Ed 2d 398, 100 S Ct 1759 (plurality opinion). Neither jury was given a constitutional limiting definition of the challenged aggravating factor. Second, in neither case did the State appellate court, in reviewing the propriety of the death sentence, purport to affirm the death sentence by applying a limiting definition of the aggravating circumstance to the facts presented. 486 US, at 364, 100 L Ed 2d 372, 108 S Ct 1853; 446 US, at 429, 64 L Ed 2d 398, 100 S Ct 1759 (plurality opinion). These points were crucial to the conclusion we reached in Maynard. See 486 US, at 363-364, 100 L Ed 2d 372, 108 S Ct 1853. They are equally crucial to our decision in this case.

[5-8] When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in Maynard and Godfrey. But the logic of those cases has no place in the context of sentencing by a trial judge. Trial judges are presumed to know the law and to apply it in making their decisions. If the Arizona Supreme Court has narrowed the definition of the "especially heinous, cruel or depraved" aggravating circumstance, we presume that Arizona trial judges are applying the narrower definition. It is irrelevant that the statute itself may not narrow the construction of the factor. Moreover, even if a trial judge fails to apply the narrowing construction or applies an improper construction, the Constitution does not necessarily require that a

state appellate court vacate a death sentence based on that factor. Rather, as we held in Clemons v Mississippi, 494 US 738, 108 L Ed 2d 725, 110 S Ct 1441 (1990), a state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined or the court may eliminate consideration of the factor altogether and determine whether any remaining aggravating circumstances are sufficient to warrant the death penalty.

[4c, 9] When a federal court is asked to review a state court's application of an individual statutory aggravating or mitigating circumstance in a particular case, it must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer. If so, then the federal court must attempt to determine whether the state courts have further defined the vague terms and, if they have done so, whether those definitions are constitutionally sufficient, i.e., whether they provide *some* guidance to the sentencer. In this case there is no serious argument that Arizona's "especially heinous, cruel or depraved" aggravating factor is not facially vague. But the Arizona Supreme Court has sought to give substance to the operative terms, and we find that its construction meets constitutional requirements.

[4d] The Arizona Supreme Court stated that "a crime is committed in an especially cruel manner when the perpetrator inflicts mental anguish or physical abuse before the victim's death," and that "[m]ental anguish includes a victim's uncertainty as to his ultimate fate." 159 Ariz , at 586, 769 P2d, at 1032. The court rejected the State's argument that the six days Powell suffered after being shot constituted cruelty within the meaning of the statute. The court pointed out that it had limited the cruelty circumstance in prior cases to situations where the suffering of the victim was intended by or foreseeable to the killer. Id., at 587, 769 P2d, at 1033.

In Maynard v Cartwright, we expressed approval of a definition that would limit Oklahoma's "especially heinous,

[497 US 655]

atrocious, or cruel" aggravating circumstance to murders involving "some kind of torture or physical abuse," 486 US, at 364-365, 100 L Ed 2d 372, 108 S Ct 1853, but we also noted that such a construction was not the only one "that would be constitutionally acceptable." Id., at 365, 100 L Ed 2d 372, 108 S Ct 1853. The construction given by the Arizona Supreme Court to the cruelty aspect of the Arizona aggravating circumstance is virtually identical to the construction we approved in Maynard.

The Arizona Supreme Court's construction also is similar to the construction of Florida's "especially heinous, atrocious, or cruel" aggravating circumstance that we approved in Proffitt v Florida, 428 US, at 255-256, 49 L Ed 2d 913, 96 S Ct 2960 (joint opinion of Stewart, Powell, and Stevens, JJ.). Recognizing that the proper degree of definition of an aggravating factor of this nature is not susceptible of mathematical precision, we conclude that the definition given to the "especially cruel" provision by the Arizona Supreme Court is constitutionally sufficient because it gives meaningful guidance to the sentencer. Nor can we fault the state court's statement that a crime is committed in an especially "depraved" manner when the perpetrator "relishes the murder, evidencing debasement or perversion," or "shows an indifference to the suffering of the victim and evidences a sense of pleasure" in the killing. See 159 Ariz, at 587, 769 P2d, at 1033.

[10, 11] Walton nevertheless contends that the heinous, cruel, or depraved factor has been applied in an arbitrary manner and, as applied, does not distinguish his case from cases in which the death sentence has not been imposed. In effect Walton challenges the proportionality review of the Arizona Supreme Court as erroneous and asks us to overturn it. This we decline to do, for we have just concluded that the challenged factor has been construed by the Arizona courts in a manner that furnishes sufficient guidance to the sentencer. This being so, proportionality review is not constitutionally required, and we "lawfully may presume that [Walton's] death sentence was not 'wantonly and freakishly' imposed—

and thus that the sentence is not disproportionate within any recognized meaning of the Eighth Amendment." McCleskey v Kemp, 481 US 279, 306, 308, 95 L Ed 2d 262, 107 S Ct 1756 (1987); Pulley v Harris, 465 US 37, 43, 79 L Ed 2d 29, 104 S Ct 871 (1984). Furthermore, the Arizona Supreme Court plainly undertook its proportionality review in good faith and found that Walton's sentence was proportional to the sentences imposed in cases similar to his. The Constitution does not require us to look behind that conclusion.

The judgment of the Arizona Supreme Court is affirmed.

It is so ordered.

SEPARATE OPINIONS

Justice **Scalia,** concurring in part and concurring in the judgment.

Today a petitioner before this Court says that a state sentencing court (1) had unconstitutionally *broad* discretion to sentence him to death instead of imprisonment, *and* (2) had unconstitutionally *narrow* discretion to sentence him to imprisonment instead of death. An observer unacquainted with our death penalty jurisprudence (and in the habit of thinking logically) would probably say these positions cannot both be right. The ultimate choice in capital sentencing, he would point out, is a unitary one—the choice between death and imprisonment. One cannot have discretion whether to select the one yet lack discretion whether to select the other. Our imaginary observer would then be surprised to discover that, under this Court's Eighth Amendment jurisprudence of the past 15 years, petitioner would have a strong chance of winning on *both* of these antagonistic claims, simultaneously—as evidenced by the facts that four Members of this Court think he should win on both, see post, at 677, 111 L Ed 2d, at 544 (Blackmun, J., dissenting), and that an en banc panel of a Federal Court of Appeals so held in an essentially identical case, see Adamson v Ricketts, 865 F2d 1011, 1029-1044 (CA9 1988). But that just shows that our jurisprudence and logic have long since parted ways. I write separately to say that, and explain why, I will no longer seek to apply one of the two incompatible

branches of that jurisprudence. I agree with the Court's analysis of petitioner's first claim, and concur in its opinion as to Parts I, II, and V. As to the second claim, I concur only in the judgment.

I

A

Over the course of the past 15 years, this Court has assumed the role of rulemaking body for the States' administration of capital sentencing—effectively requiring capital sentencing proceedings separate from the adjudication of guilt, see, e. g., Woodson v North Carolina, 428 US 280, 301-305, 49 L Ed 2d 944, 96 S Ct 2978 (1976) (plurality opinion); Gregg v Georgia, 428 US 153, 195, 49 L Ed 2d 859, 96 S Ct 2909 (1976) (opinion announcing judgment), dictating the type and extent of discretion the sentencer must and must not have, see, e. g., Lockett v Ohio, 438 US 586, 57 L Ed 2d 973, 98 S Ct 2954 (1978) (plurality opinion); Godfrey v Georgia, 446 US 420, 64 L Ed 2d 398, 100 S Ct 1759 (1980), requiring that certain categories of evidence must and must not be admitted, see, e. g., Skipper v South Carolina, 476 US 1, 90 L Ed 2d 1, 106 S Ct 1669 (1986); Booth v Maryland, 482 US 496, 96 L Ed 2d 440, 107 S Ct 2529 (1987), undertaking minute inquiries into the wording of jury instructions to ensure that jurors understand their duties under our labyrinthine code of rules, see, e. g., Caldwell v Mississippi, 472 US 320, 86 L Ed 2d 231, 105 S Ct 2633 (1985); Mills v Maryland, 486 US 367, 100 L Ed 2d 384, 108 S Ct 1860 (1988), and prescribing the procedural forms that sentencing decisions must follow, see, e. g., McKoy v North Carolina, 494 US 433, 108 L Ed 2d 369, 110 S Ct 1227 (1990). The case that began the development of this Eighth Amendment jurisprudence was Furman v Georgia, 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726 (1972) (per curiam), which has come to stand for the principle that a sentencer's discretion to return a death sentence must be constrained by specific standards, so that the death penalty is not inflicted in a random and capricious fashion.

In Furman, we overturned the sentences of two men convicted and sentenced to death in state courts for murder and one man so convicted and sentenced for rape, under statutes

[497 US 658]

that gave the jury complete discretion to impose death for those crimes, with no standards as to the factors it should deem relevant. The brief per curiam gave no reasons for the Court's decision, other than to say that "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eight and Fourteenth Amendments." Id., at 239-240, 33 L Ed 2d 346, 92 S Ct 2726. To uncover the reasons underlying the decision in Furman, one must turn to the opinions of the five Justices forming the majority, each of whom wrote separately and none of whom joined any other's opinion. Of these opinions, two rested on the broadest possible ground—that the death penalty was cruel and unusual punishment in all circumstances. See id., at 305, 33 L Ed 2d 346, 92 S Ct 2726 (Brennan, J., concurring); id., at 369-371, 33 L Ed 2d 346, 92 S Ct 2726 (Marshall, J., concurring). A third, that of Justice Douglas, rested on a narrower ground—that the discretionary capital sentencing systems under which the petitioners had been sentenced were operated in a manner that discriminated against racial minorities and unpopular groups. See id., at 256-257, 33 L Ed 2d 346, 92 S Ct 2726 (concurring opinion).

The critical opinions, however, in light of the subsequent development of our jurisprudence, were those of Justices Stewart and White. They focused on the infrequency and seeming randomness with which, under the discretionary state systems, the death penalty was imposed. Justice Stewart wrote:

> "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the

> petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed . . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique
>
> [497 US 659]
>
> penalty to be so wantonly and so freakishly imposed." Id., at 309-310, 33 L Ed 2d 346, 92 S Ct 2726 (concurring opinion) (footnotes omitted).

Justice White took a similar view. In his opinion the death sentences under review violated the Eighth Amendment because "as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice." Id., at 313, 33 L Ed 2d 346, 92 S Ct 2726. "[T]here is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not," ibid., so that it constitutes a "pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes," id., at 312, 33 L Ed 2d 346, 92 S Ct 2726. The opinions of both Justice Stewart and Justice White went out of the way to say that capital punishment was not in itself a cruel and unusual punishment, and that a mandatory system of capital sentencing, in which everyone convicted of a particular crime received that punishment, would "present quite different issues." Id., at 310-311, 33 L Ed 2d 346, 92 S Ct 2726 (White, J., concurring); see also id., at 307-308, 33 L Ed 2d 346, 92 S Ct 2726 (Stewart, J., concurring).

Furman led at least 35 States to adopt new capital sentencing procedures that eliminated some of the discretion previously conferred to impose or withhold the death penalty. See Gregg v Georgia, supra, at 179, 49 L Ed 2d 859, 96 S Ct 2909. In 1976, we upheld against Eighth Amendment challenge three "guided discretion" schemes representative of these measures, which, in varying forms, required the sentencer to consider certain specified aggravating and mitigating circumstances in reaching its decision. In the principal case, Gregg v Georgia, supra, the three-Justice opinion announcing the judgment read Furman as "mandat[ing] that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that *discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action,"* id., at 189, 49 L Ed 2d 859, 96 S Ct 2909 (joint opinion of Stewart, Powell, and Stevens,

[497 US 660]

JJ.) (emphasis added). See also id., at 221-222, 49 L Ed 2d 859, 96 S Ct 2909 (White, J., joined by Burger, C. J., and Rehnquist, J., concurring in judgment); Proffitt v Florida, 428 US 242, 251, 49 L Ed 2d 913, 96 S Ct 2960 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); id., at 260, 49 L Ed 2d 913, 96 S Ct 2960 (White, J., joined by Burger, C. J., and Rehnquist, J., concurring in judgment); Jurek v Texas, 428 US 262, 276, 49 L Ed 2d 929, 96 S Ct 2950 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); id., at 279, 49 L Ed 2d 929, 96 S Ct 2950 (White, J., joined by Burger, C. J., and Rehnquist, J., concurring in judgment).

Since the 1976 cases, we have routinely read Furman as standing for the proposition that "channelling and limiting . . . the sentencer's discretion in imposing the death penalty" is a "fundamental constitutional requirement," Maynard v Cartwright, 486 US 356, 362, 100 L Ed 2d 372, 108 S Ct 1853 (1988), and have insisted that States furnish the sentencer with " 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death,' " Godfrey v Georgia, 446 US, at 428, 64 L Ed 2d 398, 100 S Ct 1759 (footnotes omitted). Only twice since 1976 have we actually invalidated a death sentence because of inadequate guidance to the sentencer, see Maynard, supra, at 362-364, 100 L Ed 2d 372, 108 S Ct 1853; Godfrey, supra, at 428-429, 433, 64 L Ed 2d 398, 100 S Ct 1759, but we have repeatedly incanted the principle that "unbridled discretion" is unacceptable, Penry v Lynaugh, 492 US 302, 106 L Ed 2d 256, 109 S Ct 2934 (1989), that capital sentencing procedures must constrain and guide the sentencer's discretion to ensure "that the death penalty is not meted out arbitrarily and capriciously," California v Ramos, 463 US 992, 999, 77 L Ed 2d 1171, 103 S Ct 3446 (1983), that "the State must establish rational criteria that narrow the decisionmaker's judgment," McCleskey v Kemp, 481 US 279, 305, 93 L Ed 2d 934, 107 S Ct 837 (1987), that "death penalty statutes [must] be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion," California v Brown, 479 US 538, 541, 93 L Ed 2d 934, 107 S Ct 837 (1987), that our cases require "procedural protections . . . to ensure that the death penalty will be imposed in a consistent, rational manner," Barclay v Florida, 463 US 939, 960, 77 L Ed 2d 1134, 103 S Ct 3418 (1983) (Stevens,

J., concurring in judgment), and that "[States] must administer [the death] penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not," Spaziano v Florida, 468 US 447, 460, 82 L Ed 2d 340, 104 S Ct 3154 (1984). See also Zant v Stephens, 462 US 862, 877, 77 L Ed 2d 235, 103 S Ct 2733 (1983); Eddings v Oklahoma, 455 US 104, 110, 71 L Ed 2d 1, 102 S Ct 869 (1982); Pulley v Harris, 465 US 37, 51, 79 L Ed 2d 29, 104 S Ct 871 (1984); Booth v Maryland, 482 US, at 502, 96 L Ed 2d 440, 107 S Ct 2529; Mills v Maryland, 486 US, at 374, 100 L Ed 2d 384, 108 S Ct 1860; Lowenfield v Phelps, 484 US 231, 244, 98 L Ed 2d 568, 108 S Ct 546 (1988).

B

Shortly after introducing our doctrine *requiring* constraints on the sentencer's discretion to "impose" the death penalty, the Court began developing a doctrine *forbidding* constraints on the sentencer's discretion to *"decline* to impose" it. McCleskey v Kemp, supra, at 304, 95 L Ed 2d 262, 107 S Ct 1756 (emphasis deleted). This second doctrine—counterdoctrine would be a better word—has completely exploded whatever coherence the notion of "guided discretion" once had.

Some States responded to Furman by making death the mandatory punishment for certain categories of murder. We invalidated these statutes in Woodson v North Carolina, 428 US 280, 49 L Ed 2d 944, 96 S Ct 2978 (1976), and Roberts v Louisiana, 428 US 325, 49 L Ed 2d 974, 96 S Ct 3001 (1976), a plurality of the Court concluding that the sentencing process must accord at least some consideration to the "character and record of the individual offender." Woodson, supra, at 304, 49 L Ed 2d 944, 96 S Ct 2978 (plurality opinion). Other States responded to Furman by leaving the sentencer some discretion to spare capital defendants, but limiting the kinds of mitigating circumstances the sentencer could consider. We invalidated these statutes in Lockett v Ohio, 438 US 586, 57 L Ed 2d 973, 98 S Ct 2954 (1978), a plurality saying the Eighth Amendment requires that the sentencer "not be precluded from considering, as a mitigating factor, *any aspect* of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," id.,

at 604, 57 L Ed 2d 973, 98 S Ct 2954 (opinion of Burger, C. J., joined by Stewart, Powell, and Stevens, JJ.) (emphasis omitted and added). The reasoning of the pluralities in these cases was later adopted by a majority of the Court. See Sumner v Shuman, 483 US 66, 97 L Ed 2d 56, 107 S Ct 2716 (1987) (embracing Woodson); Eddings v Oklahoma, supra (embracing Lockett).

These decisions, of course, had no basis in Furman. One might have supposed that curtailing or eliminating discretion in the sentencing of capital defendants was not only consistent with Furman, but positively required by it—as many of the States, of course, *did* suppose. But in Woodson and Lockett, it emerged that uniform treatment of offenders guilty of the same capital crime was not only not *required* by the Eighth Amendment, but was all but *prohibited*. Announcing the proposition that "[c]entral to the application of the [Eighth] Amendment is a determination of contemporary standards regarding the infliction of punishment," Woodson, supra, at 288, 49 L Ed 2d 944, 96 S Ct 2978, and pointing to the steady growth of discretionary sentencing systems over the previous 150 years (those very systems we had found unconstitutional in Furman), Woodson, supra, at 291-292, 49 L Ed 2d 944, 96 S Ct 2978, the pluralities in those cases determined that a defendant could not be sentenced to death unless the sentencer was convinced, by an unconstrained and unguided evaluation of offender and offense, that death was the appropriate punishment, id., at 304-305, 49 L Ed 2d 944, 96 S Ct 2978; Lockett, supra, at 604-605, 57 L Ed 2d 973, 98 S Ct 2954. In short, the practice which in Furman had been described as the discretion to sentence to death and pronounced constitutionally prohibited, was in Woodson and Lockett renamed the discretion not to sentence to death and pronounced constitutionally required.

As elaborated in the years since, the Woodson-Lockett principle has prevented States from imposing all but the most minimal constraints on the sentencer's discretion to decide that an offender eligible for the death penalty should nonetheless not receive it. We have, in the first place, repeatedly rebuffed States' efforts to channel that discretion by

specifying objective factors on which its exercise should rest. It would misdescribe the sweep of this principle to say that "all mitigating evidence" must be considered by the sentencer. That would assume some objective criterion of what is mitigating, which is precisely what we have forbidden. Our cases proudly announce that the Constitution effectively prohibits the States from excluding from the sentencing decision *any* aspect of a defendant's character or record, or *any* circumstance surrounding the crime: that the defendant had a poor and deprived childhood, or that he had a rich and spoiled childhood; that he had a great love for the victim's race, or that he had a pathological hatred for the victim's race; that he has limited mental capacity, or that he has a brilliant mind which can make a great contribution to society; that he was kind to his mother, or that he despised his mother. *Whatever* evidence bearing on the crime or the criminal the defense wishes to introduce as rendering the defendant less deserving of the death penalty must be admitted into evidence and considered by the sentencer. See, e.g., Lockett, supra, at 597, 57 L Ed 2d 973, 98 S Ct 2954 ("character, prior record, age, lack of specific intent to cause death, and . . . relatively minor part in the crime"); Eddings v Oklahoma, supra, at 107, 71 L Ed 2d 1, 102 S Ct 869 (inter alia, that the defendant's "parents were divorced when he was 5 years old, and until he was 14 [he] lived with his mother without rules or supervision"); Hitchcock v Dugger, 481 US 393, 397, 95 L Ed 2d 347, 107 S Ct 1821 (1987) (inter alia, that "petitioner had been one of seven children in a poor family that earned its living by picking cotton; that his father had died of cancer; and that petitioner had been a fond and affectionate uncle"); Skipper v South Carolina, 476 US, at 4, 90 L Ed 2d 1, 106 S Ct 1669 (that "petitioner had been a well-behaved and well-adjusted prisoner" while awaiting trial). Nor may States channel the sentencer's consideration of this evidence by defining the weight or significance it is to receive—for example, by making evidence of mental retardation relevant only insofar as it bears on the question whether the crime was committed deliberately. See Penry v Lynaugh,

492 US 302, 322-323, 328, 106 L Ed 2d 256, 109 S Ct 2934 (1989). Rather, they must let the sentencer "give effect," McKoy v North Carolina, 494 US 433, 442-443, 108 L Ed 2d 369, 110 S Ct 1227 (1990), to mitigating evidence in whatever manner it pleases. Nor, when a jury is assigned the sentencing task, may the State attempt to impose structural rationality on the sentencing decision by requiring that mitigating circumstances be found unanimously, see id., at 443, 108 L Ed 2d 369, 110 S Ct 1227; each juror must be allowed to determine and "give effect" to his perception of what evidence favors leniency, regardless of whether those perceptions command the assent of (or are even comprehensible to) other jurors.

To acknowledge that "there perhaps is an inherent tension" between this line of cases and the line stemming from Furman, McCleskey v Kemp, 481 US, at 363, 95 L Ed 2d 262, 107 S Ct 1756 (Blackmun, J., dissenting), is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II. And to refer to the two lines as pursuing "twin objectives," Spaziano v Florida, 468 US, at 459, 82 L Ed 2d 340, 104 S Ct 3154, is rather like referring to the twin objectives of good and evil. They cannot be reconciled. Pursuant to Furman, and in order "to achieve a more rational and equitable administration of the death penalty," Franklin v Lynaugh, 487 US 164, 181, 101 L Ed 2d 155, 108 S

Ct 2320 (1988), we require that States "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,'" Godfrey v Georgia, 446 US, at 428, 64 L Ed 2d 398, 100 S Ct 1759. In the next breath, however, we say that "the State *cannot* channel the sentencer's discretion . . . to consider any relevant [mitigating] information offered by the defendant," McCleskey v Kemp, supra, at 306, 95 L Ed 2d 262, 107 S Ct 1756 (emphasis added), and that the sentencer must enjoy unconstrained discretion to decide whether any sympathetic factors bearing on the defendant or the crime indicate that he does not "deserve to be sentenced to death," Penry v Lynaugh, supra, at 326, 106 L Ed 2d 256, 109 S Ct 2934. The latter requirement quite obviously destroys whatever

rationality and predictability the former requirement was designed to achieve.*

The Court has attempted to explain the contradiction by saying that the two requirements serve different functions: The first serves to "narrow" according to rational criteria the class of offenders eligible for the death penalty, while the second guarantees that each offender who is death-eligible is not actually sentenced to death without "an individualized assessment of the appropriateness of the death penalty." Penry v Lynaugh, supra, at 317, 106 L Ed 2d 256, 109 S Ct 2934; see also Zant v Stephens, 462 US, at 878-879, 77 L Ed 2d 235, 103 S Ct 2733. But it is not "individualized assessment" that is the issue here. No one asserts that the Constitution

permits condemnation en masse. The issue is whether, in the process of the individualized sentencing determination, the society may specify which factors are relevant, and which are not—whether it may insist upon a rational scheme in which all sentencers making the individualized determinations apply the same standard. That is *precisely* the issue that was involved in Furman, no more and no less. Having held, in Furman, that the aggravating factors to be sought in the individualized determination must be specified in advance, we are able to refer to the defendants who will qualify under those factors as a "class of death eligibles"—from among whom those actually to receive death will be selected on the basis of unspecified mitigating factors. But if we had held in Lockett that the *mitigating* factors to be sought in the individualized determination must be specified in advance, we would equally have been able to refer to the defendants who will qualify under those factors as a "class of mercy eligibles"—from among whom those actually to receive mercy will be selected on the basis of unspecified aggravating factors. In other words, classification *versus* individuation does not *explain* the opposite treatment of aggravating and mitigating factors; it is merely one way of *describing the result* of that opposite treatment. What is involved here is merely setting standards for individualized determinations, and the question remains why the Constitution demands that the aggravating standards and mitigating standards be accorded opposite treatment. It is impossible to understand why. Since the individualized determination is a unitary one (does this defendant deserve death for this crime?) once one says each sentencer must be able to answer "no" for whatever reason it deems morally sufficient (and indeed, for whatever reason any one of 12 jurors deems morally sufficient), it becomes impossible to claim that the Constitution requires consistency and rationality among sentencing determinations to be preserved by strictly limiting the reasons for which each sentencer can say "yes." In fact, randomness

---

* Justice Stevens contends that the purpose of Furman is merely to narrow the group of crimes (to which the sentencer's unconstrained discretion is then applied) to some undefined point near the "tip of the pyramid" of murder—the base of that pyramid consisting of all murders, and the apex consisting of a particular type crime of murder defined in minute detail. Post, at 715-718, 111 L Ed 2d, at 568-570 (dissenting opinion). There is, however, no hint in our Furman jurisprudence of an attempt to determine what constitutes the critical line below the "tip of the pyramid," and to assess whether *either* the elements of the crime are alone sufficient to bring the statute above that line (in which case no aggravating factors whatever need be specified) *or* whether the aggravating factors are sufficient for that purpose. I read the cases (and the States, in enacting their post-Furman statutes, have certainly read them) as requiring aggravating factors to be specified *whenever* the sentencer is given discretion. It is a means of confining the sentencers' discretion—giving them something specific to look for rather than leaving them to wander at large among all aggravating circumstances. That produces a consistency of result which is unachievable—no matter how narrowly the crime is defined—if they are left to take into account any aggravating factor at all. We have, to be sure, held that the discretion-limiting aggravating factor can duplicate a factor already required by the definition of the crime, see Lowenfield v Phelps, 484 US 231, 98 L Ed 2d 568, 108 S Ct 546 (1988), but in those circumstances the sentencer's discretion is *still* focused and confined. We have never allowed sentencers to be given complete discretion without a requisite finding of aggravating factors. If and when the Court redefines Furman to permit the latter, and to require an assessment (I cannot imagine on what basis) that a sufficiently narrow level of the "pyramid" of murder has been reached, I shall be prepared to reconsider my evaluation of Woodson and Lockett.

and "freakishness" are even more evident in a system that requires aggravating factors to be found in great detail, since it permits sentencers to accord different treatment, for whatever mitigating reasons they wish, not only to two different murderers, but to two murderers whose crimes have been found to be of similar gravity. It is difficult enough to justify the Furman requirement so long as the States are *permitted* to allow random mitigation; but to impose it while simultaneously *requiring* random mitigation is absurd. I agree with Justice White's observation that the Lockett rule represents a sheer "about-face" from Furman, an outright negation of the principle of guided discretion that brought us down the path of regulating capital sentencing procedure in the first place. Lockett v Ohio, 438 US, at 622, 57 L Ed 2d 973, 98 S Ct 2954 (opinion concurring in part, dissenting in part, and concurring in judgments).

C

The simultaneous pursuit of contradictory objectives necessarily produces confusion. As The Chief Justice has pointed out, in elaborating our doctrine "the Court has gone from pillar to post, with the result that the sort of reasonable predictability upon which legislatures, trial courts, and appellate courts must of necessity rely has been all but completely sacrificed." Lockett v Ohio, supra, at 629, 57 L Ed 2d 973, 98 S Ct 2954 (Rehnquist, J., dissenting). Repeatedly over the past 20 years state legislatures and courts have adopted discretion-reducing procedures to satisfy the Furman principle, only to be told years later that their measures have run afoul of the Lockett principle. Having said in Furman that unconstrained discretion in capital sentencing was unacceptable, see Furman v Georgia, 408 US, at 256-257, 33 L Ed 2d 346, 92 S Ct 2726 (Douglas, J., concurring); id., at 309-310, 33 L Ed 2d 346, 92 S Ct 2726 (Stewart, J. concurring); id., at 311-312, 33 L Ed 2d 346, 92 S Ct 2726 (White, J., concurring), we later struck down mandatory schemes, adopted in response to Furman, because they constrained sentencing discretion. See Woodson v North Carolina, 428 US 280, 49 L Ed 2d 944, 96 S Ct 2978 (1976). Having sustained specific state sentencing schemes

in 1976 because they provided the constitutionally necessary degree of "guided discretion" in the form of objective sentencing criteria, see, e. g., Proffitt v Florida, 428 US 242, 49 L Ed 2d 913, 96 S Ct 2960 (1976); Jurek v Texas, 428 US 262, 49 L Ed 2d 929, 96 S Ct 2950 (1976), we later struck down those very schemes because they required the sentencer to confine itself to the factors contained in those objective criteria, see Hitchcock v Dugger, 481 US 393, 95 L Ed 2d 347, 107 S Ct 1821 (1987) (Florida); Penry v Lynaugh, 492 US 302, 106 L Ed 2d 256, 109 S Ct 2934 (1989) (Texas). Having encouraged the States to adopt the "important additional safeguard against arbitrariness" of requiring specific jury findings supporting its sentencing decision, Gregg v Georgia, 428 US, at 198, 49 L Ed 2d 859, 96 S Ct 2909 (joint opinion of Stewart, Powell, and Stevens, JJ.), we later made such findings impossible as to mitigating circumstances (and thus meaningless as a whole) by prohibiting a requirement that the jury agree on mitigating circumstances, McKoy v North Carolina, 494 US 433, 108 L Ed 2d 369, 110 S Ct 1227 (1990). For state lawmakers, the lesson has been that a decision of this Court is nearly worthless as a guide for the future; though we approve or seemingly even require some sentencing procedure today, we may well retroactively prohibit it tomorrow.

In a jurisprudence containing the contradictory commands that discretion to impose the death penalty must be limited but discretion not to impose the death penalty must be virtually unconstrained, a vast number of procedures support a plausible claim in one direction or the other. Conscientious counsel are obliged to make those claims, and conscientious judges to consider them. There has thus arisen, in capital cases, a permanent floodtide of stay applications and petitions for certiorari to review adverse judgments at each round of direct and collateral review, alleging novel defects in sentencing procedure arising out of some permutation of either Furman or Lockett. State courts, attempting to give effect to the contradictory principles in our jurisprudence and reluctant to condemn an offender without virtual certainty that no error has been committed, often suspend the normal rules of procedural bar to give ear to each new claim that

the sentencer's discretion was overconstrained or underconstrained. An adverse ruling typically gives rise to yet another round of federal habeas review—and by the time that is concluded we may well have announced yet another new rule that will justify yet another appeal to the state courts. The effects of the uncertainty and unpredictability are evident in this Court alone, even though we see only the tip of a mountainous iceberg. Since granting certiorari in McKoy v North Carolina, supra, on February 21, 1989 (the first of this Term's capital cases to have certiorari granted), we have received over 350 petitions for certiorari in capital cases; 8 were granted, and 84 were held for the 9 cases granted for this Term; 37 were held for this case alone. Small wonder, then, that the statistics show a capital punishment system that has been approved, in many States, by the democratic vote of the people, that has theoretically been approved as constitutional by this Court, but that seems unable to function except as a parody of swift or even timely justice. As of May 1990 there were 2,327 convicted murderers on death row; only 123 have been executed since our 1972 Furman decision. NAACP Legal Defense and Educational Fund, Death Row, USA 1 (1990). Those executions that have been carried out have occurred an average of eight years after the commission of the capital crime. See E. Carnes & S. Stewart, Summary of Post-Furman Capital Punishment Data § VIII (unpublished report by Alabama Assistant Attorneys General on file with Harvard Law School Library, 1988), cited in Powell, Commentary, 102 Harv L Rev 1013, 1038, n 26 (1989).

In my view, it is time for us to reexamine our efforts in this area and to measure them against the text of the constitutional provision on which they are purportedly based.

II

The Eighth Amendment, made applicable to the States by the Fourteenth Amendment, see Robinson v California, 370 US 660, 666, 8 L Ed 2d 758, 82 S Ct 1417 (1962), provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The requirement as to punishments stands in stark contrast to the requirement for bail and fines, which are invalid if they are "excessive." When punishments other than fines are involved, the Amendment explicitly requires a court to consider not only whether the penalty is severe or harsh, but also whether it is "unusual." If it is not, then the Eighth Amendment does not prohibit it, no matter how cruel a judge might think it to be. Moreover, the Eighth Amendment's prohibition is directed against cruel and unusual *punishments*. It does not, by its terms, regulate the procedures of sentencing as opposed to the substance of punishment. As The Chief Justice has observed, "[t]he prohibition of the Eighth Amendment relates to the character of the punishment, and not to the process by which it imposed." Gardner v Florida, 430 US 349, 371, 51 L Ed 2d 393, 97 S Ct 1197 (1977) (Rehnquist, J., dissenting). Thus, the procedural elements of a sentencing scheme come within the prohibition, if at all, only when they are of such a nature as systematically to render the infliction of a cruel punishment "unusual."

Our decision in Furman v Georgia, 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726 (1972), was arguably supported by this text. As I have already described, see Part I-A, supra, the critical opinions of Justice Stewart and Justice White in that case rested on the ground that discretionary capital sentencing had made the death sentence such a random and infrequent event among capital offenders ("wanto[n] and freakis[h]," as Justice

Stewart colorfully put it) that its imposition had become cruel and unusual. As far as I can discern (this is not the occasion to explore the subject), that is probably not what was meant by an "unusual punishment" in the Eighth Amendment—that is to say, the text did not originally prohibit a traditional form of punishment that is rarely imposed, as opposed to a form of punishment that is not traditional. But the phrase can bear

the former meaning. Moreover, since in most States, until the beginning of this century, the death penalty was mandatory for the convictions for which it was prescribed, see H. Bedau, The Death Penalty in America 10-11 (3d ed 1982); W. Bowers, Executions in America 8 (1974), it cannot be said that the Furman interpretation of the phrase is contradicted by the clear references to a permissible death penalty in the Constitution, see US Const, Amdt 5; US Const, Amdt 14, § 1. I am therefore willing to adhere to the precedent established by our Furman line of cases, and to hold that when a State adopts capital punishment for a given crime but does not make it mandatory, the Eighth Amendment bars it from giving the sentencer unfettered discretion to select the recipients, but requires it to establish in advance, and convey to the sentencer, a governing standard. See Maynard v Cartwright, 486 US 356, 100 L Ed 2d 372, 108 S Ct 1853 (1988); Godfrey v Georgia, 446 US 420, 64 L Ed 2d 398, 100 S Ct 1759 (1980).

The Woodson-Lockett line of cases, however, is another matter. As far as I can discern, that bears no relation whatever to the text of the Eighth Amendment. The mandatory imposition of death—without sentencing discretion—for a crime which States have traditionally punished with death cannot possibly violate the Eighth Amendment, because it will not be "cruel" (neither absolutely nor for the particular crime) and it will not be "unusual" (neither in the sense of being a type of penalty that is not traditional nor in the sense of being rarely or "freakishly" imposed). It is quite immaterial that most States have abandoned the practice of automatically sentencing to death all offenders guilty of a capital crime, in favor of a separate procedure in which the sentencer is given the opportunity to consider the appropriateness of death in the individual case, see Woodson v North Carolina, 428 US, at 294-295, 49 L Ed 2d 944, 96 S Ct 2978 (joint opinion of Stewart, Powell, and Stevens, JJ.); still less is it relevant that mandatory capital sentencing is (or alleged to be) out of touch

with " 'contemporary community values' " regarding the administration of justice, id., at 295, 49 L Ed 2d 944, 96 S Ct 2978 (citation omitted).

I am aware of the argument, see id., at 302-303, 49 L Ed 2d 944, 96 S Ct 2978; Roberts v Louisiana, 428 US, at 333-335, 49 L Ed 2d 974, 96 S Ct 3001 (plurality opinion), that mandatory capital sentencing schemes may suffer from the same defects that characterize absolutely discretionary schemes. In mandatory systems, the argument goes, juries frequently acquit offenders whom they find guilty but believe do not deserve the death penalty for their crime; and because this "jury nullification" occurs without the benefit of any guidance or standards from the State, the result is the same "arbitrary and capricious imposition of death sentences" struck down in Furman. One obvious problem with this argument is that it proves too much, invalidating Furman at the same time that it validates Woodson. If juries will ignore their instructions in determining guilt in a mandatory capital sentencing scheme, there is no reason to think they will not similarly chafe at the " 'clear and objective standards' . . . provid[ing] 'specific and detailed guidance,' " Godfrey v Georgia, supra, at 428, 64 L Ed 2d 398, 100 S Ct 1759 (footnotes omitted), that Furman requires. The Furman approach must be preferred, since it is facially implausible that the risk of arbitrariness arising from juries' ignoring their instructions is greater than the risk of arbitrariness from giving them no instructions at all. The theory of "unusualness" adopted in Furman is tenuous enough when used to invalidate explicitly conferred standardless sentencing discretion; I am unwilling to extend that theory to situations in which the sentencer is *denied* that discretion, on the basis of a conjecture (found nowhere else in the law) that juries systematically disregard their oaths.

Despite the fact that I think Woodson and Lockett find no proper basis in the Constitution, they have some claim to my adherence because of the doctrine of stare decisis. I do not reject that claim lightly, but I must reject it here. My initial and my fundamental problem, as I have described it in detail above, is not that Woodson and Lockett are wrong,

but that Woodson and Lockett are rationally irreconcilable with Furman. It is that which led me into the inquiry whether either they or Furman was wrong. I would not know how to apply them—or, more precisely, how to apply both them and Furman—if I wanted to. I cannot continue to say, in case after case, what degree of "narrowing" is sufficient to achieve the constitutional objective enunciated in Furman when I know that that objective is in any case impossible of achievement because of Woodson-Lockett. And I cannot continue to say, in case after case, what sort of restraints upon sentencer discretion are unconstitutional under Woodson-Lockett when I know that the Constitution positively *favors* constraints under Furman. Stare decisis cannot command the impossible. Since I cannot possibly be guided by what seem to me incompatible principles, I must reject the one that is plainly in error.

The objectives of the doctrine of stare decisis are not furthered by adhering to Woodson-Lockett in any event. The doctrine exists for the purpose of introducing certainty and stability into the law and protecting the expectations of individuals and institutions that have acted in reliance on existing rules. As I have described, the Woodson-Lockett principle has frustrated this very purpose from the outset—contradicting the basic thrust of much of our death penalty jurisprudence, laying traps for unwary States, and generating a fundamental uncertainty in the law that shows no signs of ending or even diminishing.

I cannot adhere to a principle so lacking in support in constitutional text and so plainly unworthy of respect under stare decisis. Accordingly, I will not, in this case or in the future, vote to uphold an Eighth Amendment claim that the sentencer's discretion has been unlawfully restricted.

III

I turn, finally, to petitioner's

Eighth Amendment claims in the present case.

With respect to the Furman claim, I agree with the Court's analysis and conclusion, and join those portions of its opinion. The aggravating circumstance found to exist in this case, that the murder was committed in an "especially heinous, cruel or depraved" manner—cruelty being defined as involving the infliction of mental anguish or physical abuse, and depravity defined as involving the relishing of the murder or the victim's suffering—defines with reasonable specificity certain elements that distinguish the death-eligible offense from other murders. They are precise enough, in my view, both to guide the sentencer and to enable review of the sentence.

[2c, 3c] As to petitioner's claim that in two respects the Arizona procedure deprived the sentencer of discretion to consider all mitigating circumstances: For the reasons stated above I do not believe that claim, if correct, states an Eighth Amendment violation.

I therefore concur in part and concur in the judgment.

Justice **Brennan,** with whom Justice **Marshall** joins, dissenting.*

The Court's most cavalier application today of longstanding Eighth Amendment doctrines developed over the course of two decades of careful and sustained inquiry, when added to the host of other recent examples of crabbed application of doctrine in the death penalty context, see, e.g., Blystone v Pennsylvania, 494 US 299, 108 L Ed 2d 255, 110 S Ct 1078 (1990); Boyde v California, 494 US 370, 108 L Ed 2d 316, 110 S Ct 1190 (1990); cf. Saffle v Parks, 494 US 484, 108 L Ed 2d 415, 110 S Ct 1257 (1990); Sawyer v Smith, ante, p 227, 111 L Ed 2d 193, 110 S Ct 2822, suggests that this Court is losing sight of its responsibility to ensure that the ultimate criminal sanction is meted out only in accordance with constitutional principle. While I join Justice Blackmun's dissenting opinions in today's decisions, I also adhere to my

view that the death penalty is in all circumstances a cruel and unusual punishment:

> "The fatal constitutional infirmity in the punishment of death is that it treats 'members of the human race as nonhumans, as objects to be toyed with and discarded. [It is] thus inconsistent with the fundamental premise of the [Cruel and Unusual Punishments] Clause that even the vilest criminal remains a human being possessed of common human dignity.' As such it is a penalty that 'subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the [Clause].' I therefore would hold, on that ground alone, that death is today a cruel and unusual punishment prohibited by the Clause. 'Justice of this kind is obviously no less shocking than the crime itself, and the new "official" murder, far from offering redress for the offense committed against society, adds instead a second defilement to the first.' " Gregg v Georgia, 428 US 153, 230-231, 49 L Ed 2d 859, 96 S Ct 2909 (1976) (dis-

---

* [This opinion applies also to No. 89-189, Lewis v Jeffers, post, p 764, 111 L Ed 2d 606, 110 S Ct 3092.]

senting opinion) (citations and footnote omitted).

See also Furman v Georgia, 408 US 238, 257-306, 33 L Ed 2d 346, 92 S Ct 2726 (1972) (concurring opinion).

Even if I did not believe that the death penalty is wholly inconsistent with the constitutional principle of human dignity, I would agree that the concern for human dignity lying at the core of the Eighth Amendment requires that a decision to impose the death penalty be made only after an assessment of its propriety in each individual case.

> "A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of
>
> **[497 US 676]**
>
> a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Woodson v North Carolina, 428 US 280, 304, 49 L Ed 2d 944, 96 S Ct 2978 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

Thus "a system of capital punishment at once [must be] consistent and principled but also humane and sensible to the uniqueness of the individual." Eddings v Oklahoma, 455 US 104, 110, 71 L Ed 2d 1, 102 S Ct 869 (1982).[1]

In the past, "this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." Id., at 118, 71 L Ed 2d 1, 102 S Ct 869 (O'Connor, J., concurring). But today's decisions reflect, if anything, the opposing concern that States ought to be able to execute prisoners

[497 US 677]

with as little interference as possible from our established Eighth Amendment doctrine.

---

[1] Justice Scalia's separate opinion dismissing the settled principle underlying Lockett v Ohio, 438 US 586, 57 L Ed 2d 973, 98 S Ct 2954 (1978), based on the assertion that this doctrinal principle cannot be reconciled with that underlying Furman v Georgia, 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726 (1972), reflects a misdescription and apparent misunderstanding of our doctrine. Justice Scalia's concern that the Lockett principle is not commanded by the explicit text of the Eighth Amendment has long been rejected by this Court; it is well established that the Eighth Amendment's proscription of cruel and unusual punishments "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v Dulles, 356 US 86, 101, 2 L Ed 2d 630, 78 S Ct 590 (1958) (plurality opinion); see Weems v United States, 217 US 349, 378, 54 L Ed 793, 30 S Ct 544 (1910). The Lockett and Furman principles speak to different concerns underlying our notion of civilized punishment; the Lockett rule flows primarily from the Amendment's core concern for human dignity, see Woodson v North Carolina, 428 US 280, 304, 49 L Ed 2d 944, 96 S Ct 2978 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.), whereas the Furman principle reflects the understanding that the Amendment commands that punishment not be meted out in a wholly arbitrary and irrational manner. 428 US, at 303, 49 L Ed 2d 944, 96 S Ct 2978. Our cases have applied these principles together to "insis[t] that capital punishment be imposed fairly, and with reasonable consistency, or not at all." Eddings v Oklahoma, 455 US 104, 112, 71 L Ed 2d 1, 102 S Ct 869 (1982) (emphasis added); see, e.g., Penry v Lynaugh, 492 US 302, 319, 326-328, 106 L Ed 2d 256, 109 S Ct 2934 (1989). See generally post, at 714-719, 111 L Ed 2d, at 567-570 (Stevens, J., dissenting).

Justice **Blackmun,** with whom Justice **Brennan,** Justice **Marshall,** and Justice **Stevens** join, dissenting.

In my view, two Arizona statutory provisions, pertinent here, run afoul of the established Eighth Amendment principle that a capital defendant is entitled to an individualized sentencing determination which involves the consideration of all relevant mitigating evidence. The first is the requirement that the sentencer may consider *only* those mitigating circumstances proved by a preponderance of the evidence. The second is the provision that the defendant bears the burden of establishing mitigating circumstances "sufficiently substantial to call for leniency." I also conclude that Arizona's "heinous, cruel or depraved" aggravating circumstance, as construed by the Arizona Supreme Court, provides no meaningful guidance to the sentencing authority and, as a consequence, is unconstitutional.

I therefore dissent from the Court's affirmance of Jeffrey Alan Walton's sentence of death.

I

During the past 15 years, this Court's death penalty jurisprudence consistently has stressed the importance of an individualized-sentencing process, one that permits "the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." Woodson v North Carolina, 428 US 280, 303, 49 L Ed 2d 944, 96 S Ct 2978 (1976) (plurality opinion). Such a procedure is required because "[a] process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." Id., at 304, 49 L Ed 2d 944, 96 S Ct 2978. A plurality of this Court stated in

Lockett v Ohio, 438 US 586, 604, 57 L Ed 2d 973, 98 S Ct 2954 (1978), that a capital sentencer may "not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Emphasis in original.) In Eddings v Oklahoma, 455 US 104, 114-115, 71 L Ed 2d 1, 102 S Ct 869 (1982), a majority held that "[t]he sentencer, and the [state appellate court] on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration."[1] The Court, moreover, has insisted that the substance as well as the form of Lockett must be respected. See Penry v Lynaugh, 492 US 302, 319, 106 L Ed 2d 256, 109 S Ct 2934 (1989) ("[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence").

From those holdings two closely

---

[1] The Court in Eddings further instructed that on remand "the state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances." 455 US, at 117, 71 L Ed 2d 1, 102 S Ct 869.

related principles emerge. The first is that the "qualitative difference" between death and all other penalties necessitates a greater degree of "reliability in the determination that death is the appropriate punishment in a specific case." Woodson v North Carolina, 428 US, at 305, 49 L Ed 2d 944, 96 S Ct 2978 (plurality opinion). The second is that the particularized sentencing procedure mandated by the Eighth Amendment requires that the sentencer be allowed to consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v Ohio, 438 US, at 604, 57 L Ed 2d 973, 98 S Ct 2954 (plurality opinion). Only if the defendant is allowed an unrestricted opportunity to present relevant mitigating evidence will a capital sentencing procedure be deemed sufficiently reliable to satisfy constitutional standards. The Court said in Eddings that "the rule in Lockett

recognizes that a consistency produced by ignoring individual differences is a false consistency." 455 US, at 112, 71 L Ed 2d 1, 102 S Ct 869.

The Court today upholds an Arizona statute which (a) excludes from the sentencer's consideration all mitigating circumstances that the defendant has failed to prove by a preponderance of the evidence, and (b) places upon the capital defendant the burden of demonstrating that the mitigating circumstances so proved are "sufficiently substantial to call for leniency." The plurality makes no effort to explain how these provisions are consistent with the Eighth Amendment principles announced in Woodson, Lockett, and their progeny.[2] Indeed, the plurality's analysis of these issues includes

virtually no discussion of capital cases, and those that the majority does discuss are demonstrably inapposite. Rather, the plurality relies on "analogous" cases that do not involve the death penalty. Its analysis thereby ignores what I had thought to be settled principles regarding the distinctive nature of capital sentencing.

---

[2] The plurality does assert, however, that its analysis is consistent with Lockett and its progeny. See ante, at 649-650, 111 L Ed 2d, at 525-526. In contrast, Justice Scalia, who provides the fifth vote for affirmance, expresses no view on the question whether the Arizona statute comports with the standards announced in the Court's prior decisions. He argues, instead, that any violation of Lockett is immaterial because Lockett should be overruled. Eight Members of the Court agree that Lockett remains good law, and I shall not attempt today a detailed exposition of this Court's Eighth Amendment jurisprudence. I do wish, however, to make two brief observations:

First, Justice Scalia's argument is not new—as his citation to then Justice Rehnquist's dissent in Lockett demonstrates. See ante, at 667, 111 L Ed 2d, at 537. The rule that a capital sentencer must be allowed to consider all relevant mitigating evidence has been vigorously opposed, intensely debated, and eventually accepted by all Members of this Court as a common starting point for analysis in individual cases. See, e.g., Hitchcock v Dugger, 481 US 393, 95 L Ed 2d 347, 107 S Ct 1821 (1987) (Scalia, J., writing for a unanimous Court). This history suggests not only that considerations of stare decisis support continued application of the Lockett rule. It indicates as well that this Court's Eighth Amendment jurisprudence is not so patently irrational that it should be abruptly discarded.

My second observation relates to the integrity of this Court's adjudicative process. The validity of Lockett has been presumed throughout this case, and the arguments raised by Justice Scalia have not been addressed in the petitioner's brief or argument. It is disturbing that the decisive vote in a capital case should turn on a single Justice's rejection of a line of authority that both parties to this controversy, and eight Members of this Court, have accepted.

A

The Arizona capital sentencing statute flatly provides: "[T]he burden of establishing the existence of the [mitigating] circumstances included in subsection G of this section is on the defendant." Ariz Rev Stat Ann § 13-703(C) (1989). The Arizona Supreme Court has construed the statute to require that any mitigating circumstances must be proved by a preponderance of the evidence. See, e.g., State v McMurtrey, 143 Ariz 71, 73, 691 P2d 1099, 1101 (1984). There can be no doubt that this provision of Arizona law excludes from the sentencer's consideration relevant mitigating evidence that might affect the determination whether the death penalty is appropriate. Exclusion of that evidence is unsupported by this Court's decisions and serves no legitimate state interest.

The plurality does not analyze this case within the framework established by our Eighth Amendment decisions. Rather, the plurality relies almost exclusively on noncapital cases upholding the State's right to place upon the defendant the burden of proving an affirmative defense. See ante, at 650, 111 L Ed 2d, at 526. Reliance on these cases is misplaced, however, since those decisions rest upon a premise that is wholly inapplicable in the capital sentencing context. In Patterson v New York, 432 US 197, 53 L Ed 2d 281, 97 S Ct 2319 (1977), the Court explained the justification in a noncapital case for allowing the burden of persuasion as to affirmative defenses to be placed upon the defendant rather than the State:

> "The Due Process Clause, as we see it, does not put New York to the choice of abandoning those defenses or undertaking
>
>
>
> to disprove their existence in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment.
>
> . . . . . .
>
> ". . . [I]n each instance of a murder conviction under the present law, New York will have proved beyond a reasonable doubt that the defendant has intentionally killed another person, an act which it is not disputed the State may constitutionally criminalize and punish. *If the State nevertheless chooses to recognize a factor that mitigates the degree of criminality or punishment, we think the State may assure itself that the fact has been established with reasonable certainty.* To recognize at all a mitigating circumstance does not require the State to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate." Id., at 207-209, 53 L Ed 2d 281, 97 S Ct 2319 (emphasis added).

The Court's decision thus rested upon an argument that "the greater power includes the lesser": since the State constitutionally could decline to recognize the defense *at all,* it could take the lesser step of placing the burden of proof upon the defendant. That reasoning is simply inapposite when a capital defendant introduces mitigating evidence, since the State lacks the greater power to exclude the evidence entirely.[3]

But it makes no sense to analyze petitioner's claim of Lockett error by drawing on "analogous" cases outside the sphere of capital sentencing. In developing the requirement

of individualized capital sentencing (with unlimited presentation of relevant mitigating evidence), this Court has not purported to rely on principles applicable to criminal prosecutions generally. Instead, the Court's Eighth Amendment jurisprudence explicitly has proceeded from the premise "that death is a punishment different from all other sanctions in kind rather than degree." Woodson v North Carolina, 428 US, at 303-304, 49 L Ed 2d 944, 96 S Ct 2978 (plurality opinion).[4] To suggest that the principles announced in Lockett and Eddings are applicable only insofar as they are consistent with the constitutional rules governing noncapital cases is to deprive those decisions of all significance.

Application of the preponderance standard in this context is especially problematic in light of the fact that the "existence" of a mitigating factor frequently is not a factual issue to which a "yes" or "no" answer can be given. See Stebbing v Maryland, 469 US 900, 902-904, 83 L Ed 2d 212, 105 S Ct 276 (1984) (Marshall, J., dissenting from denial of certiorari). The statute, for example, lists as a first mitigating circumstance the fact that "[t]he defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired . . . ." Ariz Rev Stat Ann § 13-703(G)(1) (1989). Petitioner offered evidence of childhood sexual abuse. Presumably, no individual who suffers such treatment is wholly unaffected; at the same time, it is rare that such an individual is so deeply traumatized that his impairment furnishes a complete defense for his actions. The question whether an individual's capacity to behave lawfully is "impaired" is one of degree, not an either/or proposition.

The preponderance standard, however, encourages the sentencer to conclude that unless some vaguely defined threshold of "significance" has been reached, the evidence of abuse and consequent impairment cannot be considered *at all.*

Indeed, it appears that the Arizona Supreme Court has applied the statute in just this fashion. See, e.g., State v Wallace, 151 Ariz 362, 369, 728 P2d 232, 239 (1986) ("[W]e find that neither defendant's 'difficult earlier years' nor his use of 'various drugs' so affected his capacity to conform to the requirements of law that they constitute mitigating factors under § 13-703(G)(1)"), cert denied, 483 US 1011, 483 US 1011, 107 S Ct 3243 (1987); State v Rossi, 146 Ariz 359, 367, 706 P2d 371, 379 (1985) (intoxication or duress is not a mitigating circumstance unless it is substantial); State v Woratzeck, 134 Ariz 452, 458, 657 P2d 865, 871 (1982) (same); State v Nash, 143 Ariz 392, 406, 694 P2d 222, 236 (State acknowledged some degree of mental impairment but argued that "it was not significant enough to be a mitigating circumstance"), cert denied, 471 US 1143, 86 L Ed 2d 706, 105 S Ct 2689 (1985). The Arizona Supreme Court has not simply held that duress or impairment which falls below the threshold should be given reduced weight at the final stage of the sentencing process, when aggravating and mitigating circumstances are balanced. Rather, it has held that duress or impairment which falls below the threshold is not a mitigating factor. It is therefore misleading, in many instances, to characterize an Arizona court's rejection of proffered mitigating evidence as a determination that the evidence should not be credited. The trial judge instead may be acting upon the belief that a defendant's impairment, though proved, is not "significant" within the meaning of the statute. Thus, under Arizona law, a sentencing judge is entitled to give *no* weight to mitigating evidence on the ground that the evidence is *not mitigating enough.* Under the guise of a burden of proof,

---

[3] This is not the first time a Member of this Court has recognized the connection between the State's greater power to eliminate all consideration of mitigating evidence and its lesser power to place the burden of proof on the defendant. See Lockett v Ohio, 438 US 586, 633, 57 L Ed 2d 973, 98 S Ct 2954 (1978) (Rehnquist, J., concurring in part and dissenting in part) ("Because I continue to believe that the Constitution is not offended by the State's refusal to consider mitigating factors at all, there can be no infirmity in shifting the burden of persuasion to the defendant when it chooses to consider them").

[4] The plurality in Lockett stated: "We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes . . . . Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases." Id., at 604-605, 57 L Ed 2d 973, 98 S Ct 2954.

the statute provides that some mitigating evidence is not to be considered at all.[5]

Even when the trial judge's rejection of a particular mitigating circumstance is based on credibility determinations, application of the preponderance standard is unwarranted. Mitigating evidence that fails to meet this standard is not so unreliable that it has no proper place in the sentencing decision: Decisions as to punishment, like decisions as to guilt or innocence, will often be based on the *cumulative* effect of several pieces of evidence, no one of which by itself is fully persuasive. The problems with the preponderance standard are compounded when the defendant presents several possible mitigating factors. A trial judge might be 49% convinced as to each of 10 mitigating circumstances; yet he would be forced to conclude, as a matter of law, that there was no mitigation to weigh against the aggravating factors.

The Arizona Supreme Court has articulated two closely related justifications for placing upon the capital defendant the burden of proving that a mitigating circumstance exists. The court has asserted that

---

[5] One might ask what would happen if the defendant argued that he had proved the mitigating circumstance of "moderate impairment." Presumably the Arizona Supreme Court would respond that no such mitigating factor is recognized under Arizona law. In prior decisions indicating that certain proffered evidence of impairment or duress would not constitute a mitigating factor, that court has relied on the language of the Arizona statute, which requires that impairment be "significant" and duress "substantial." See, e.g., State v Rossi, 146 Ariz 359, 366-367, 706 P2d 371, 378-379 (1985). Rejection of mitigating evidence on the ground that it does not support a mitigating circumstance *as defined in the statute,* however, cannot be reconciled with Hitchcock v Dugger, 481 US 393, 95 L Ed 2d 347, 107 S Ct 1821 (1987), in which this Court held that a capital defendant cannot be restricted to proof of statutory mitigating factors.

"[f]acts which would tend to show mitigation are peculiarly within the knowledge of a defendant," State v Smith, 125 Ariz 412, 416, 610 P2d 46, 50 (1980), and that "[t]o require the State to negate every mitigating circumstance would place an impermissible burden on the State," State v Watson, 120 Ariz 441, 447, 586 P2d

[497 US 685]

1253, 1259 (1978), cert denied, 440 US 924, 59 L Ed 2d 478, 99 S Ct 1254 (1979). Until today, this Court has never identified a state interest which outweighs the capital defendant's right to unrestricted presentation of mitigating evidence. Even if such an interest could exist, however, the interests advanced by the State in support of the preponderance standard do not withstand scrutiny.

The State's justifications are not without force when a criminal defendant offers an affirmative defense in a trial to determine guilt or innocence. A jury's decision as to an affirmative defense *is* a binary choice: either the defense is accepted or it is not. Since the jury's acceptance of the defense automatically results in an acquittal (or in conviction on a lesser charge), the State may suffer real prejudice if the defense is established on the basis of minimally persuasive evidence which the State has no practical opportunity to rebut—especially if it is difficult to anticipate the defenses that a particular individual may offer. In contrast, if a capital sentencer believes that certain mitigating evidence has *some* persuasive value, but does not meet the preponderance standard, the sentencer simply may give that evidence reduced weight—weight proportional to its persuasiveness—at the final balancing stage.[6] No legitimate interest is served

[497 US 686]

by forbidding the sentencer to give such evidence any effect at all.

The Arizona rule at issue here falls well within the prohibition announced in Lockett and its progeny. The statute defines a wide range of relevant mitigating evidence—evidence with some degree of persuasiveness which has not been proved by a preponderance—that *cannot* be given effect by the capital sentencer. That rule finds no support in this Court's precedents, and it serves no legitimate governmental interest. I therefore conclude that the Arizona death penalty statute, as construed by the Supreme Court of Arizona, impermissibly limits the sentencer's consideration of relevant mitigating evidence, and thereby violates the Eighth Amendment.[7]

---

[6] See Eddings v Oklahoma, 455 US 104, 114-115, 71 L Ed 2d 1, 102 S Ct 869 (1982) ("The sentencer, and the [state appellate court] on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration").

As the Arizona Supreme Court has recognized, the determination that an aggravating or mitigating factor exists does not require that the factor be given any particular weight. "The statute does not require that the number of aggravating circumstances be weighed against the number of mitigating circumstances. One mitigating circumstance, for example, may be 'sufficiently substantial' to outweigh two aggravating circumstances. The converse is also true—one aggravating circumstance could be so substantial that two or more mitigating circumstances would not be 'sufficiently substantial to call for leniency. ARS § 13-454(D).'" State v Brookover, 124 Ariz 38, 42, 601 P2d 1322, 1326 (1979).

[7] Nor is Arizona's decision to place the burden of proving mitigation on the defendant saved by the fact that the State is required to prove aggravating circumstances beyond a reasonable doubt. See McCleskey v Kemp, 481 US 279, 304, 95 L Ed 2d 262, 107 S Ct 1756 (1987) ("In contrast to the carefully

B

I also believe that the Constitution forbids the State of Arizona to place upon the capital defendant the burden of proving mitigating circumstances that are "sufficiently substantial to call for leniency." Ariz Rev Stat Ann § 13-703(E) (1989). Once an aggravating circumstance has been established, the Arizona statute mandates that death is to be deemed the appropriate penalty unless the defendant proves otherwise. That statutory provision, in my view, establishes a "presumption of death"[8] in violation of the Eighth Amendment.

[497 US 687]

The Arizona Supreme Court repeatedly has indicated that a defendant's mitigating evidence will be deemed "sufficiently substantial to call for leniency" only if the mitigating factors "outweigh" those in aggravation.[9] That court has sustained the requirement on the ground that "[w]hen the issue of guilt is settled and only the question of punishment remains, due process is not offended by requiring the already guilty defendant to carry the burden of showing why he should receive leniency." State v Watson, 120 Ariz, at 447, 586 P2d, at 1259. If the mitigating and aggravating circumstances are in equipoise, the statute requires that the trial judge impose capital punishment. The assertion that a sentence of death may be imposed in such a case runs directly counter to the Eighth Amendment requirement that a capital sentence must rest upon a "determination that death is the appropriate punishment in a specific case." Woodson v North Carolina, 428 US, at 305, 49 L Ed 2d 944, 96 S Ct 2978 (plurality opinion).

The plurality takes a hard-line approach and makes little effort to ground its holding on our Eighth Amendment jurisprudence. In support of its position, the plurality cites only two very recent capital cases, Blystone v Pennsylvania, 494 US 299, 108 L Ed 2d 255, 110 S Ct 1078 (1990), and Boyde v California, 494 US 370, 108 L Ed 2d 316, 110 S Ct 1190 (1990). Reliance even on these precedents is misplaced. The statutes upheld in those cases provided that the death penalty would be imposed "only after a determination that the aggravating circumstances outweigh the mitigating circumstances present in the particular crime committed by the particular defendant, or that there are no such mitigating circumstances." Blystone, 494 US, at 305, 108 L Ed 2d 255, 110 S Ct 1078. In neither Boyde nor Blystone did the challenged statute require a capital

[497 US 688]

sentence when aggravating and mitigating factors are evenly balanced. Those decisions simply do not speak to the issue posed by the Arizona statute:

---

defined standards that must narrow a sentencer's discretion to *impose* the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence") (emphasis in original).

[8] See Adamson v Ricketts, 865 F2d 1011, 1041 (CA9 1988) (en banc), cert pending, No. 88-1553. See also Jackson v Dugger, 837 F2d 1469, 1474 (CA11), cert denied, 486 US 1026, 100 L Ed 2d 236, 108 S Ct 2005 (1988).

[9] See, e.g., State v McCall, 160 Ariz 119, 125, 770 P2d 1165, 1171 (1989); State v Mauro, 159 Ariz 186, 208, 766 P2d 59, 81 (1988); State v Moorman, 154 Ariz 578, 587, 744 P2d 679, 688 (1987); State v LaGrand, 153 Ariz 21, 37, 734 P2d 563, 579, cert denied, 484 US 872, 98 L Ed 2d 157, 108 S Ct 206 (1987); State v McMurtrey, 151 Ariz 105, 110, 726 P2d 202, 207 (1986), cert denied, 480 US 911, 94 L Ed 2d 530, 107 S Ct 1359 (1987).

whether the State permissibly may place upon the capital defendant the burden of demonstrating that a sentence of death is *not* appropriate.

The plurality does not attempt to explain why Arizona may require a capital sentence in a case where aggravating and mitigating circumstances are evenly balanced.[10] Indeed, the plurality does not even acknowledge that this is the dispositive question. Instead, it offers only a conclusory assertion: "So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." Ante, at 650, 111 L Ed 2d, at 526. One searches in vain for any hint of a limiting principle. May a State require that the death penalty be imposed whenever an aggravating factor is established and mitigating circumstances do not "*substantially* outweigh" those in aggravation? May a state statute provide that a death sentence is presumptively appropriate whenever an aggravating circumstance is proved, and that the presumption can be rebutted only by a showing that mitigating circumstances are "extraordinarily great"? These formulations would appear to satisfy the plurality's test: viz., that the State is required to establish an aggravating circumstance, and no mitigating evidence is excluded from the sentencer's consideration.[11] But the right to present mitigating

evidence is rendered all but meaningless if the rules that guide the sentencer's deliberations virtually ensure that the mitigating evidence will not change the outcome.[12]

Like the plurality's analysis of the requirement that mitigating circumstances be proved by a preponderance of the evidence, its approval of this provision appears to rest upon an analogy between mitigating evidence in capital sentencing and affirmative defenses in noncapital cases. In noncapital cases, of course, the States are given broad latitude to sacrifice precision for predictability by imposing determinate sentences and restricting the defendant's ability to present evidence in mitigation or excuse. If the States were similarly free to make capital punishment mandatory for specified crimes, and to prohibit the introduction of mitigating evidence or declare such evidence to be irrelevant, the plurality's reasoning today would be unassailable. There then could be no objection to a sentencing scheme which permitted a defendant to argue that the death penalty was inappropriate in his case, but placed upon his shoulders the burden of persuading the sentencer. This Court, however, repeatedly has recognized that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed," Lockett v Ohio, 438 US, at 604, 57 L Ed 2d 973, 98 S Ct 2954 (plurality opinion), and that in capital cases "the punishment should be directly related to the personal culpability of the defendant," Penry v Lynaugh, 492 US, at 327, 106 L Ed 2d 256, 109 S Ct 2934. I see no way that these principles can be squared with

---

[10] The State's asserted interest in ensuring that only "reliable" evidence is considered at the final balancing stage of course provides no basis for a requirement that death be imposed whenever the mitigating evidence found to be reliable evenly balances the aggravating circumstances.

[11] The fact that the presumption of death is triggered only by the finding of an aggravating circumstance does not save the statute. See Sumner v Shuman, 483 US 66, 78, 97 L Ed 2d 56, 107 S Ct 2716 (1987) (proof of an aggravating factor "do[es] not provide an adequate basis on which to determine whether the death sentence is the appropriate sanction in any particular case"; capital defendant is still entitled to individualized consideration of mitigating evidence).

[12] See Penry v Lynaugh, 492 US 302, 319, 106 L Ed 2d 256, 109 S Ct 2934 (1989) ("[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence"); Franklin v Lynaugh, 487 US 164, 185, 101 L Ed 2d 155, 108 S Ct 2320 (1988) (O'Connor, J., concurring in judgment) ("Indeed, the right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration").

a capital sentencing scheme which provides that doubtful cases should be resolved in favor of a sentence of death. I therefore conclude that the Constitution bars Arizona from placing upon a capital defendant the burden of proving that mitigating circumstances are "sufficiently substantial to call for leniency."

II

In Godfrey v Georgia, 446 US 420, 64 L Ed 2d 398, 100 S Ct 1759 (1980), we considered Georgia's "outrageously or wantonly vile, horrible or inhuman" aggravating circumstance. The plurality concluded: "There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" Id., at 428-429, 64 L Ed 2d 398, 100 S Ct 1759. Two Terms ago, in Maynard v Cartwright, 486 US 356, 100 L Ed 2d 372, 108 S Ct 1853 (1988), the Court unanimously struck down an Oklahoma death sentence based in part upon that State's "especially heinous, atrocious, or cruel" aggravating circumstance. The Court noted that "the language of the Oklahoma aggravating circumstance at issue . . . gave no more guidance than the 'outrageously or wantonly vile, horrible or inhuman' language that the jury returned in its verdict in Godfrey." Id., at 363-364, 100 L Ed 2d 372, 108 S Ct 1853.

The Arizona statute at issue today lists as an aggravating circumstance the conclusion that "[t]he defendant committed the offense in an especially heinous, cruel or depraved manner." Ariz Rev Stat Ann § 13-703(F)(6) (1989) (the F6 circumstance). The Arizona Supreme Court consistently has held that "[t]hese terms are considered disjunctive; the presence of any one of three factors is an aggravating circumstance." State v Beaty, 158 Ariz 232, 242, 762 P2d 519, 529 (1988), cert denied, 491 US 910, 105 L Ed 2d 708, 109 S Ct 3200 (1989). At the sentencing phase in the present case, the State relied primarily on medical evidence detailing the injuries that the victim Powell suffered when he regained consciousness after the

shooting.[13] The trial judge's sentencing order stated that he found that Walton had "committed the offense in an extremely heinous, cruel or depraved manner," App 56, but did not specify the basis for that finding. In its "independent review" of the capital sentence, the Arizona Supreme Court held that the (F)(6) circumstance was not supported by evidence of Powell's suffering after the shooting, since Walton could not have foreseen that Powell would survive his wound. The court found, however, that the murder was especially cruel since "Powell suffered great mental anguish both during the car ride when his fate was uncertain and in his final march into the desert when his fate had become certain." 159 Ariz 571, 587, 769 P2d 1017, 1033 (1989). The court also indicated that a finding of depravity would be supported by Walton's comment some hours after the shooting that he had "never seen a man pee in his pants before." Ibid.

---

[13] Defense counsel objected to the introduction of this testimony on the ground that Walton could not have foreseen Powell's suffering after the shooting, since Walton reasonably believed that Powell was dead. The trial judge overruled the objection on the

In sustaining Walton's sentence of death, the majority offers two principal grounds upon which, it says, Godfrey and Maynard may be distinguished. First, the majority points out that capital sentencing in Arizona is conducted by a trial judge who is presumed to be aware of any limiting construction announced by the State Supreme Court. Ante, at 653, 111 L Ed 2d, at 528. Second, the majority notes that the Arizona Supreme Court itself "purport[ed] to affirm the death sentence by applying a limiting definition of the aggravating circumstance to the facts presented." Ibid. In my view, neither of these factors supports the Court's decision to affirm petitioner's death sentence.

A

Unlike a jury, a sentencing judge is presumed to know the law as stated in the controlling opinions of the State Supreme Court. Even if the aggravating circumstance is vague on its face, the sentence will be valid if the judge's discretion has been suitably channeled by the "instructions" provided by the appellate court's construction of the statute. The trial judge's familiarity with the State Supreme Court's opinions, however, will serve to narrow his discretion only if that body of case law articulates a construction of the aggravating circumstance that is coherent and consistent, and that meaningfully limits the range of homicides to which the aggravating factor will apply.[14] One therefore would expect the majority to analyze Arizona Supreme Court decisions issued prior to the imposition of petitioner's sentence (Jan. 27, 1987), in order to determine whether the judge who sentenced Walton to death can be presumed to have acted on the basis of a constitutionally sufficient limiting construction of the aggravating factor. The Court, however, cites no Arizona cases at all,

---

ground that "the testimony that I understand he's going to testify to certainly goes to cruelty. . . ." Tr 233 (Jan. 26, 1987).

[14] The Arizona Supreme Court stated: "[T]he trial court's finding of cruelty is supported by the mental torment of the victim prior to the shooting rather than the events which took place afterwards." 159 Ariz 571, 587, 769 P2d 1017, 1033 (1989). The trial judge, however, made no "finding of cruelty": he found more generally that Walton "committed the offense in an extremely heinous, cruel or depraved manner." The trial judge's sentence therefore can stand only if all three of the statutory terms have been given constitutionally sufficient limiting constructions.

justifying the omission as a refusal to second-guess the State Supreme Court's proportionality review. Ante, at 655-656, 111 L Ed 2d, at 529-530. The Court thus distinguishes Godfrey and Maynard on the ground that Arizona sentencing judges are presumed to read and be guided by the opinions of the Arizona Supreme Court, yet insists, as a matter of principle, that it is barred from determining whether those opinions furnish constitutionally

adequate guidance. This, it seems to me, is strange and unusual reasoning indeed.[15]

Had the majority examined the Arizona Supreme Court's application of the "especially heinous, cruel or depraved" aggravating circumstance, it would have been hard pressed to conclude that the state court has placed meaningful limitations on the scope of the (F)(6) factor. The Arizona Supreme Court attempted to define the statutory terms in State v Knapp, 114 Ariz 531, 562 P2d 704 (1977), cert denied, 435 US 908, 55 L Ed 2d 500, 98 S Ct 1458 (1978). The court there stated: "The words 'heinous, cruel or depraved' have meanings that are clear to a person of average intelligence and understanding." Id., at 543, 562 P2d, at 716. The court then offered definitions culled from Webster's Third New International Dictionary: "heinous" was defined as "hatefully or shockingly evil: grossly bad"; "cruel" as "disposed to inflict pain esp. in a wanton, insensate or vindictive manner: sadistic"; and "depraved" as "marked by debasement, corruption, perversion or deterioration." Ibid.[16] The court explained: "What our

legislature intended to include as an aggravating circumstance was a killing wherein additional circumstances of the nature enumerated above set the crime apart from the usual or the norm." Ibid.

In State v Gretzler, 135 Ariz 42, 659 P2d 1, cert denied, 461 US 971, 77 L Ed 2d 1327, 103 S Ct 2444 (1983), the Arizona Supreme Court reviewed its prior decisions construing the (F)(6) factor. The court explained that "cruelty involves the pain and distress visited upon the victims, and that heinous and depraved go to the mental state and attitude of the perpetrator as reflected in his words and actions." 135 Ariz, at 51, 659 P2d, at 10.[17] The court also listed five factors that, in prior cases, had supported a finding that a particular killing was especially heinous or depraved. These factors were (1) "the apparent relishing of the murder by the killer," (2) "the infliction of gratuitous violence on the victim," (3) "the needless mutilation of the victim," (4) "the senselessness of the crime," and (5) "the helplessness of the victim." Id., at 52, 659 P2d, at 11. The court did not disavow the Knapp definitions; to the contrary, it cited those definitions with approval. Id., at 51, 659 P2d, at 10. Nor did the court hold that a murder could be deemed especially heinous or depraved *only* when one of these five factors was present. Rather, the court stated: "Where no circumstances, *such as the specific factors discussed above,* separate the crime from the 'norm' of first degree murders, we will reverse a finding that the crime was committed in an 'especially heinous, cruel, or depraved manner.'" Id., at 53, 659 P2d, at 12 (emphasis added).

---

[15] The majority relies on our holding in Pulley v Harris, 465 US 37, 43, 79 L Ed 2d 29, 104 S Ct 871 (1984), in arguing that proportionality review is not constitutionally required. Ante, at 655-656, 111 L Ed 2d, at 529-530. That reliance is misplaced. In Pulley the Court held that, so long as *other* safeguards at the initial sentencing proceeding adequately limit the sentencer's discretion, the Constitution does not require the additional protection of proportionality review by an appellate court. See 465 US, at 44-54, 79 L Ed 2d 29, 104 S Ct 871. Pulley is simply irrelevant when the adequacy of the initial sentencing is itself the point at issue.

[16] These definitions are strikingly similar to the jury instructions given in Maynard, in which the Oklahoma jury was told that "the term 'heinous' means extremely wicked or shockingly evil; 'atrocious' means outrageously wicked and vile; 'cruel' means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others." Cartwright v Maynard, 822 F2d 1477, 1488 (CA10 1987). The majority acknowledges, albeit obliquely, that those instructions were unconstitutionally vague. See ante, at 652-653, 111 L Ed 2d, at 528. The Tenth Circuit's assessment of the Oklahoma jury instructions is equally applicable to the definitions used in Knapp: "Vague terms do not suddenly become clear when they are defined by reference to other vague terms." Cartwright v Maynard, 822 F2d, at 1489.

[17] The court also noted that "our concept of cruelty involves not only physical pain, but

The principles announced in Gretzler have failed to place meaningful limitations on the application of the (F)(6) aggravating

circumstance. Since its decision in Gretzler, the Arizona Supreme Court has continued to identify new factors which support a finding that a particular murder was heinous or depraved. The court, for example, has held that heinousness or depravity was shown in part by the age of the victim, see State v Wallace, 151 Ariz, at 368, 728 P2d, at 238 ("[T]he fact that defendant killed two children, with whom he admittedly had no dispute and who posed no danger to him, is additional evidence of his 'shockingly evil state of mind'"); State v Zaragoza, 135 Ariz 63, 69, 659 P2d 22, 28 ("The victim in this case was 78 years old"), cert denied, 462 US 1124, 77 L Ed 2d 1356, 103 S Ct 3097 (1983); by the fact the murder was committed to eliminate a witness, see State v Correll, 148 Ariz 468, 481, 715 P2d 721, 734 (1986); State v Gillies, 142 Ariz 564, 570, 691 P2d 655, 661 (1984), cert denied, 470 US 1059, 84 L Ed 2d 834, 105 S Ct 1775 (1985); State v Smith, 141 Ariz 510, 511-512, 687 P2d 1265, 1266-1267 (1984); by the fact the victim had been kind to the killer, State v Fisher, 141 Ariz 227, 252, 686 P2d 750, 775, cert denied, 469 US 1066, 83 L Ed 2d 436, 105 S Ct 548 (1984); by the fact the killer used "special bullets . . . designed to inflict greater tissue damage," State v Rossi, 146 Ariz, at 365, 706 P2d, at 377, or "intentionally and repeatedly fir[ed] a high-powered, destructive weapon at the victim," State v Chaney, 141 Ariz 295, 313, 686 P2d 1265, 1283 (1984); by the fact "the victim was bound to an extent far greater than was necessary to achieve" the purpose of preventing her escape, State v Villafuerte, 142 Ariz 323, 331, 690 P2d 42, 50 (1984), cert denied, 469 US 1230, 84 L Ed 2d 371, 105 S Ct 1234 (1985); or by the killer's "total disregard for human life," State v Correll, 148 Ariz, at 481, 715 P2d, at 734. The Arizona Supreme Court has not purported to announce necessary conditions for a finding of heinousness or depravity. Instead, the court has ob-

---

also 'mental . . . distress visited upon the victims.'" 135 Ariz, at 51, 659 P2d, at 10, quoting State v Clark, 126 Ariz 428, 436, 616 P2d 888, 896, cert denied, 449 US 1067, 66 L Ed 2d 612, 101 S Ct 796 (1980).

served: "Our previous cases have approved findings of heinous or depraved conduct where the perpetrator acted with gratuitous violence, relished the killing *or in some other way* acted in such a fashion that his acts set him apart from the 'norm' of first degree murderers."

State v Johnson, 147 Ariz 395, 401, 710 P2d 1050, 1056 (1985) (emphasis added).

Indeed, there would appear to be few first-degree murders which the Arizona Supreme Court would *not* define as especially heinous or depraved—and those murders which *do* fall outside this aggravating circumstance are likely to be covered by some other aggravating factor. Thus, the court will find heinousness and depravity on the basis of "gratuitous violence" if the murderer uses more force than necessary to kill the victim, see State v Summerlin, 138 Ariz 426, 436, 675 P2d 686, 696 (1983); State v Ceja, 126 Ariz 35, 40, 612 P2d 491, 496 (1980), but the murder will be deemed cruel if the killer uses insufficient force and the victim consequently dies a lingering death, see State v Chaney, 141 Ariz, at 312, 686 P2d, at 1282. A determination that a particular murder is "senseless" will support a finding of depravity; but a murder to eliminate a witness is also depraved, a murder for pecuniary gain is covered by a separate aggravating circumstance,[18] and evidence showing that the defendant killed out of hatred for the victim or a desire for revenge may be used to buttress the court's conclusion that the killer "relished" the crime.

See State v Jeffers, 135 Ariz 404, 430, 661 P2d 1105, 1131, cert denied, 464 US 865, 78 L Ed 2d 174, 104 S Ct 199 (1983).[19] In State v Wallace, 151 Ariz, at 368, 728 P2d, at 238, the court's determination that the crime was "senseless" (and therefore heinous and depraved) was based in part on the fact that the defendant "steadfastly maintains there was no reason or justification for what he did"—this in a case where the defendant argued that his remorse for the crime constituted a mitigating factor.

---

[18] See Ariz Rev Stat Ann § 13-703(F)(5) (1989). Indeed, the Arizona courts have been willing to find that a particular murder was committed *both* for an unworthy purpose and for no purpose at all. In State v Tison, 129 Ariz 526, 633 P2d 335 (1981), cert denied, 459 US 882, 74 L Ed 2d 147, 103 S Ct 180 (1982), the Arizona Supreme Court found two aggravating circumstances: (1) the murders were committed for pecuniary gain, since the object of the killings was to obtain an automobile, id., at 542, 633 P2d, at 351, and (2) the murders were senseless, and therefore especially heinous and depraved, in part because the victims could not have impeded the theft of the car and the killings therefore did not further the defendants' plan, id., at 543, 633 P2d, at 352. See also State v Correll, 148 Ariz 468, 479, 715 P2d 721, 732 (1986) (pecuniary gain circumstance was established by the fact that the defendant and an accomplice "very carefully executed the armed robbery, and the murders were part of the scheme of robbery"); id., at 481, 715 P2d, at 734 ((F)(6) factor was proved because "depravity is indicated by the senselessness of the murders in that the murders were unnecessary to accomplish the robbery").

[19] The Arizona Supreme Court has identified other particularly reprehensible motives which, in its view, will support a finding of heinousness or depravity. See State v Martinez-Villareal, 145 Ariz 441, 451, 702 P2d 670, 680 (murder to demonstrate "manliness" reflects "a manifest disregard for the fundamental principles upon which our society is based"), cert denied, 474 US 975, 88 L Ed 2d 324, 106 S Ct 339 (1985); State v McCall, 139 Ariz 147, 162, 677 P2d 920, 935 (1983) (finding supported in part by the fact that the mutilation of the victims' bodies "was designed to be a 'message' to warn other people"), cert denied, 467 US 1220, 81 L Ed 2d 375, 104 S Ct 2670 (1984). Taken together, the state court's decisions reflect the indisputable fact that there is no legitimate reason to commit murder, but they provide no principled basis for identifying the most blameworthy killings.

I must also conclude that the Arizona Supreme Court's construction of "cruelty" has become so broad that it imposes no meaningful limits on the sentencer's discretion. The court in State v Knapp, 114 Ariz, at 543, 562 P2d, at 716, used a dictionary definition to regard "'cruel'" as "'disposed to inflict pain esp. in a wanton, insensate or vindictive manner: sadistic.'" This might have provided the starting point for a limiting construction that would have meaningfully distinguished the most egregious murders. This Court in Maynard expressed apparent approval of a construction that would limit the aggravating circumstance to murders involving "torture or serious physical abuse." 486 US, at 364, 100 L Ed 2d 372, 108 S Ct 1853; accord, Godfrey v Georgia, 446 US, at 431, 64 L Ed 2d 398, 100 S Ct 1759 (plurality opinion). And I have no quarrel with the proposition that a murder which is preceded by the deliberate infliction of gratuitous suffering is more blameworthy than one which is not.

[497 US 698]

The Arizona Supreme Court's later decisions, however, made it clear that the murder which is "especially cruel" is the norm rather than the exception. The application of this circumstance has been expanded to cover any murder in which the victim is shown to have experienced fear or uncertainty as to his ultimate fate.[20] The Arizona Supreme Court has not required that the defendant must have deliberately delayed or protracted the killing *for the purpose* of causing the victim mental anguish. Nor has the court required that the period of fear or uncertainty be of extended duration: The court has made findings of cruelty in cases where that period was brief.[21] Indeed, in explaining the sorts of murder that would *not* be especially cruel, the Arizona Supreme Court has repeatedly referred to killings in which the victim was not conscious, see, e.g., State v Beaty, 158 Ariz, at 242, 762 P2d, at 529 ("[T]o suffer pain or distress, the victim must be conscious at the time the offense is committed. If the evidence is inconclusive on consciousness, the factor of cruelty cannot exist"), cert denied, 491 US 910, 105 L Ed 2d 708, 109 S Ct 3200 (1989),[22] and has explained that the victim of an "especially cruel" killing is "to be contrasted with the individual who is killed instantly without knowing what happened." State v Gillies, 142

---

[20] See, e.g., State v Bracy, 145 Ariz 520, 537, 703 P2d 464, 481 (1985), cert denied, 474 US 1110, 88 L Ed 2d 932, 106 S Ct 898 (1986); State v Carriger, 143 Ariz 142, 160, 692 P2d 991, 1009 (1984), cert denied, 471 US 1111, 85 L Ed 2d 864, 105 S Ct 2347 (1985); State v Correll, 148 Ariz, at 480, 715 P2d, at 733.

[21] See State v Rossi, 146 Ariz, at 365, 706 P2d, at 377 ("Before defendant fired the fatal shot, the victim leaned against his bedroom wall and pleaded with defendant, stating 'You have my money, you shot me, what more do you want?' This evinces the victim's mental anguish").

[22] See also State v Villafuerte, 142 Ariz 323, 331, 690 P2d 42, 50 (1984), cert denied, 469 US 1230, 84 L Ed 2d 371, 105 S Ct 1234 (1985); State v Harding, 137 Ariz 278, 294, 670 P2d 383, 399 (1983), cert denied, 465 US 1013, 79 L Ed 2d 246, 104 S Ct 1017 (1984); State v Zaragoza, 135 Ariz 63, 69, 659 P2d 22, 28, cert denied, 462 US 1124, 77 L Ed 2d 1356, 103 S Ct 3097 (1983).

Ariz 564, 570, 691 P2d 655, 661 (1984), cert denied, 470 US 1059, 84 L Ed 2d 834, 105 S Ct 1775 (1985). I do not believe that an aggravating factor

which requires only that the victim be conscious and aware of his danger for some measurable period before the killing occurs can be said to provide a "principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Godfrey v Georgia, 446 US, at 433, 64 L Ed 2d 398, 100 S Ct 1759 (plurality opinion). And I am entirely baffled by the majority's assertion that this construction of the aggravating circumstance is "virtually identical," ante, at 655, 111 L Ed 2d, at 529, to a requirement of torture or serious physical abuse.[23]

The majority is correct in asserting that, in the absence of evidence to the contrary, the trial judge who sentenced petitioner to death must be presumed to have been aware of the manner in which these statutory terms had been construed by the Arizona Supreme Court. That judge's familiarity with the applicable precedents, however, could not possibly have served to guide or channel his sentencing discretion. The entire body of Arizona case law, like the bare words of the statute, provided "no principled way to distinguish this case" from other homicides where capital sentences were not imposed. Under this Court's decisions in Godfrey and Maynard, the standards by which the trial court sentenced Walton to death were constitutionally deficient.

B

Relying on Clemons v Mississippi, 494 US 738, 108 L Ed 2d 725, 110 S Ct 1441 (1990), the majority also contends that "a state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined . . . .

[T]he Arizona Supreme Court has sought to give substance to the operative terms, and we find that its construction meets constitutional requirements." Ante, at 654, 111 L Ed 2d, at 528-529. The Court thus holds that, even if the trial-level sentencing procedure failed to satisfy the Eighth Amendment, Walton's sentence nevertheless may stand because the appellate court, applying a satisfactory limiting construction, independently determined that the murder was especially cruel. For three independent reasons, I cannot accept that conclusion.

(1) If the (F)(6) factor and the prior decisions of the Arizona Supreme Court failed to provide sufficient guidance to the trial judge, the appellate court's conclusion that this murder fell within some narrow definition of "cruel" could not eliminate the possibility that the trial court, in balancing aggravating and mitigating circumstances, had relied on factors lying outside this narrow definition. Affirmance of Walton's death

---

[23] The State, focusing on the fear and uncertainty experienced by Powell prior to the shooting, asserts: "It is without question that the victim suffered an excruciatingly 'cruel' death," and suggests that Powell's mental anguish was equivalent to "torture." Brief for Respondent 48-49. I do not minimize Thomas Powell's suffering, but it bears noting that the State of Arizona seeks to confine Jeffrey Walton in its penitentiary, set a date for his execution, and put him to death. It seems strange for the State to suggest that an individual has been "tortured" when he is made to contemplate the prospect of his own demise.

sentence depends not only on the Arizona Supreme Court's determination that this murder was especially cruel, but also upon its conclusion that the mitigating factors did not outweigh those in aggravation. I adhere to the view, expressed in the separate opinion in Clemons, 494 US, at 756, 108 L Ed 2d 725, 110 S Ct 1441, which three other Justices joined, that an appellate court is incapable of finding and balancing aggravating and mitigating factors in a manner that is sufficiently reliable to satisfy the Eighth Amendment.[24] Indeed, the Arizona Supreme Court's treatment of the record in this case hardly provides support for those Members of this Court—a bare majority—who now would entrust the task of capital sentencing to an appellate tribunal. The state court's conclusion that the murder was especially cruel was based in large part

on its assertions that Powell "was so clearly terrified by the time they stopped that [one of the assailants] tried to reassure him that they would not hurt him" and that during the final march into the desert the victim "begged the defendant not to kill him." 159 Ariz, at 587, 769 P2d, at 1033. The court's discussion includes no citations to the record (which furnishes frail support for the court's characterization of the events), and appears to be based primarily on a misreading of the State's appellate brief.[25] Given the institutional limitations of appellate courts generally, and the questionable treatment of the facts by the Arizona Supreme Court in this case, I cannot agree that the appellate sentencing here was sufficiently reliable to meet the standards of the Eighth Amendment.[26]

---

[24] The discussion of appellate reweighing in Clemons technically is dictum: The Court vacated Clemons' death sentence but stated that on remand the Mississippi Supreme Court might reweigh the valid aggravating and mitigating circumstances or apply a limiting construction of the challenged aggravating factor if it concluded that under state law it had the power to do so. 494 US, at 750-752, 108 L Ed 2d 725, 110 S Ct 1441.

[25] The Arizona Supreme Court's first assertion is supported only by the following passage from the testimony of Sharold Ramsey:

"Q. How was [Powell] acting after you pulled up at the pullout and they got out of the car?

"A. He was scared.

"Q. How do you know?

"A. I don't remember. I just told him not to be scared because he wouldn't be hurt. . . ." App 24.

The statement that Powell "begged the defendant not to kill him" appears to be based entirely on Walton's statement during his taped interrogation that "the guy told Rob [one of Walton's accomplices], he goes, don't hurt me, I don't tell anybody, ((inaudible))." Tr 82 (Dec. 15, 1986, pm).

In its brief to the Arizona Supreme Court, the State asserted, without record citation: "During the ride, Powell begged his abductors to spare him and they could keep his money and car." Appellee's Answering Brief in No. CR 87-0022-AP, p 50. That assertion was made more or less in passing: the State's argument on cruelty focused on Powell's mental and physical suffering *after* the shooting. The Arizona Supreme Court's opinion asserts that Powell begged for his life when he and Walton were alone in the desert (rather than during the car ride beforehand). There is not one line of testimony that supports the court's statement.

[26] The trial judge in this case found that Walton rather than Hoover had fired the fatal shot—an issue on which the evidence was conflicting and on which the jury was apparently unable to agree. See 159 Ariz, at 592-593, 769 P2d, at 1038-1039 (concurring opinion). In its brief to the Arizona Supreme Court, the State argued that this finding should be reviewed deferentially on the ground that "[a]s the trial court is better situated to assess the impact of the evidence, its decision should not be overturned absent an abuse of that discretion." Appellee's Answering Brief in No. 87-0022-AP, p 48. The

(2) In Clemons, this Court stated that, insofar as the Federal Constitution is concerned, a state appellate court may determine for itself whether a capital sentence is warranted when the trial-level sentencing proceeding has been tainted by constitutional error. Whether the supreme court of a particular State possesses that power, however, is a matter of state law.[27] The Arizona Supreme Court has taken obviously inconsistent positions on the question whether trial-level error in capital sentencing necessitates a remand, or whether the error may be cured by the appellate court's independent review. Compare State v Wallace, 151 Ariz, at 369, 728 P2d, at 239 ("As we have set aside the finding of pecuniary gain, we must now allow the trial court another opportunity to exercise its sentencing discretion and reweigh the remaining aggravating and mitigating factors"); State v Rossi, 146 Ariz, at 368, 706 P2d, at 380 ("Because we believe the trial judge used the wrong standard for determining and applying mitigating factors, we must vacate defendant's death sentence and remand for resentencing"); State v McMurtrey, 143 Ariz 71, 73, 691 P2d 1099, 1101 (1984) ("Because the trial judge imposed upon the defendant a more onerous burden of proof in determining the existence of mitigating circumstances, the matter will have to be remanded for resentencing"); State v Gillies, 135 Ariz 500, 516, 662 P2d

1007, 1023 (1983) (court remanded for resentencing after three of four aggravating circumstances found by the trial judge were invalidated on appeal), with State v Rockwell, 161 Ariz 5, 15-16, 775 P2d 1069, 1079-1080 (1989) (court invalidated two of three aggravating circumstances and concluded that the mitigating evidence outweighed the remaining aggravating factor); State v Poland, 144 Ariz 388, 407, 698 P2d 183, 202 (1985) ("The finding that the murders were committed in an 'especially heinous, cruel or depraved manner' is set aside, but the findings as to the other aggravating circumstances are affirmed. No mitigating circumstances sufficiently substantial to call for leniency have been shown"); State v James, 141 Ariz 141, 148, 685 P2d 1293, 1300 (court struck down one aggravating factor but upheld the death sentence on the ground that "[t]here is [another] aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency"), cert denied, 469 US 990, 83 L Ed 2d 332, 105 S Ct 398 (1984); State v Blazak, 131 Ariz 598, 604, 643 P2d 694, 700 (one aggravating factor invalidated, but death sentence upheld because "[e]ven in the absence of this aggravating circumstance, there are still enough aggravating circumstances that cannot be overcome by the mitigating circumstances"), cert denied, 459 US 882, 74 L Ed 2d 149, 103 S Ct 184

Arizona Supreme Court did not purport to make an independent determination on this point: It stated only that "we find substantial evidence to support the trial judge's finding that the defendant killed the victim." 159 Ariz, at 586, 769 P2d, at 1032.

[27] See Clemons, 494 US, at 754, 108 L Ed 2d 725, 110 S Ct 1441 ("Nothing in this opinion is intended to convey the impression that state appellate courts are required to or necessarily should engage in reweighing or harmless error analysis when errors have occurred in a capital sentencing proceeding. Our holding is only that such procedures are constitutionally permissible").

(1982).[28] It simply is not clear whether the Arizona Supreme Court regards itself as having the power to uphold a capital sentence on the basis of its own comparison of aggravating and mitigating circumstances when the sentencing judge has relied in part upon an invalid aggravating factor.

In this case, as in all capital cases, the Arizona Supreme Court performed an "independent review" of the trial-level [497 US 704] sentencing process. The Arizona Supreme Court consistently has maintained: "Unlike appellate review of non-capital crimes, our duty on review of the death penalty is to conduct an independent examination of the record to determine whether the death penalty was properly imposed." State v Schad, 129 Ariz 557, 573, 633 P2d 366, 382 (1981), cert denied, 455 US 983, 71 L Ed 2d 693, 102 S Ct 1492 (1982). The independent review performed by the Arizona Supreme Court in capital cases, however, is quite different from appellate "reweighing" as that term is used in Clemons. The Arizona court's review does not proceed from the premise that errors in the trial-level sentencing process can be cured by the State Supreme Court's determination that death is the appropriate penalty. Rather, that review historically has been explained as an additional level of protection for the defendant, a means of ensuring that a trial judge's sentence of death is subjected to rigorous scrutiny. See State v Richmond, 114 Ariz 186, 196, 560 P2d 41, 51 (1976) ("The gravity of the death penalty requires that we painstakingly examine the record to determine whether it has been erroneously imposed"), cert denied, 433 US 915, 53 L Ed 2d 1101, 97 S Ct 2988 (1977). Under Arizona law, the trial court is the sentencer, and the appellate court's review is intended to ensure that trial-level functions were properly carried out. Indeed, the Arizona Supreme Court has resisted analogies between its own independent review and the initial trial-level sentencing process: "While we have an independent duty of review, we perform it as an appellate court, not as a trial court. . . . We hold, therefore, that the Arizona procedure is not a single indivisible hearing, but instead resembles a trial on the issue of life or death followed by the utilization of this court's appellate process . . . ." State v Rumsey, 136 Ariz 166, 173, 665 P2d 48, 55 (1983).[29] Today's [497 US 705] majority indicates, however, that the Arizona Supreme Court's independent review may serve as a *substitute* for a constitutionally adequate trial-level sentencing proceeding, despite the fact that the State Supreme Court did not believe that any trial-level error had occurred and regarded itself as *affirming* the sentencing decision of the lower court.

---

[28] See also State v Smith, 146 Ariz 491, 504, 707 P2d 289, 302 (1985) ("Our elimination of some aggravating factors *in the absence of mitigating circumstances* does not mandate a remand to the trial court for resentencing") (emphasis added) (citing cases). Where mitigating factors are absent, affirmance of the death sentence does not require reweighing and is more properly characterized as harmless-error analysis.

[29] In affirming the judgment of the Arizona Supreme Court in that case, this Court stated that "the availability of appellate review, including reweighing of aggravating and mitigating circumstances, [does not] make the appellate process part of a single continuing sentencing proceeding. The Supreme Court of Arizona noted that its role is strictly that of an appellate court, not a trial court. Indeed, no appeal need be taken if life imprisonment is imposed, *and the appellate reweighing can work only to the defendant's advantage.*" Arizona v Rumsey, 467 US 203, 210, 81 L Ed 2d 164, 104 S Ct 2305 (1984) (emphasis added). We also referred to the trial judge as "the sole decisionmaker in the proceeding." Id., at 211, 81 L Ed 2d 164, 104 S Ct 2305.

Whether or not the Arizona Supreme Court possesses the power to "reweigh" evidence in order to cure trial-level error, it is clear that the court did not purport to exercise that power in this case. The court did not suggest that the trial judge's finding of the (F)(6) circumstance was constitutionally suspect. The Arizona Supreme Court made independent determinations as to aggravating and mitigating circumstances, but these findings were plainly intended to *supplement* rather than to replace the findings of the trial court. That this is a distinction with a difference should be clear to the present majority from this Court's opinion in Caldwell v Mississippi, 472 US 320, 86 L Ed 2d 231, 105 S Ct 2633 (1985). In Caldwell we invalidated a capital sentence imposed by a jury which had been incorrectly informed that its verdict was only a "recommendation." We stated that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Id., at 328-329, 86 L Ed 2d 231, 105 S Ct 2633. The same reasoning should apply here. Just as a jury's sentence of death may not stand if the jury believed that it was merely *recommending* capital punishment, the Arizona Supreme Court's independent determination that death is appropriate cannot cure trial-level error if the appellate court believed incorrectly

[497 US 706]

that it was simply *affirming* a constitutionally valid sentence imposed by the trial judge.

Thus, even if I could accept the majority's conclusion that appellate resentencing can cure constitutional defects in the trial-level procedure, I could not agree that the Arizona Supreme Court has purported to exercise that power here. To conclude that Walton's death sentence may stand, despite constitutional defects in the trial-level sentencing process, it is not enough for the majority to say that the Constitution permits a state appellate court to reweigh valid aggravating and mitigating factors. The majority must also be prepared to assert with reasonable assurance that the Arizona Supreme Court would have chosen to affirm the death sentence on the basis of its own reweighing if it had recognized that the trial-level procedure was defective. Given the Arizona court's inconsistent treatment of the reweighing issue, no such assertion is possible. In holding that the appellate court's independent review can save the sentence even if the trial judge received insufficient guidance, the majority affirms a decision that the Arizona Supreme Court never made.

(3) Even if I believed that appellate resentencing could cure trial-level error, and that the Arizona Supreme Court can properly be regarded as the sentencer in this case, I would still conclude that petitioner's sentence must be vacated. The (F)(6) aggravating factor, as construed by the State Supreme Court, sweeps so broadly that it includes within its reach virtually every homicide. The appellate court's application of the statutory language simply provides no meaningful basis on

which a defendant such as Walton can be singled out for death.

Indeed, my conclusion that the sentence imposed by the appellate court is invalid follows almost necessarily from my belief that the trial-level sentencing was constitutionally flawed.[30] The defective nature of the trial court's sentence

did not stem from the judge's failure to abide by limitations announced by the Arizona Supreme Court. Rather, the trial-level sentencing procedure was defective because, even assuming that the trial judge correctly applied the relevant precedents, those decisions had failed to articulate a constitutionally sufficient narrowing construction of the statutory language. In the two years between the trial court's imposition of sentence and its own affirmance, the Arizona Supreme Court did not purport to narrow the scope of the (F)(6) aggravating factor. It therefore is difficult to see how any trial-level error could have been cured by the appellate court's application of the *same* legal rules that the trial judge is presumed to have followed.

The majority concedes, as it must, that the statutory language is unconstitutionally vague under Godfrey and Maynard. The majority therefore recognizes that the validity of the (F)(6) factor depends upon the construction given it by the Arizona Supreme Court. I do not see how the adequacy of that construction can be determined other than through examination of the body of state-court precedents—an examination that the majority conspicuously declines to undertake. Because the Arizona Supreme Court has utterly failed to place meaningful limits on the application of this aggravating factor, a sentence based in part upon the (F)(6) circumstance should not stand.[31]

III

Earlier this Term the very same majority of this Court severely restricted the regime of federal habeas corpus that had previously helped to safeguard the constitutional rights of criminal defendants, including those accused of capital crimes. See Butler v McKellar, 494 US 407, 108 L Ed 2d 347, 110 S Ct 1212 (1990); Saffle v Parks, 494 US 484, 108 L Ed 2d 415, 110 S Ct 1257 (1990). Today this majority serves notice that capital defendants no longer should expect from this Court on direct review a considered examination of their constitutional claims. In adjudicating claims that will mean life or death for convicted inmates in Arizona and elsewhere, the majority makes only the most perfunctory effort to reconcile its holding with this Court's prior Eighth Amendment jurisprudence. Nor does the majority display any recognition that a decision concerning the constitutionality of a State's capital punishment scheme may require an understanding of the manner in which that scheme actually operates.

---

[30] The one difference is that the trial judge found only that the murder was committed "in an extremely heinous, cruel or depraved manner," while the appellate court specified that the murder was "cruel." If the Arizona Supreme Court's prior decisions had placed meaningful limits on the concept of "cruelty," that difference might be significant. In fact, however, the state court's construction of "cruelty" has placed no significant constraints on the sentencer's discretion—whether the sentencer is the trial judge or the Arizona Supreme Court itself.

[31] The breadth of the (F)(6) circumstance is particularly unfortunate in light of the statutory requirement that the defendant, in order to avoid the death penalty, must demonstrate mitigating factors "sufficiently substantial to call for leniency." The presumption of death is triggered whenever an aggravating circumstance is found; the Arizona Supreme Court's expansive construction of the (F)(6) factor ensures that an aggravating circumstance plausibly can be discovered in virtually any murder.

Perhaps the current majority has grown weary of explicating what some Members no doubt choose to regard as hypertechnical rules that currently govern the administration of the death penalty. Certainly it is to be hoped that States will scrupulously protect the constitutional rights of capital defendants even without the prospect of meaningful federal oversight. Good wishes, however, are no substitute for this Court's careful review. Today's decision is either an abdication of the Court's constitutional role, or it is a silent repudiation of previously settled legal principles.

I dissent.

Justice **Stevens,** dissenting.

While I join Justice Blackmun's dissent, I write separately to dissent from the Court's holding in Part II and to comment on Justice Scalia's opinion.

[497 US 709]

I

The Court holds in Part II of its opinion that a person is not entitled to a jury determination of facts that must be established before the death penalty may be imposed. I am convinced that the Sixth Amendment requires the opposite conclusion.

Arizona Rev Stat Ann § 13-1105(C) (1989) provides that first-degree murder, which includes both premeditated murder and felony murder, is "punishable by death or life imprisonment as provided by § 13-703." Section § 13-703(B) requires, after guilt of first-degree murder is established, that a judge conduct a hearing to determine if any statutory aggravating or mitigating circumstances exist. The State bears the burden of proving the existence of any aggravating circumstance by evidence admissible under the Arizona Rules of Evidence. § 13-703(C). Section 13-703(E) then provides, as the Arizona Supreme Court has explained: "Where none of the statutory aggravating circumstances are found to be present, our statute prohibits the death penalty. Where one or more statutory aggravating circumstance is found, and no mitigation exists, the statute requires the death penalty. Where both aggravating and mitigating circumstances are found in a given case, the trial judge, and then this court on review, must determine whether the mitigating circumstances are 'sufficiently substantial to call for leniency.'" State v Gretzler, 135 Ariz 42, 55, 659 P2d 1, 13 (citations omitted), cert denied, 461 US 971, 77 L Ed 2d 1327, 103 S Ct 2444 (1983). Thus, under Arizona law, as construed by Arizona's highest court, a first-degree murder is not punishable by a death sentence until at least one statutory aggravating circumstance has been proved.[1]

[497 US 710]

In this case, the sentencing judge

---

[1] Although Arizona's aggravating circumstances are not "separate penalties or offenses," Poland v Arizona, 476 US 147, 156, 90 L Ed 2d 123, 106 S Ct 1749 (1986) (double jeopardy challenge), they operate as statutory "elements" of capital murder under Arizona law because in their absence, that sentence is unavailable under §§ 13-1105 and 13-703. Cf. McMillan v Pennsylvania, 477 US 79, 88, 91 L Ed 2d 67, 106 S Ct 2411 (1986) (5-year mini-

found two aggravating circumstances: that petitioner committed the offense "as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value" and that he committed it "in an especially heinous, cruel or depraved manner." Ariz Rev Stat Ann §§ 13-703(F)(5), (F)(6) (1989).[2] At issue is the narrow question whether these findings about petitioner's commission of the offense are, under Arizona law, elements of a capital crime and therefore must be determined by a jury.

If this question had been posed in 1791, when the Sixth Amendment became law, the answer would have been clear. By that time,

> "the English jury's role in determining critical facts in homicide cases was entrenched. As factfinder, the jury had the power to determine not only whether the defendant was guilty of homicide but also the degree of the
>
>
>
> offense. Moreover, *the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established.* Throughout its history, the jury determined which homicide defendants would be subject to capital punishment by making factual determinations, many of which related to difficult assessments of the defendant's state of mind. By the time the Bill of Rights was adopted, the jury's right to make these determinations was unquestioned."[3]

Similarly, if this question had arisen in 1968, when this Court held the guarantee of trial by jury in criminal prosecutions binding on the States, I do not doubt that petitioner

---

mum term required upon finding by sentencing court was "a penalty within the range already available to it without the special finding"); Cabana v Bullock, 474 US 376, 385, 88 L Ed 2d 704, 106 S Ct 689 (1986) (requiring a finding of intent to comply with the Eighth Amendment does not establish any new element of the *State's definition* of a capital offense).

[2] This Court has long distinguished a jury's determination of "whether a defendant is guilty of having engaged in certain criminal conduct" from a sentencing judge's consideration of "the fullest information possible concerning the defendant's life and characteristics." Williams v New York, 337 US 241, 246-247, 93 L Ed 1337, 69 S Ct 1079 (1949). Both of the aggravating circumstances in this case concern the offense itself, not the offender. Indeed, the Arizona courts' findings of aggravation rested entirely on evidence that had been presented to the jury during the guilt phase of the trial; the Arizona Supreme Court disregarded the only testimony about aggravation offered at the sentencing hearing as irrelevant. Tr (Jan. 26-27, 1987); 159 Ariz 571, 587, 769 P2d 1017, 1033 (1989) (testimony about victim after shooting did not bear on cruelty). Cf. Spaziano v Florida, 468 US 447, 452, 82 L Ed 2d 340, 104 S Ct 3154 (1984) (after a Florida jury recommended life, sentencing judge found defendant's felony record was an aggravating factor); Hildwin v Florida, 490 US 638, 639, 104 L Ed 2d 728, 109 S Ct 2055 (1989) (per curiam) (after a Florida jury recommended death, sentencing judge found defendant's felony record and status as a prisoner at the time of the crime were aggravating factors).

[3] White, Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial, 65 Notre Dame L Rev 1, 10-11 (1989) (footnote omitted; emphasis added). The right to a jury trial in criminal matters was most strongly guarded because " 'in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the Crown, in suits between the king and the subject, than in disputes between one individual and another.' " Id., at 10 (quoting 4 W. Blackstone, Commentaries 343 (1769)). For a view of earlier practices, see generally Green, The Jury and the English Law of Homicide, 1200-1600, 74 Mich L Rev 413 (1976).

again would have prevailed. Justice White's eloquent opinion for the Court in Duncan v Louisiana, 391 US 145, 20 L Ed 2d 491, 88 S Ct 1444 (1968), was faithful to the history and meaning of the Sixth Amendment:

> "The history of trial by jury in criminal cases has been frequently told. It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta. Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and
>
> **[497 US 712]**
>
> Bill of Rights of 1689. In the 18th century Blackstone could write:
>
> "'Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control, by justices of oyer and terminer occasionally named by the crown; who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure. But the founders of the English law have, with excellent forecast, contrived that . . . the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen and superior to all suspicion.'
>
> "Jury trial came to America with English colonists, and received strong support from them.
>
> . . . . .
>
> "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing
>
> **[497 US 713]**
>
> an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State

Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." Id., at 151-152, 155-156, 20 L Ed 2d 491, 88 S Ct 1444 (footnotes omitted).

Since Duncan, this Court has held that a death sentence under Florida law may be imposed by a judge, rather than a jury, Spaziano v Florida, 468 US 447, 82 L Ed 2d 340, 104 S Ct 3154 (1984), and has held that a judge may make a factual determination that mandates imposition of a minimum sentence within the penalty range of certain noncapital offenses, McMillan v Pennsylvania, 477 US 79, 91 L Ed 2d 67, 106 S Ct 2411 (1986). By stretching the limits of sentencing determinations that are made by judges exposed to "the voice of higher authority," these decisions have encroached upon the factfinding function that has so long been entrusted to the jury.[4] Further distorting the sentencing function to

encompass findings of factual elements necessary to establish a capital offense is the unhappy product of the gradual "increase and spread" of these precedents, "to the utter disuse of juries in questions of the most momentous concern."[5] Even if the unfortunate decisions in Spaziano and McMillan fell just one step short of the stride the Court takes today, it is not too late to change our course and follow the wise and inspiring voice that spoke for the Court in Duncan v Louisiana.

II

Justice Scalia announces in a separate opinion that henceforth he will not regard Woodson v North Carolina, 428 US 280, 49 L Ed 2d 944, 96 S Ct 2978 (1976), Roberts v Louisiana, 428 US 325, 49 L Ed 2d 974, 96 S Ct 3001 (1976), Lockett v Ohio, 438 US 586, 57 L Ed 2d 973, 98 S Ct 2954 (1978), Godfrey v Georgia, 446 US 420, 64 L Ed 2d 398, 100 S Ct 1759 (1980), and other cases adopting their reasoning as binding precedent. The major premise for this rejection of our capital sentencing jurisprudence is his professed inability to reconcile those cases with the central holding in Furman v Georgia, 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726 (1972).[6] Although

---

[4] Duncan v Louisiana, 391 US 145, 156, 20 L Ed 2d 491, 88 S Ct 1444 (1968). Although the 18th-century English ruler no longer bears upon our judges, today the "voice of higher authority" to which elected judges too often appear to listen is that of the many voters who generally favor capital punishment but who have far less information about a particular trial than the jurors who have sifted patiently through the details of the relevant and admissible evidence. How else do we account for the disturbing propensity of elected judges to impose the death sentence time after time notwithstanding a jury's recommendation of life? I have been advised that in Florida, where the jury provides an advisory sentence before the judge imposes sentence in a capital case, Fla Stat § 921.141 (1989), judges imposed death over a jury recommendation of life in 125 of the 617 death sentences entered between December 1972 and December 1989. See also Radelet, Rejecting the Jury: The Imposition of the Death Penalty in Florida, 18 UCDL Rev 1409 (1985) (judges are more likely than juries to favor the imposition of a death sentence).

[5] "So that the liberties of England cannot but subsist, so long as this *palladium* remains sacred and inviolate, not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience. And however *convenient* these may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient)* yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern." 4 W. Blackstone, Commentaries 343-344 (1769).

there are other flaws in Justice Scalia's opinion,[7] it is at least appropriate to explain why his major premise is simply wrong.

The cases that Justice Scalia categorically rejects today rest on the theory that the risk of arbitrariness condemned in Furman is a function of the size of the class of convicted persons who are eligible for the death penalty. When Furman was decided, Georgia included virtually all defendants convicted of forcible rape, armed robbery, kidnaping, and first-degree murder in that class. As the opinions in Furman observed, in that large class of cases race and other irrelevant factors unquestionably played an unacceptable role in determining which defendants would die and which would live.

However, the size of the class may be narrowed to reduce sufficiently that risk of arbitrariness, even if a jury is then given complete discretion to show mercy when evaluating the individual characteristics of the few individuals who have been found death eligible.

The elaborate empirical study of the administration of Georgia's capital sentencing statute that the Court considered in McCleskey v Kemp, 481 US 279, 95 L Ed 2d 262, 107 S Ct 1756 (1987), further illustrates the validity of this theory. In my opinion in that case I observed:

> "One of the lessons of the Baldus study is that there exist certain categories of extremely serious crimes for which prosecutors con-

---

[6] Furman has been characterized as mandating that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v Georgia, 428 US 153, 189, 49 L Ed 2d 859, 96 S Ct 2909 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

[7] For example, Justice Scalia incorrectly assumes that our holdings in Woodson v North Carolina, 428 US 280, 49 L Ed 2d 944, 96 S Ct 2978 (1976), and Roberts v Louisiana, 428 US 325, 49 L Ed 2d 974, 96 S Ct 3001 (1976), rest entirely on the view that mandatory death penalty statutes pose the same risk of arbitrariness that supported the Court's decision in Furman v Georgia, 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726 (1972). See ante, at 671-672, 111 L Ed 2d, at 540. In fact, that consideration was only one of the three grounds for invalidating the North Carolina and Louisiana mandatory statutes. See Woodson, 428 US, at 288-305, 49 L Ed 2d 944, 96 S Ct 2978 (plurality opinion). Justice Scalia ironically overlooks a more traditional reason supporting our conclusion in Woodson, the growing societal consensus against mandatory imposition of the death penalty:

> "The history of mandatory death penalty statutes in the United States thus reveals that the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid. The two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society—jury determinations and legislative enactments—both point conclusively to the repudiation of automatic death sentences." Id., at 292-293, 49 L Ed 2d 944, 96 S Ct 2978.

We further held that the "fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Id., at 304, 49 L Ed 2d 944, 96 S Ct 2978.

> sistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender. If Georgia were to narrow the class of death-eligible defendants to those categories, the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated." Id., at 367, 95 L Ed 2d 262, 107 S Ct 1756 (dissenting opinion).

The Georgia Supreme Court itself understood the concept that Justice Scalia apparently has missed. In Zant v Stephens, 462 US 862, 77 L Ed 2d 235, 103 S Ct 2733 (1983), we quoted the following excerpt from its opinion analogizing the law governing homicides in Georgia to a pyramid:

> " 'All cases of homicide of every category are contained within the pyramid. The consequences flowing to the perpetrator increase in severity as the cases proceed from the base of the apex, with the death penalty applying only to those few cases which are contained in the space just beneath the apex. To reach that category a case must pass through three planes of division between the base and the apex.
>
> " 'The first plane of division above the base separates from all homicide cases those which fall into the category
>
> [497 US 717]
>
> of murder. This plane is established by the legislature in statutes defining terms such as murder, voluntary manslaughter, involuntary manslaughter, and justifiable homicide. In deciding whether a given case falls above or below this plane, the function of the trier of facts is limited to finding facts. The plane remains fixed unless moved by legislative act.
>
> " 'The second plane separates from all murder cases those in which the penalty of death is a possible punishment. This plane is established by statutory definitions of aggravating circumstances. The function of the factfinder is again limited to making a determination of whether certain facts have been established. Except where there is treason or aircraft hijacking, a given case may not move above this second plane unless at least one statutory aggravating circumstance exists. Code Ann § 27-2534.1(c).
>
> " 'The third plane separates, from all cases in which a penalty of death may be imposed, those cases in which it shall be imposed. There is an absolute discretion in the factfinder to place any given case below the plane and not impose death. The plane itself is established by the factfinder. In establishing the plane, the factfinder considers all evidence in extenuation, mitigation and aggravation of punishment. Code Ann § 27-2503 and § 27-2534.1. There is a final limitation on the imposition of the death penalty resting in the automatic appeal procedure: This court determines whether the penalty of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; whether the statutory aggravating circumstances are supported by the evidence; and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. Code Ann § 27-2537. Performance of this function may cause this court to

remove a case from the death penalty category but can never have the opposite result.

" 'The purpose of the statutory aggravating circumstances is to limit to a large degree, but not completely, the factfinder's discretion. Unless at least one of the ten statutory aggravating circumstances exists, the death penalty may not be imposed in any event. If there exists at least one statutory aggravating circumstance, the death penalty may be imposed but the factfinder has a discretion to decline to do so without giving any reason. Waters v State, 248 Ga 355, 369, 283 SE2d 238 (1981); Hawes v State, 240 Ga 327, 334, 240 SE2d 833 (1977); Fleming v State, 240 Ga 142, 240 SE2d 37 (1977). In making the decision as to the penalty, the factfinder takes into consideration all circumstances before it from both the guilt-innocence and the sentence phases of the trial. These circumstances relate both to the offense and the defendant.

" 'A case may not pass the second plane into that area in which the death penalty is authorized unless at least one statutory aggravating circumstance is found. However, this plane is passed regardless of the number of statutory aggravating circumstances found, so long as there is at least one. Once beyond this plane, the case enters the area of the factfinder's discretion, in which all the facts and circumstances of the case determine, in terms of our metaphor, whether or not the case passes the third plane and into the area in which the death penalty is imposed.' 250 Ga 97, 99-100, 297 SE2d 1, 3-4 (1982)." Id., at 870-872, 77 L Ed 2d 235, 103 S Ct 2733.

Justice Scalia ignores the difference between the base of the pyramid and its apex. A rule that forbids unguided discretion at the base is completely consistent with one that requires discretion at the apex. After narrowing the class of cases to those at the tip of the pyramid, it is then appropriate to allow the sentencer discretion to show mercy based on individual mitigating circumstances in the cases that remain.

Perhaps a rule that allows the specific facts of particular cases to make the difference between life and death—a rule that is consistent with the common-law tradition of case-by-case adjudication—provides less certainty than legislative guidelines that mandate the death penalty whenever specified conditions are met. Such guidelines would fit nicely in a Napoleonic Code drafted in accord with the continental approach to the formulation of legal rules. However, this Nation's long experience with mandatory death sentences—a history recounted at length in our opinion in Woodson and entirely ignored by Justice Scalia today—has led us to reject such rules. I remain convinced that the approach adopted by this Court in Weems v United States, 217 US 349, 54 L Ed 793, 30 S Ct 544 (1910), and in Trop v Dulles, 356 US 86, 2 L Ed 2d 630, 78 S Ct 590 (1958), followed by Justice Stewart, Justice Powell, and myself in 1976, and thereafter repeatedly endorsed by this Court, is not only wiser, but far more just, than the reactionary position espoused by Justice Scalia today.

EDITOR'S NOTE

An annotation on "Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances," appears p 947, infra.

[497 US 720]

UNITED STATES, Petitioner

v

MARSHA B. KOKINDA et al.

497 US 720, 111 L Ed 2d 571, 110 S Ct 3115

[No. 88-2031]

Argued February 26, 1990. Decided June 27, 1990.

Decision: United States Postal Service held permitted, under Federal Constitution's First Amendment, to prohibit in-person solicitation of funds on government-owned sidewalk adjoining post office.

SUMMARY

A post office building in Maryland was set back from a highway and was surrounded by a parking lot. A sidewalk, which was approximately 7 feet wide, (1) ran adjacent to the post office building, (2) separated the building from the surrounding parking lot, (3) provided the sole means by which post office customers could travel from the parking lot to the building, and (4) lay entirely on United States Postal Service property. For several hours on August 6, 1986, volunteers for a political organization set up a table on the sidewalk near the entrance of the post office in order to solicit contributions, sell books and subscriptions to the organization's newspaper, and distribute literature addressing a variety of political issues. While the volunteers were at this location, about 40 or 50 postal customers complained to postal employees regarding the volunteers' presence. After the volunteers refused to comply with the postmaster's request that they leave, they were arrested by postal inspectors. The volunteers were tried before a United States Magistrate in the District of Maryland and were convicted of violating a Postal Service regulation (39 CFR § 232.1(h)(1)) that prohibited the soliciting of alms and contributions on postal premises. The United States District Court for the District of Maryland, affirming the convictions, held that (1) the postal sidewalk was not a public forum, (2) the Postal Service's ban on solicitation was reasonable, and (3) the ban's application to the volunteers did not violate their rights under the Federal Constitution's First Amendment. The United States Court of Appeals for the Fourth Circuit, reversing, (1) held that the postal sidewalk was a public forum, (2) analyzed the

Briefs of Counsel, p 1005, infra.

regulation as a "time, place, and manner" regulation, and (3) determined that the Federal Government had no significant interest in a total ban on solicitation, and that the regulation was not narrowly tailored to address the government's interest in preventing the obstruction or disruption of post office business or the harassment of postal patrons (866 F2d 699). The volunteers' petition for rehearing and suggestion for rehearing en banc were denied.

On certiorari, the United States Supreme Court reversed. Although unable to agree on an opinion, five members of the court agreed that the volunteers' First Amendment rights had not been violated.

O'CONNOR, J., announced the judgment of the court and, in an opinion joined by REHNQUIST, Ch. J., and WHITE and SCALIA, JJ., expressed the view that (1) with respect to First Amendment interests, regulation of speech activity which takes place on government property that is a nonpublic forum—defined as property which is not of the type that has been traditionally open to the public for expressive activity and which has not been dedicated by the government to such activity—is examined under a reasonableness standard, not under a strict-scrutiny standard; (2) the postal sidewalk did not have the characteristics of public sidewalks that are traditionally open to expressive activity, nor had the postal sidewalk been expressly dedicated to any such activity, and therefore—even if the sidewalk had been dedicated to some First Amendment uses and thus was not a purely nonpublic forum—regulation of the sidewalk's reserved nonpublic uses required application of the reasonableness test; (3) the ban on solicitation on the postal sidewalk was reasonable, because (a) solicitation is inherently disruptive of the Postal Service's business, (b) the Postal Service had concluded, after long experience, that a case-by-case approach to regulation of solicitation was unworkable, and (c) the regulation did not discriminate on the basis of content or viewpoint; and (4) therefore, the ban on solicitation, as applied, did not violate the First Amendment.

KENNEDY, J., concurring in the judgment, expressed the view that (1) there was a powerful argument that, because of the wide range of activities that the Federal Government permitted to take place on the postal sidewalk, that sidewalk was more than a nonpublic forum; but (2) regardless of whether the postal sidewalk was a public or nonpublic forum, the postal regulation at issue met the standards that have been traditionally applied to "time, place, and manner" restrictions of protected expression, because (a) the challenged portion of the regulation was narrowly drawn to prohibit only personal solicitations on postal property for the immediate payment of money, (b) the government had a significant interest in facilitating its customers' postal transactions, (c) given the Postal Service's past experience with expressive activity on its property, its judgment that in-person solicitation deserved different treatment from alternative forms of solicitation and expression should not be rejected, and (d) the regulation was content neutral and permitted members of the public to engage in a broad range of activity to express their views, including the solicitation of financial support; and (3) therefore, the regulation did not violate the First Amendment.

Brennan, J., joined by **Marshall** and **Stevens**, JJ., and joined in part (as to points 1, 2, and 3 below) by **Blackmun**, J., dissenting, expressed the view that (1) the postal sidewalk was a public forum because it was open and accessible to the general public; (2) even if the sidewalk was not a traditional public forum, it should have been found to be a "limited-purpose" public forum from which the public may not be excluded absent a showing of a compelling interest to which any exclusion is narrowly tailored; (3) whether the sidewalk was a traditional public forum or a limited-purpose public forum, the postal regulation was not a valid "time, place, and manner" regulation, given that (a) the ban on solicitation was tied explicitly to the content of speech, and (b) the ban was absolute and was not narrowly tailored to the government's interest in avoiding disruption; and (4) even if the sidewalk was not a public forum, the postal regulation should not have been found to be reasonable as applied.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Appeal § 1677; Constitutional Law § 934; Postal Service § 2 — reversal — First Amendment — solicitation — sidewalk surrounding post office

1a-1f. On certiorari to review a United States Court of Appeals decision that reversed the convictions, under a United States Postal Service regulation (39 CFR § 232.1(h)(1)) that prohibits the soliciting of alms and contributions on postal premises, of persons who solicited contributions on a sidewalk near the entrance of a post office—which sidewalk (1) ran adjacent to the post office building, (2) separated the building from a parking lot that surrounded the building, (3) provided the sole means by which post office customers could travel from the parking lot to the building, and (4) lay entirely on Postal Service property—the United States Supreme Court will reverse the Court of Appeals' judgment, where (1) four Justices are of the view that, under the Federal Constitution's First Amendment, the Postal Service regulation is valid as applied, because (a) the regulation must be analyzed under the reasonableness test set forth for the regulation of speech activity that takes place on a nonpublic forum, and (b) the regulation is reasonable under such a test; and (2) a fifth Justice is of the view that the regulation is valid under the First Amendment, regardless of whether the postal sidewalk was a public or nonpublic forum, because the challenged portion of the regulation, which prohibits only in-person solicitation for the immediate payment of monetary contributions, meets the standards that have been traditionally applied to "time, place, and manner" restrictions of protected expression. [Per

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

16A Am Jur 2d, Constitutional Law §§ 519, 520; 62 Am Jur 2d, Post Office § 28

USCS, Constitution, Amendment 1

US L Ed Digest, Constitutional Law § 934; Postal Service § 2

Index to Annotations, Freedom of Speech and Press; Post Office; Sidewalks; Solicitation

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCE

The Supreme Court and the right of free speech and press. 93 L Ed 1151, 2 L Ed 2d 1706, 11 L Ed 2d 1116, 16 L Ed 2d 1053, 21 L Ed 2d 976.

O'Connor, J., Rehnquist, Ch. J., and White, Scalia, and Kennedy, JJ. Dissenting: Brennan, Marshall, Blackmun, and Stevens, JJ.]

Constitutional Law § 934 — free speech — public forum — "time, place, and manner" restrictions

2a, 2b. Under the Federal Constitution's First Amendment, the government may properly impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions (1) are justified without reference to the content of the regulated speech, (2) are narrowly tailored to serve a significant government interest, and (3) leave open ample alternative channels of communication of the information. [Per Kennedy, Brennan, Marshall, Blackmun, and Stevens, JJ.]

SYLLABUS BY REPORTER OF DECISIONS

Respondents, members of a political advocacy group, set up a table on a sidewalk near the entrance to a United States Post Office to solicit contributions, sell books and subscriptions to the organization's newspaper, and distribute literature on a variety of political issues. The sidewalk is the sole means by which customers may travel from the parking lot to the post office building and lies entirely on Postal Service property. When respondents refused to leave the premises, they were arrested and subsequently convicted by a Federal Magistrate of violating, inter alia, 39 CFR § 232.1(h)(1), which prohibits solicitation on postal premises. The District Court affirmed the convictions. It rejected respondents' argument that § 232.1(h)(1) violated the First Amendment, holding that the postal sidewalk was not a public forum and that the ban on solicitation is reasonable. The Court of Appeals reversed. Finding that the sidewalk is a public forum and analyzing the regulation as a time, place, and manner restriction, it determined that the Government has no significant interest in banning solicitation and that the regulation is not narrowly tailored to accomplish the asserted governmental interest.

Held: The judgment is reversed.

866 F2d 699, reversed.

Justice O'Connor, joined by The Chief Justice, Justice White, and Justice Scalia, concluded that the regulation, as applied, does not violate the First Amendment.

(a) Although solicitation is a recognized form of speech protected by the First Amendment, the Government may regulate such activity on its property to an extent determined by the nature of the relevant forum. Speech activity on governmental property that has been traditionally open to the public for expressive activity or has been expressly dedicated by the Government to speech activity is subject to strict scrutiny. Perry Education Assn. v Perry Local Educators' Assn. 460 US 37, 45, 74 L Ed 2d 794, 103 S Ct 948. However, where the property is not a traditional public forum and the Government has not dedicated its property to First Amendment activity, such regulation is examined only for reasonableness. Id., at 46, 74 L Ed 2d 794, 103 S Ct 948.

(b) Section 232.1(h)(1) must be analyzed under the standards applicable to nonpublic fora: It must be reasonable and "not an effort to suppress expression merely because public officials oppose the speaker's view." Ibid. The postal sidewalk is not a traditional public forum. The fact that the sidewalk resembles the municipal sidewalk across the parking lot from the post office is irrelevant to forum analysis. See Greer v Spock, 424 US 828, 47 L Ed 2d 505, 96 S Ct 1211. The sidewalk was constructed solely to provide for the passage of individuals engaged in postal business, not as a public passageway. Nor has the Postal Service expressly dedicated its sidewalk to any expressive activity. Postal property has only been dedicated to the posting of public notices on designated bulletin boards. A practice of allowing individuals and groups to leaflet, speak, and picket on postal premises and a regulation prohibiting disruptive conduct do not add up to such dedication. Even conceding that the forum has been dedicated to some First Amendment uses, and thus is not a purely nonpublic forum, regulation of the reserved nonpublic uses would still require application of the reasonableness test.

(c) It is reasonable for the Postal Service to prohibit solicitation where it has determined that the intrusion creates significant interference with Congress' mandate to ensure the most effective and efficient distribution of the mails. The categorical ban is based on the Service's long, real-world experience with solicitation, which has shown that, because of continual demands from a wide variety of groups, administering a program of permits and approvals had distracted postal facility managers from their primary jobs. Whether or not the Service permits other forms of speech, it is not unreasonable for it to prohibit solicitation on the ground that it inherently disrupts business by impeding the normal flow of traffic. See Heffron v International Society for Krishna Consciousness, Inc., 452 US 640, 653, 69 L Ed 2d 298, 101 S Ct 2559. Confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information. Even if more narrowly tailored regulations could be promulgated, the Service is only required to promulgate reasonable regulations, not the most reasonable or the only reasonable regulation possible. Clearly, the regulation does not discriminate on the basis of content or viewpoint. The Service's concern about losing customers because of the potentially unpleasant situation created by solicitation per se does not reveal an effort to discourage one viewpoint and advance another.

Justice Kennedy, agreeing that the regulation does not violate the First Amendment, concluded that it is unnecessary to determine whether the sidewalk is a nonpublic forum, since the regulation meets the traditional standards applied to time, place, and manner restrictions of protected expression. See Clark v Community for Creative Non-Violence, 468 US 288, 293, 82 L Ed 2d 221, 104 S Ct 3065. The regulation expressly permits respondents and all others to engage in political speech on topics of their choice and to distribute literature soliciting support, including money contributions, provided there is no in-person solicitation for immediate payments on the premises. The Government has a significant interest in protecting the integrity of the purposes to which it has dedicated its property, that is, facilitating its customers' postal transactions. Given the Postal Service's past experience with expressive activity on its property, its judgment that in-person solicitation should be treated differently from alternative forms of solicitation and expression should not be rejected.

O'Connor, J., announced the judgment of the Court and delivered an opinion, in which Rehnquist, C.J., and White and Scalia, JJ., joined. Kennedy, J., filed an opinion concurring in the judgment. Brennan, J., filed a dissenting opinion, in which Marshall and Stevens, JJ., joined, and in which Blackmun, J., joined as to Part I.

APPEARANCES OF COUNSEL

John G. Roberts, Jr. argued the cause for petitioner.

Jay Alan Sekulow argued the cause for respondents.

Briefs of Counsel, p 1005, infra.

[497 US 722]

Justice **O'Connor** announced the judgment of the Court and delivered an opinion, in which The **Chief Justice**, Justice **White**, and Justice **Scalia** join.

[1a] We are called upon in this case to determine whether a United States Postal Service regulation that prohibits

[497 US 723]

"[s]oliciting alms and contributions" on postal premises violates the First Amendment. We hold the regulation valid as applied.

I

The respondents in this case, Marsha B. Kokinda and Kevin E. Pearl, were volunteers for the National Democratic Policy Committee, who set up a table on the sidewalk near the entrance of the Bowie, Maryland, Post Office to solicit contributions, sell books and subscriptions to the organization's newspaper, and distribute literature addressing a variety of political issues. The postal sidewalk provides the sole means by which customers of the post office may travel from the parking lot to the post office building and lies entirely on Postal Service property. The District Court for the District of Maryland described the layout of the post office as follows:

> "[T]he Bowie post office is a freestanding building, with its own sidewalk and parking lot. It is located on a major highway, Route 197. A sidewalk runs along the edge of the highway, separating the post office property from the street. To enter the post office, cars enter a driveway that traverses the public sidewalk and enter a parking lot that surrounds the post office building. Another sidewalk runs adjacent to the building itself, separating the parking lot from the building. Postal patrons must use the sidewalk to enter the post office. The sidewalk belongs to the post office and is used for no other purpose." App to Pet for Cert 24a.

During the several hours that respondents were at the post office, postal employees received between 40 and 50 complaints regarding their presence. The record does not indicate the substance of the complaints with one exception. One individual complained "because she knew the Girl Scouts were not allowed to sell cookies on federal property." 866 F2d 699, 705 (CA4 1989). The Bowie postmaster asked respondents to leave, which they refused to do. Postal inspectors

[497 US 724]

arrested respondents, seizing their table as well as their literature and other belongings.

Respondents were tried before a United States Magistrate in the District of Maryland and convicted of violating 39 CFR § 232.1(h)(1) (1989), which provides in relevant part:

> "Soliciting alms and contributions, campaigning for election to any

> public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises are prohibited."

Respondent Kokinda was fined $50 and sentenced to 10 days' imprisonment; respondent Pearl was fined $100 and received a 30-day suspended sentence under that provision.

Respondents appealed their convictions to the District Court, asserting that application of § 232.1(h)(1) violated the First Amendment. The District Court affirmed their convictions, holding that the postal sidewalk was not a public forum and that the Postal Service's ban on solicitation is reasonable.

A divided panel of the United States Court of Appeals for the Fourth Circuit reversed. 866 F2d 699 (1989). The Court of Appeals held that the postal sidewalk is a traditional public forum and analyzed the regulation as a time, place, and manner regulation. The court determined that the Government has no significant interest in banning solicitation and that the regulation is not narrowly tailored to accomplish the asserted governmental interest.

The United States' petition for rehearing and a suggestion for rehearing en banc were denied. Because the decision below conflicts with other decisions by the Courts of Appeals, see United States v Belsky, 799 F2d 1485 (CA11 1986); United States v Bjerke, 796 F2d 643 (CA3 1986), we granted certiorari. 493 US 807, 107 L Ed 2d 16, 110 S Ct 47 (1989).

[497 US 725]

II

Solicitation is a recognized form of speech protected by the First Amendment. See Schaumburg v Citizens for a Better Environment, 444 US 620, 629, 63 L Ed 2d 73, 100 S Ct 826 (1980); Riley v National Federation of Blind of N. C., Inc., 487 US 781, 788-789, 101 L Ed 2d 669, 108 S Ct 2667 (1988). Under our First Amendment jurisprudence, we must determine the level of scrutiny that applies to the regulation of protected speech at issue.

The Government's ownership of property does not automatically open that property to the public. United States Postal Service v Council of Greenburgh Civic Assns. 453 US 114, 129, 69 L Ed 2d 517, 101 S Ct 2676 (1981). It is a long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when "the governmental function operating . . . [is] not the power to regulate or license, as lawmaker, . . . but, rather, as proprietor, to manage [its] internal operation[s] . . . ." Cafeteria & Restaurant Workers v McElroy, 367 US 886, 896, 6 L Ed 2d 1230, 81 S Ct 1743 (1961). That distinction was reflected in the plurality opinion in Lehman v City of Shaker Heights, 418 US 298, 41 L Ed 2d 770, 94 S Ct 2714 (1974), which upheld a ban on political advertisements in city transit vehicles:

> "Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. . . . The car card space, although incidental to the provision of public transportation, is a part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of adver-

tising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles." Id., at 303, 41 L Ed 2d 770, 94 S Ct 2714 (plurality opinion).

The Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints, as does a private business, but its action

is valid in these circumstances unless it is unreasonable, or, as was said in Lehman, "arbitrary, capricious, or invidious." Ibid. In Lehman, the plurality concluded that the ban on political advertisements (combined with the allowance of other advertisements) was permissible under this standard:

> "Users [of the transit system] would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians. In these circumstances, the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation. Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require." Id., at 304, 41 L Ed 2d 770, 94 S Ct 2714.

Since Lehman, "the Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes. Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum." Cornelius v NAACP Legal Defense & Educational Fund, Inc., 473 US 788, 800, 87 L Ed 2d 567, 105 S Ct 3439 (1985). In Perry Education Assn. v Perry Local Educators' Assn. 460 US 37, 74 L Ed 2d 794, 103 S Ct 948 (1983), the Court announced a tripartite framework for determining how First Amendment interests are to be analyzed with respect to Government property. Regulation of speech activity on governmental property that has been traditionally open to the public for expressive activity, such as public streets and parks, is examined under strict scrutiny. Id., at 45, 74 L Ed 2d 794, 103 S Ct 948. Regulation of speech on property that the Government has expressly dedicated to speech activity is also

examined under strict scrutiny. Ibid. But regulation of speech activity where the Government has not dedicated its property to First Amendment activity is examined only for reasonableness. Id., at 46, 74 L Ed 2d 794, 103 S Ct 948.

[1b] Respondents contend that although the sidewalk is on postal service property, because it is not distinguishable from the municipal sidewalk across the parking lot from the post office's entrance, it must be a traditional public forum and therefore subject to strict scrutiny. This argument is unpersuasive. The mere physical characteristics of the property cannot dictate forum analysis. If they did, then Greer v Spock, 424 US 828, 47 L Ed 2d 505, 96 S Ct

1211 (1976), would have been decided differently. In that case, we held that even though a military base permitted free civilian access to certain unrestricted areas, the base was a nonpublic forum. The presence of sidewalks and streets within the base did not require a finding that it was a public forum. Id., at 835-837, 47 L Ed 2d 505, 96 S Ct 1211.

The postal sidewalk at issue does not have the characteristics of public sidewalks traditionally open to expressive activity. The municipal sidewalk that runs parallel to the road in this case is a public passageway. The Postal Service's sidewalk is not such a thoroughfare. Rather, it leads only from the parking area to the front door of the post office. Unlike the public street described in Heffron v International Society for Krishna Consciousness, Inc. 452 US 640, 69 L Ed 2d 298, 101 S Ct 2559 (1981), which was "continually open, often uncongested, and constitute[d] not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people [could] enjoy the open air or the company of friends and neighbors in a relaxed environment," id., at 651, 69 L Ed 2d 298, 101 S Ct 2559, the postal sidewalk was constructed solely to provide for the passage of individuals engaged in postal business. The sidewalk leading to the entry of the post office is not the traditional public forum sidewalk referred to in Perry.

Nor is the right of access under consideration in this case the quintessential public sidewalk which we addressed in

Frisby v Schultz, 487 US 474, 101 L Ed 2d 420, 108 S Ct 2495 (1988) (residential sidewalk). The postal sidewalk was constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood or city. The dissent would designate all sidewalks open to the public as public fora. See post, at 745, 111 L Ed 2d, at 593 ("[T]hat the walkway at issue is a sidewalk open and accessible to the general public is alone sufficient to identify it as a public forum"). That, however, is not our settled doctrine. In United States v Grace, 461 US 171, 75 L Ed 2d 736, 103 S Ct 1702 (1983), we did not merely identify the area of land covered by the regulation as a sidewalk open to the public and therefore conclude that it was a public forum:

> "The sidewalks comprising the outer boundaries of the Court grounds are indistinguishable from any other sidewalks in Washington, D.C., and we can discern no reason why they should be treated any differently. Sidewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property. In this respect, the present case differs from Greer v Spock . . . . In Greer, the streets and sidewalks at issue were located within an enclosed military reservation, Fort Dix, N.J., and were thus separated from the streets and sidewalks of any municipality. That is not true of the sidewalks surrounding the Court. There is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court

> grounds that they have entered some special type of enclave." Id., at 179-180, 75 L Ed 2d 736, 103 S Ct 1702 (footnote omitted).

Grace instructs that the dissent is simply incorrect in asserting that every public sidewalk is a public forum. Post, at 745, 111 L Ed 2d, at 593. As we recognized in Grace, the location and purpose [497 US 729] of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum.

The dissent's attempt to distinguish Greer is also unpersuasive. The dissent finds Greer "readily distinguishable" because the sidewalk in that case "was not truly 'open' to the public." Post, at 748, n 5, 111 L Ed 2d, at 595. This assertion is surprising in light of Justice Brennan's description of the public access permitted in Greer:

> "No entrance to the Fort is manned by a sentry or blocked by any barrier. The reservation is crossed by 10 paved roads, including a major state highway. Civilians without any prior authorization are regular visitors to unrestricted areas of the Fort or regularly pass through it, either by foot or by auto, at all times of the day and night. Civilians are welcome to visit soldiers and are welcome to visit the Fort as tourists. They eat at the base and freely talk with recruits in unrestricted areas. Public service buses, carrying both civilian and military passengers, regularly serve the base. A 1970 traffic survey indicated that 66,000 civilian and military vehicles per day entered and exited the Fort. Indeed, the reservation is so open as to create a danger of muggings after payday and a problem with prostitution." 424 US, at 851, 47 L Ed 2d 505, 96 S Ct 1211 (dissenting opinion).

In Greer we held that the power of the Fort's commanding officer summarily to exclude civilians from the area of his command demonstrated that "[t]he notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is . . . historically and constitutionally false." Id., at 838, 47 L Ed 2d 505, 96 S Ct 1211. It is the latter inquiry that has animated our traditional public forum analysis, and that we apply today. Postal entryways, like the walkways at issue in Greer, may be open to the public, but that fact alone does not establish that such areas must be treated as traditional public fora under the First Amendment.

[497 US 730]

The Postal Service has not expressly dedicated its sidewalks to any expressive activity. Indeed, postal property is expressly dedicated to only one means of communication: the posting of public notices on designated bulletin boards. See 39 CFR § 232.1(o) (1989). No postal service regulation opens postal sidewalks to any First Amendment activity. To be sure, individuals or groups have been permitted to leaflet, speak, and picket on postal premises, see Reply Brief for United States 12; 43 Fed Reg 38824 (1978), but a regulation prohibiting disruption, 39 CFR § 232(1)(e) (1989), and a practice of allowing some speech activities on postal property do not add up to the dedication of postal property to speech activities. We have held that "[t]he government does not create a public forum by . . . *permitting* limited discourse, but only by intentionally opening a nontraditional forum for public discourse." Cornelius, 473 US, at 802, 87 L Ed 2d 567, 105 S Ct 3439 (emphasis added); see also Perry, 460 US, at 47, 74 L Ed 2d 794, 103 S Ct 948 ("[S]elective access does not transform government property into a public forum"). Even conceding that the forum here has been dedicated to some First Amendment uses, and thus is not a purely nonpublic forum, under Perry, regulation of the reserved nonpublic uses would still require application of the reasonableness test. See Cornelius, supra, at 804-806, 87 L Ed 2d 567, 105 S Ct 3439.

Thus, the regulation at issue must be analyzed under the standards set forth for nonpublic fora: It must be reasonable and "not an effort to suppress expression merely because public officials oppose the speaker's view." Perry, supra, at 46, 74 L Ed 2d 794, 103 S Ct 948. Indeed, "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." Cornelius, supra, at 806, 87 L Ed 2d 567, 105 S Ct 3439. "The Government's decision to restrict access to a nonpublic forum need only be *reasonable;* it need not be the most reasonable or the only reasonable limitation." 473 US, at 808, 87 L Ed 2d 567, 105 S Ct 3439.

[497 US 731]

III

[1c] The history of regulation of solicitation in post offices demonstrates the reasonableness of the provision here at issue. The Postal Service has been regulating solicitation at least since 1958. Before enactment of the 1970 Postal Reorganization Act, Pub L 91-375, 84 Stat 720, 39 USC § 201 et seq. [39 USCS §§ 201 et seq.], the Post Office Department's internal guidelines "strictly prohibited" the "[s]oliciting [of] subscriptions, canvassing for the sale of any article, or making collections . . . in buildings operated by the Post Office Department, or on the grounds or sidewalks within the lot lines" of postal premises. Postal Service Manual, Facilities Transmittal Letter 8, Buildings Operation: Buildings Operated by the Post Office Department § 622.8 (July 1958). The Department prohibited all forms of solicitation until 1963, at which time it created an exception to its categorical ban on solicitation to enable certain "established national health, welfare, and veterans' organizations" to conduct fund drives "at or within" postal premises with the local postmaster's permission, and at his discretion. See Facilities Transmittal letter 53, Buildings Operation: Buildings Operated by the Post Office Department § 622.8 (July 1963). The general prohibition on solicitation was enlarged in 1972 to include "[s]oliciting alms and contributions or collecting private debts on postal premises." 37 Fed Reg 24347 (1972), codified at 39 CFR § 232.6(h)(1) (1973).

Soon after the 1972 amendment to the regulation, the Service expanded the exemption to encompass "[n]ational organizations which are wholly nonprofit in nature and which are devoted to charitable or philanthropic purposes" and "[l]ocal charitable and other nonprofit organizations," 39 CFR §§ 232.6(h)(2), (3) (1974), and to permit these organizations to "request use of lobby space for annual or special fund raising campaigns, providing they do not interfere with the transaction of postal business or require expenditures by the Postal Services or the use of its employees or equipment."

[497 US 732]

38 Fed Reg 27824-27825 (1973), codified at 39 CFR § 232.16(h)(2) (1974). Finally, in 1978, the Service promulgated the regulation at issue here. After 15 years of providing various exceptions to its rule against solicitation, the Service concluded that a categorical ban on solicitation was necessary, because the "Postal Service lacks the resources to enforce such regulation in the tens of thousands of post offices throughout the nation. In addition, such regulation would be, of necessity, so restrictive as to be tantamount to prohibition, and so complex as to be unadministrable." 43 Fed Reg 38824 (1978).

"[C]onsideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." Heffron, 452 US, at 650-651, 69 L Ed 2d 298, 101 S Ct 2559. The purpose of the forum in this case is to accomplish the most efficient and effective postal delivery system. See 39 USC §§ 403(a), 403(b)(1) [39 USCS §§ 403(a), 403(b)(1)]; HR Rep No. 91-1104, pp 1, 5, 11-12, 17, 19 (1970). Congress has made clear that "it wished the Postal Service to be run more like a business than had its predecessor, the Post Office Department." Franchise Tax Board of California v United States Postal Service, 467 US 512, 519-520, and n 13, 81 L Ed 2d 446, 104 S Ct 2549 (1984). Congress has directed the Service to become a self-sustaining service industry and to "seek out the needs and desires of its present and potential customers—the American public" and to provide services in a manner "responsive" to the "needs of the American people." HR Rep No. 91-1104, supra, at 19-20. The Postal Service has been entrusted with this mission at a time when the mail service market is becoming much more competitive. It is with this mission in mind that we must examine the regulation at issue.

The Government asserts that it is reasonable to restrict access of postal premises to solicitation, because solicitation is inherently disruptive of the Postal Service's business. We

[497 US 733]

agree. "Since the act of soliciting alms or contributions usually has as its objective an immediate act of charity, it has the potentiality for evoking highly personal and subjective reactions. Reflection usually is not encouraged, and the person solicited often must make a hasty decision whether to share his resources with an unfamiliar organization while under the eager gaze of the solicitor." 43 Fed Reg 38824 (1978).

The dissent avoids determining whether the sidewalk is a public forum because it believes the regulation, 39 CFR § 232.1(h) (1989), does not pass muster even under the reasonableness standard applicable to nonpublic fora. In concluding that § 232.1(h) is unreasonable, the dissent relies heavily on the fact that the Service permits other types of potentially disruptive speech on a case-by-case basis. The dissent's criticism in this regard seems to be that solicitation is not receiving the same treatment by the Postal Service that other forms of speech receive. See post, at 760, 111 L Ed 2d, at 603 (criticizing "inconsistent treatment"). That claim, however, is more properly addressed under the equal protection component of the Fifth Amendment. In any event, it is anomalous that the Service's allowance of some avenues of speech would be relied upon as evidence that it is impermissibly suppressing other speech. If anything, the Service's generous accommodation of some types of speech testifies to its willingness to provide as broad a forum as possible, consistent with its postal mission. The dissent would create, in the name of the First Amendment, a disincentive for the Government to dedicate its property to any speech activities at all. In the end, its approach permits it to sidestep the single issue before us: Is the Government's prohibition of *solicitation* on postal sidewalks *unreasonable?*

Whether or not the Service permits other forms of speech, which may or may not be disruptive, it is not unreasonable to prohibit solicitation on the ground that it is unquestionably a particular form of speech that is disruptive of business. Solicitation

impedes the normal flow of traffic. See Heffron, supra, at 653, 69 L Ed 2d 298, 101 S Ct 2559. Solicitation requires action by those who would respond: The individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor's literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card. See Record, Exh 5 (credit card receipt); see also United States v Belsky, 799 F2d 1485, 1489 (CA11 1986) ("Soliciting funds is an inherently more intrusive and complicated activity than is distributing literature"). As residents of metropolitan areas know from daily experience, confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information. One need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand, but one must listen, comprehend, decide, and act in order to respond to a solicitation. Solicitors can achieve their goal only by "stopping [passersby] momentarily or for longer periods as money is given or exchanged for literature" or other items. Heffron, supra, at 653, 69 L Ed 2d 298, 101 S Ct 2559 (upholding stringent restrictions on the location of sales and solicitation activity). Justice Blackmun noted this distinction in his opinion concurring in part and dissenting in part to Heffron:

> "The distribution of literature does not require that the recipient stop in order to receive the message the speaker wishes to convey; instead, the recipient is free to read the message at a later time. . . . [S]ales and the the collection of solicited funds not only require the fairgoer to stop, but also 'engender additional confusion . . . because they involve acts of exchanging articles for money, fumbling for and dropping money, making change, etc.' " 452 US, at 665, 69 L Ed 2d 298, 101 S Ct 2559 (citation omitted).

This description of the disruption and delay caused by solicitation rings of "common-sense," ibid., which is sufficient

in this Court to uphold a regulation under reasonableness review.

The Postal Service's judgment is

based on its long experience with solicitation. It has learned from this experience that because of a continual demand from a wide range of groups for permission to conduct fundraising or vending on postal premises, postal facility managers were distracted from their primary jobs by the need to expend considerable time and energy fielding competing demands for space and administering a program of permits and approvals. See Tr of Oral Arg 9 ("The Postal Service concluded after an experience with limited solicitation that there wasn't enough room for everybody who wanted to solicit on postal property and further concluded that allowing limited solicitation carried with it more problems than it was worth"). Thus, the Service found that "even the limited activities permitted by [its] program . . . produced highly unsatisfactory results." 42 Fed Reg 63911 (1977). It is on the basis of this real-world experience that the Postal Service enacted the regulation at issue in this case. The Service also enacted regulations barring deposit or display of written materials except on authorized bulletin boards "to regain space for the effective display of postal materials and the efficient transaction of postal business, eliminate safety hazards, reduce maintenance costs, and improve the appearance of exterior and public-use areas on postal premises." 43 Fed Reg 38824 (1978); see 39 CFR § 232.1(o) (1989). In short, the Postal Service has prohibited the use of its property and resources where the intrusion creates significant interference with Congress' mandate to ensure the most effective and efficient distribution of the mails. This is hardly unreasonable.

The dissent concludes that the Service's administrative concerns are unreasonable, largely because of the existence of less restrictive alternatives to the regulations at issue. See post, at 761-763, 111 L Ed 2d, at 604-605. Even if more narrowly tailored regulations could be promulgated, however, the Postal Service is

only required to adopt *reasonable* regulations, not "the most reasonable or the only reasonable" regulation possible. Cornelius, 473 US, at 808, 87 L Ed 2d 567, 105 S Ct 3439.

The dissent also would strike the regulation on the ground that the Postal Service enacted it because solicitation "would be likely to produce hostile reactions and to cause people to avoid post offices." 43 Fed Reg 38824 (1978). The dissent reads into the Postal Service's realistic concern with losing postal business because of the uncomfortable atmosphere created by aggressive solicitation an intent to suppress certain views. See post, at 754, 111 L Ed 2d, at 599. But the Postal Service has never intimated that it intends to suppress the views of any "disfavored or unpopular political advocacy group." Ibid. It is the inherent nature of solicitation itself, a content-neutral ground, that the Service justifiably relies upon when it concludes that solicitation is disruptive of its business. The regulation is premised on the Service's long experience, on the fact that solicitation is inherently more disruptive than the other speech activities it permits, and on the Service's empirically based conclusion that a case-by-case approach to regulation of solicitation is unworkable.

Clearly, the regulation does not discriminate on the basis of content or viewpoint. Indeed, "[n]othing suggests the Postal Service intended to discourage one viewpoint and advance another. . . . By excluding all . . . groups from engaging in [solicitation] the Postal Service is not granting to 'one side of a debatable public question . . . a monopoly in expressing its views.'" Monterey County Democratic Central Committee v United States Postal Service, 812 F2d 1194, 1198-1199 (CA9 1987) (citation omitted). The Service's concern about losing customers because of the potentially unpleasant situation created by solicitation per se does not reveal "an effort to suppress expression merely because public officials oppose the speaker's view." Perry, 460 US, at 45-46, 74 L Ed 2d 794, 103 S Ct 948.

It is clear that this regulation passes constitutional muster under the Court's usual test for reasonableness. See Lehman, 418 US, at 303, 41 L Ed 2d 770, 94 S Ct 2714; Cornelius, supra, at 808, 87 L Ed 2d 567, 105 S Ct 3439. Accordingly, we conclude, as have the Courts of Appeals for the Third and Eleventh Circuits, that the Postal Service's regulation of solicitation is reasonable as applied. See United States v Belsky, 799 F2d 1485 (CA11 1986); United States v Bjerke, 796 F2d 643 (CA3 1986).

The judgment of the Court of Appeals is reversed.

Justice **Kennedy**, concurring in the judgment.

[1d] I agree that the postal regulation reviewed here does not violate the First Amendment. Because my analysis differs in essential respects from that in Justice O'Connor's opinion, a separate statement of my views is required.

Many of those who use postal facilities do so from necessity, not choice. They must go to a post office to conduct their business and personal correspondence, carrying cash for stamps or money orders. While it is legitimate for the Postal Service to ensure convenient and unimpeded access for postal patrons, the public's use of postal property for communicative purposes means that the surrounding walkways may be an appropriate place for the exercise of vital rights of expression. As society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place. It is true that the uses of the adjacent public buildings and the needs of its patrons are an important part of a balance, but there remains a powerful argument that, because of the wide range of activities that the Government permits to take place on this postal sidewalk, it is more than a nonpublic forum.

This is so even though the Government may intend to impose some limitations on the forum's use. If our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and its customary use by the public may control the

case. See, e. g., Cornelius v NAACP Legal Defense & Educational Fund, Inc. 473 US 788, 819-820, 87 L Ed 2d 567, 105 S Ct 3439 (1985) (Blackmun, J., dissenting). While it is proper to weigh the need to maintain the dignity and purpose of a public building, see United States v Grace, 461 US 171, 182, 75 L Ed 2d 736, 103 S Ct 1702 (1983), or to impose special security requirements, see Adderley v Florida, 385 US 39, 17 L Ed 2d 149, 87 S Ct 242

(1966), other factors may point to the conclusion that the Government must permit wider access to the forum than it has otherwise intended. Viewed in this light, the demand for recognition of heightened First Amendment protection has more force here than in those instances where the Government created a nontraditional forum to accommodate speech for a special purpose, as was thought true with teachers' mail boxes in Perry Education Assn. v Perry Local Educators' Assn. 460 US 37, 74 L Ed 2d 794, 103 S Ct 948 (1983), or the Combined Federal Campaign in Cornelius, supra.

It is not necessary, however, to make a precise determination whether this sidewalk and others like it are public or nonpublic forums; in my view, the postal regulation at issue meets the traditional standards we have applied to time, place, and manner restrictions of protected expression. See Clark v Community for Creative Non-Violence, 468 US 288, 293, 82 L Ed 2d 221, 104 S Ct 3065 (1984).

[1e, 2a] "[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" Ward v Rock Against Racism, 491 US 781, 791, 105 L Ed 2d 661, 109 S Ct 2746 (1989) (quoting Clark, supra, at 293, 82 L Ed 2d 221, 104 S Ct 3065). The regulation, in its only part challenged here, goes no further than to prohibit personal solicitations on postal property for the immediate payment of money. The regulation, as the United States concedes, expressly permits the respondents and all others to engage in

political speech on topics of their choice and to distribute literature soliciting support, including money contributions, provided there is no in-person solicitation for payments on the premises. See Brief for United States 39.

[1f] Just as the government has a significant interest in preventing "visual blight" in its cities, City Council of Los Angeles v Taxpayers for Vincent, 466 US 789, 810, 80 L Ed 2d 772, 104 S Ct 2118 (1984), in "maintaining [public] parks . . . in an attractive and intact condition," Clark, supra, at 296, 82 L Ed 2d 221, 104 S Ct 3065, and in "avoiding congestion and maintaining the orderly movement" of persons using a public forum, Heffron v International Society for Krishna Consciousness, Inc. 452 US 640, 652, 69 L Ed 2d 298, 101 S Ct 2559 (1981), so the Government here has a significant interest in protecting the integrity of the purposes to which it has dedicated the property, that is, facilitating its customers' postal transactions. Given the Postal Service's past experience with expressive activity on its property, I cannot reject its judgment that in-person solicitation deserves different treatment from alternative forms of solicitation and expression. Cf. id., at 665, 69 L Ed 2d 298, 101 S Ct 2559 (Blackmun, J., concurring in part and dissenting in part). The same judgment has been made for the classic public forums in our Nation's capital. The solicitation of money is banned in the District of Columbia on the Mall and other parks under the control of the National Park Service. See 36 CFR § 7.96(h) (1989).

The Postal Service regulation, narrow in its purpose, design, and effect, does not discriminate on the basis of content or viewpoint, is narrowly drawn to serve an important governmental interest, and permits respondents to engage in a broad range of activity to express their views, including the solicitation of financial support. For these reasons, I agree with Justice O'Connor that the Postal Service regulation is consistent with the protections of the First Amendment, and concur in the judgment of the Court.

Justice **Brennan,** with whom Justice **Marshall** and Justice **Stevens** join and with whom Justice **Blackmun** joins as to Part I, dissenting.

Today the Court holds that a United States Postal Service regulation prohibiting persons from "[s]oliciting alms and contributions" on postal premises does not violate the First Amendment as applied to members of a political advocacy group who solicited contributions from a sidewalk outside the entrance to a post office. A plurality finds that the sidewalk is not a public forum and that the Postal Service regulation is valid because it is "reasonable." Justice Kennedy concludes that although the sidewalk might well be a public forum, the regulation is permissible as applied because it is a content-neutral time, place, or manner restriction on protected speech.

Neither of these conclusions is justified. I think it clear that the sidewalk in question is a "public forum" and that the Postal Service regulation does not qualify as a content-neutral time, place, or manner restriction. Moreover, even if I did not regard the sidewalk in question as a public forum, I could not subscribe to the plurality's position that respondents can validly be excluded from the sidewalk, because I believe that the distinction drawn by the postal regulation between solicitation and virtually all other kinds of speech is not a reasonable one. For these reasons, I respectfully dissent.

I

A

The plurality begins its analysis with the determination that the sidewalk in question is not a "public forum." See ante, at 727-728, 111 L Ed 2d, at 582. Our decisions in recent years have identified three categories of forums in which expression might take place on government property: (1) traditional, "quintessential public forums"—"places which by long tradition or by government fiat have been devoted to assembly and debate,"

such as "streets and parks"; (2) "limited-purpose" or state-created semipublic forums opened "for use by the public as a place for expressive activity," such as university meeting facilities or school board meetings; and (3) nonpublic forums or public property "which is not by tradition or designation a forum for public communication." Perry Education Assn. v Perry Local Educators' Assn. 460 US 37, 45-46, 74 L Ed 2d 794, 103 S Ct 948 (1983); see also Board of Airport Comm'rs of Los Angeles v Jews for Jesus, Inc. 482 US 569, 572-573, 96 L Ed 2d 500, 107 S Ct 2568 (1987). Ironically, these public forum categories—originally conceived of as a way of *preserving* First Amendment rights, see

Kalven, The Concept of the Public Forum: Cox v Louisiana, 1965 Sup Ct Rev 1—have been used in some of our recent decisions as a means of upholding restrictions on speech. See, e. g., Hazelwood School Dist. v Kuhlmeier, 484 US 260, 98 L Ed 2d 592, 108 S Ct 562 (1988); Cornelius v NAACP Legal Defense & Educational Fund, Inc. 473 US 788, 87 L Ed 2d 567, 105 S Ct 3439 (1985); United States v Albertini, 472 US 675, 86 L Ed 2d 536, 105 S Ct 2897 (1985); City Council of Los Angeles v Taxpayers for Vincent, 466 US 789, 80 L Ed 2d 772, 104 S Ct 2118 (1984); Minnesota State Bd. for Community Colleges v Knight, 465 US 271, 79 L Ed 2d 299, 104 S Ct 1058 (1984); Perry Education Assn., supra; United States Postal Service v Council of Greenburgh Civic Assns. 453 US 114, 69 L Ed 2d 517, 101 S Ct 2676 (1981); but see United States v Grace, 461 US 171, 75 L Ed 2d 736, 103 S Ct 1702 (1983); Widmar v Vincent, 454 US 263, 70 L Ed 2d 440, 102 S Ct 269 (1981). I have questioned whether public forum analysis, as the Court has employed it in recent cases, serves to obfuscate rather than clarify the issues at hand. See Perry Education Assn., supra, at 62-63, n 6, 74 L Ed 2d 794, 103 S Ct 948 (dissenting opinion); Council of Greenburgh Civic Assns. supra, at 136, 140, 69 L Ed 2d 517, 101 S Ct 2676 (opinion concurring in judgment); Greer v Spock, 424 US 828, 859-860, 47 L Ed 2d 505, 96 S Ct 1211 (1976) (dissenting opinion). Indeed, the Court's contemporary use of public forum doctrine has been roundly criticized by commentators.[1]

[497 US 742]

Today's decision confirms my doubts about the manner in which we have been using public forum analysis. Although the plurality recognizes that public sidewalks are, as a general matter, public forums, see ante, at 728, 111 L Ed 2d, at 582, the plurality insists, with logic that is both strained and formalistic, that the specific sidewalk at issue is not a public forum. This conclusion is unsupportable. "[S]treets, sidewalks, and parks, are considered, without more, to be 'public forums.' " "Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression." United States v Grace, supra, at 177, 180, 75 L Ed 2d 736, 103 S Ct 1702. It is only common sense that a public sidewalk adjacent to a public building to which citizens are freely admitted is a natural location for speech to occur, whether that speech is critical of government generally, aimed at the particular governmental agency housed in the building, or focused upon issues unrelated to the government.

---

[1] See, e. g., L. Tribe, American Constitutional Law 993 (2d ed 1988) ("[A]n excessive focus on the public character of some forums, coupled with inadequate attention to the precise details of the restrictions on expression, can leave speech inadequately protected in some cases, while unduly hampering state and local authorities in others") (footnotes omitted); Dienes, The Trashing of the Public Forum: Problems in First Amendment Analysis, 55 Geo Wash L Rev 109, 110 (1986) ("[C]onceptual approaches such as that embodied in the nonpublic-forum doctrine simply yield an inadequate jurisprudence of labels"); Farber & Nowak, The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication, 70 Va L Rev 1219, 1234 (1984) ("Classification of public places as various types of forums has only confused judicial opinions by diverting attention from the real first amendment issues involved in the cases"); Post, Between Governance and Management: The History and Theory of the Public Forum, 34 UCLA L Rev 1713, 1715-1716 (1987) ("The doctrine has in fact become a serious obstacle not only to sensitive first amendment analysis, but also to a realistic appreciation of the government's requirements in controlling its own property. It has received nearly universal condemnation from commentators"); Stone, Content-Neutral Restrictions, 54 U Chi L Rev 46, 93 (1987) (current public forum analysis is plagued by a "myopic focus on formalistic labels" that "serves only to distract attention from the real stakes").

No doctrinal pigeonholing, complex formula, or multipart test can obscure this evident conclusion.

1

The plurality maintains that the postal sidewalk is not a traditional public forum because it "was constructed solely to provide for the passage of individuals engaged in postal business" and "leads only from the parking area to the front door of the post office." Ante, at 727, 111 L Ed 2d, at 582. This reasoning is flawed.

Quintessential examples of a "public forum" are those open spaces—streets, parks, and sidewalks—to which the public generally has unconditional access and which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v Committee for Industrial Organizations, 307 US 496, 515, 83 L Ed 1423, 59 S Ct 954 (1939) (opinion of Roberts, J.). Public parks, streets, and sidewalks are public forums because open access by all members of the public is integral to their function as central gathering places and arteries of transportation. Public access is not a matter of grace by government officials but rather is inherent in the open nature of the locations. As a result, expressive activity is compatible with the normal use of a public forum and can be accommodated simply by applying the communication-neutral rules used to regulate other, non-speech-related conduct on the premises. See Grayned v City of Rockford, 408 US 104, 116, 33 L Ed 2d 222, 92 S Ct 2294 (1972) ("The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time"). For the most part, on streets and sidewalks, including the single-purpose sidewalk at issue here, communication between citizens can be permitted according to the principle that "one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion." Jamison v Texas, 318 US 413, 416, 87 L Ed 869, 63 S Ct 669 (1943).[2]

The wooden distinctions drawn today by the plurality have no basis in our prior cases and, furthermore, are in apparent contradiction to the plurality's admission that "[t]he mere physical characteristics of the property cannot dictate forum analysis." Ante, at 727, 111 L Ed 2d, at 581. It is irrelevant that the sidewalk at issue may have been constructed only to provide access to the Bowie Post Office. Public sidewalks, parks, and streets have been reserved for public use as forums for speech even though government has not constructed them for expressive purposes. Parks are usually constructed to beautify a city and to provide opportunities for recreation, rather than to afford a forum for soapbox orators or leafleteers; streets are built to facilitate transportation, not to enable protesters to conduct marches; and sidewalks are created with pedestrians in mind, not solicitors. Hence, *why* the sidewalk was built is not salient.

---

[2] There may be important differences between cases in which citizens have a legal right to be present on government property and those in which "citizens claim a right to enter government property for the particular purpose of speaking." Laycock, Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers, 81 Nw U L Rev 1, 48 (1986), cited in Board of Airport Comm'rs of Los Angeles v Jews for Jesus, Inc. 482 US 569, 573, 96 L Ed 2d 500, 107 S Ct 2568 (1987). In the former class of cases—into which the instant case falls—the Court has recognized that when citizens are going about their business in a place they are entitled to be, they are presumptively entitled to speak. See Jamison v Texas, 318 US, at 416, 87 L Ed 869, 63 S Ct 669; see also Post, supra, at 1717, 1765-1767, 1773-1775, 1781-1784.

Nor is it important that the sidewalk runs only between the parking lot and post office entrance. The existence of a public forum does not turn on a particularized factual inquiry into whether a sidewalk serves one building or many or whether a street is a dead end or a major thoroughfare. In Boos v Barry, 485 US 312, 99 L Ed 2d 333, 108 S Ct 1157 (1988), for example, Justice O'Connor concluded that the public sidewalks within 500

[497 US 745]

feet of the embassies of the Governments of the Soviet Union and Nicaragua in Washington, D. C. are public forums without considering the factors found in today's opinion. See id., at 318, 99 L Ed 2d 333, 108 S Ct 1157. In Frisby v Schultz, 487 US 474, 101 L Ed 2d 420, 108 S Ct 2495 (1988), Justice O'Connor acknowledged that " 'time out of mind' public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum." Id., at 480, 101 L Ed 2d 420, 108 S Ct 2495 (citation omitted). She explained that "our decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a 'cliché' but recognition that '[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public.' *No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora.*" Id., at 480-481, 101 L Ed 2d 420, 108 S Ct 2495 (emphasis added; citations omitted). Justice O'Connor further wrote that "a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood" or because it is "physical[ly] narro[w]." Id., at 480, 101 L Ed 2d 420, 108 S Ct 2495.

The architectural idiosyncrasies of the Bowie Post Office are thus not determinative of the question whether the public area around it constitutes a public forum. Rather, that the walkway at issue is a sidewalk open and accessible to the general public is alone sufficient to identify it as a public forum. As the Court of Appeals observed: "[I]t ill behooves us to undertake too intricate a task of designation, holding this sidewalk public and that one not. . . . [S]uch labeling loses sight of the fact that most sidewalks are designed as outdoor public thoroughfares and that citizens should not be left to wonder at which ones they will be permitted to speak and which ones not." 866 F2d 699, 702 (CA4 1989).[3]

The cases that formed the foundation of public forum doctrine did not engage in the type of fact-specific inquiry undertaken by the plurality today. In Cox v Louisiana, 379 US 536, 553-558, 13 L Ed 2d 471, 85 S Ct 453 (1965), for example, we reversed a civil rights leader's conviction for obstructing a public passage after he organized a protest on a municipal sidewalk across the street from the Baton Rouge courthouse. We did not consider whether the sidewalk was constructed to facilitate protests (an unlikely possibility), or whether the sidewalk was a "public thoroughfare" rather than one providing access to only a limited number of locations. Similarly, in Edwards v South Carolina, 372 US 229, 9 L Ed 2d 697, 83 S Ct 680 (1963), we reversed the convictions of civil rights demonstrators who had assembled on the grounds of the South Carolina State House, "an area of two city blocks open to the general public," id., at 230, 9 L Ed 2d 697, 83 S Ct 680, without inquiring whether the State had dedicated the statehouse grounds for such expressive activities. In Shuttlesworth v Birmingham, 394 US 147, 152, 22 L Ed 2d 162, 89 S Ct 935 (1969), we did not suggest that our constitutional analysis hinged on whether the sidewalk march had occurred on Main Street or on a dead-end street leading only to a single public building. See also Carey v Brown, 447 US 455, 460, 65 L Ed 2d 263, 100 S Ct 2286 (1980); Grayned v City of Rockford, 408 US 104, 120-121, 33 L Ed 2d 222, 92 S Ct 2294 (1972); Police Dept. of Chicago v Mosley, 408 US 92, 96, 33 L Ed 2d 212, 92 S Ct 2286 (1972).

Whatever the proper application of public forum doctrine to novel situations like fund-raising drives in the federal workplace, see Cornelius v NAACP Legal Defense & Educational Fund, Inc. 473 US 788, 87 L Ed 2d 567, 105 S Ct 3439 (1985), or the internal mail systems of public schools, see Perry Education Assn. v Perry Local Educators' Assn. 460 US 37, 74 L Ed 2d 794, 103 S Ct 948 (1983), we ought not unreflectively transfer principles of analysis developed in those specialized and difficult contexts to traditional forums such as streets, sidewalks, and parks.[4] See n 2, supra. In doing so,

---

[3] To its credit, the plurality does not rely—as a ground for finding that the sidewalk at issue is not a public forum—on the fact that at the Bowie Post Office a parking lot separates the sidewalk from a nearby highway. The Court of Appeals supplied the ready answer to such an argument:

"If 'the mere presence of a parking area between the street and a sidewalk limits our scrutiny of speech-related regulations to the standard for nonpublic fora, we issue an open invitation for government architects and landscapers to surround public buildings with modern-day moats.' The First Amendment is not consigned to the mercies of architectural chicanery, nor may a federal agency, simply by designating a sidewalk its own, spare itself the inconvenience of political protest and speech." 866 F2d, at 703 (citation omitted).

[4] This is not a case involving the Government's "'discretion and control over the management of its personnel and internal affairs.'" Cornelius v NAACP Legal Defense & Educational Fund, Inc. 473 US 788, 805, 87 L Ed 2d 567, 105 S Ct 3439 (1985), quoting Arnett v Kennedy, 416 US 134, 168, 40 L Ed 2d 15, 94 S Ct 1633 (1974) (Powell, J., concurring in part); see also Cafeteria & Restaurant Workers v McElroy, 367 US 886, 896, 6 L Ed 2d 1230, 81 S Ct 1743 (1961) (upholding authority of the commander of a military base to deny employment to a civilian cook without a hearing on the basis of security concerns). The instant case involves activities of ordinary citizens *outside* the post office, not the conduct of postal employees. I reject the

the plurality dilutes the very core of the public forum doctrine. As Justice Kennedy notes, "the demand for recognition of heightened First Amendment protection has more force here than in those instances where the Government created a nontraditional forum to accommodate speech for a special purpose, as was thought true with teachers' mail boxes in Perry Education Assn. [,supra], or the Combined Federal Campaign in Cornelius." Ante, at 738, 111 L Ed 2d, at 589 (opinion concurring in judgment). We have never applied a "reasonableness" test to speech in a place where government property was open to the public.[5] Indeed, even

---

plurality's implication that the "proprietary" nature of the post office somehow detracts from the *sidewalk's* status as a public forum. Ante, at 725, 111 L Ed 2d, at 580-581. "[T]he government may not escape the reach of the First Amendment by asserting that it acts only in a proprietary capacity with respect to streets and parks." Smith v Goguen, 415 US 566, 594, 39 L Ed 2d 605, 94 S Ct 1242 (1974) (Rehnquist, J., dissenting) (emphasis added). The sidewalk or street outside the White House is no different from one outside a post office or one outside a private store—despite the differences in what transpires inside. The plurality's statement that "[t]he purpose of the forum in this case is to accomplish the most efficient and effective postal delivery system," ante, at 732, 111 L Ed 2d, at 585, confuses the sidewalk with the interior of the post office.

Furthermore, I would be wary of placing so much weight on the blurry concept of government qua "proprietor." See Garcia v San Antonio Metropolitan Transit Authority, 469 US 528, 539-547, 83 L Ed 2d 1016, 105 S Ct 1005 (1985); Owen v City of Independence, 445 US 622, 644-647, 63 L Ed 2d 673, 100 S Ct 1398 (1980). Certainly, the mere fact that postal operations are somehow *implicated* here cannot give the Government greater license to silence citizens in a public forum. Cf. Rutan v Republican Party of Illinois, ante, at 70-71, n 4, 111 L Ed 2d 52, 110 S Ct 2729 (1990). The fact that the government is acting as an employer or as a proprietor does not exempt it from the distinct requirements of the Equal Protection Clause, see, e. g., Mississippi Univ. for Women v Hogan, 458 US 718, 723-724, 73 L Ed 2d 1090, 102 S Ct 3331 (1982); Sugarman v Dougall, 413 US 634, 641, 648-649, 37 L Ed 2d 853, 93 S Ct 2842 (1973); Turner v City of Memphis, 369 US 350, 353, 7 L Ed 2d 762, 82 S Ct 805 (1962) (per curiam), or the Due Process Clause, Cleveland Bd. of Education v Loudermill, 470 US 532, 538-545, 84 L Ed 2d 494, 105 S Ct 1487 (1985); Perry v Sindermann, 408 US 593, 599-603, 33 L Ed 2d 570, 92 S Ct 2694 (1972), or the Commerce Clause, see South-Central Timber Development, Inc. v Wunnicke, 467 US 82, 87, 81 L Ed 2d 71, 104 S Ct 2237 (1984), or the Privileges and Immunities Clause of Article IV. See United Building & Construction Trades Council of Camden County v Mayor and Council of Camden, 465 US 208, 214-218, 79 L Ed 2d 249, 104 S Ct 1020 (1984).

The plurality's reliance on Lehman v City of Shaker Heights, 418 US 298, 41 L Ed 2d 770, 94 S Ct 2714 (1974) (plurality opinion), is also misplaced. That a city may protect a captive audience in the small, enclosed space of a municipal bus says little about the type of regulations that the Government may adopt in the context of an outdoor public sidewalk. Justice Douglas, who provided the fifth vote in Lehman in his opinion concurring in the judgment, saw a clear distinction between the two situations. "One who hears disquieting or unpleasant programs in public places, such as restaurants, can get up and leave. But the man on the streetcar has no choice but to sit and listen, or perhaps to sit and to try *not* to listen." Public Utilities Comm'n of District of Columbia v Pollak, 343 US 451, 469, 96 L Ed 1068, 72 S Ct 813 (1952) (Douglas, J., dissenting). Although the Government, within certain limits, may protect captive listeners against unwelcome intrusions, in public locations "we expect individuals simply to avoid speech they do not want to hear." Frisby v Schultz, 487 US 474, 484, 101 L Ed 2d 420, 108 S Ct 2495 (1988); cf. Erznoznik v City of Jacksonville, 422 US 205, 210-211, 45 L Ed 2d 125, 95 S Ct 2268 (1975); Cohen v California, 403 US 15, 21-22, 29 L Ed 2d 284, 91 S Ct 1780 (1971).

[5] Greer v Spock, 424 US 828, 47 L Ed 2d 505, 96 S Ct 1211 (1976), is readily distinguishable because the Court in that case held, over my dissent, that a sidewalk on a *military base* was not truly "open" to the public and was therefore not a public forum. The Court reasoned that although the public was freely permitted to visit the base, the commanding officer's authority to exclude not only those

in regulated **[497 US 749]** environments where a public right of access nevertheless exists, we have applied a higher level of scrutiny to restrictions on speech than the plurality does today. See Cohen v California, 403 US 15, 22, 29 L Ed 2d 284, 91 S Ct 1780 (1971); Tinker v Des Moines Independent Community School Dist., 393 US 503, 509, 21 L Ed 2d 731, 89 S Ct 733 (1969).

2

Even if I did not believe that the postal sidewalk is a "traditional" public forum within the meaning of our cases, I would find that it is a "limited-purpose" forum from which respondents may not be excluded absent a showing of a compelling interest to which any exclusion is narrowly tailored. We have recognized that even where a forum would not exist but for the decision of government to create it, the government's power to enforce exclusions from the forum is narrowly circumscribed if the government permits a wide range of expression to occur. See Perry Education Assn. 460 US, at 45, 74 L Ed 2d 794, 103 S Ct 948; see also Widmar v Vincent, 454 US 263, 267-268, 70 L Ed 2d 440, 102 S Ct 269 (1981); Madison Joint School Dist. No. 8 v Wisconsin Employment Relations Comm'n, 429 US 167, 175-176, 50 L Ed 2d 376, 97 S Ct 421 (1976); Southeastern Promotions, Ltd. v Conrad, 420 US **[497 US 750]** 546, 555-558, 43 L Ed 2d 448, 95 S Ct 1239 (1975). In a limited-purpose forum, "the Government must permit wider access to the forum than it has otherwise intended." Ante, at 738, 111 L Ed 2d, at 589 (Kennedy, J., concurring in judgment).

The plurality acknowledges both that "the forum here has been dedicated to some First Amendment uses and thus is *not* a purely nonpublic forum," ante, at 730, 111 L Ed 2d, at 584 (emphasis added), and that "the Service's generous accommodation of some types of speech testifies to its willingness to provide as broad a forum as possible, consistent with its postal mission." Ante, at 733, 111 L Ed 2d, at 586. These observations support a finding that the sidewalk is a limited-purpose forum, especially in light of the wide range of expressive activities that are permitted. The postal regulation forbids persons only from "[s]oliciting alms and

---

engaged in expressive activity, but *anyone* deemed by him to be detrimental to the defense function, was "unquestioned." Id., at 838, 47 L Ed 2d 505, 96 S Ct 1211. Compare Flower v United States, 407 US 197, 198, 32 L Ed 2d 653, 92 S Ct 1842 (1972) (per curiam) (reversing conviction for distributing leaflets on a military base where the "fort commander chose not to exclude the public from the street where petitioner was arrested" and where " 'there [wa]s no sentry post or guard at either entrance or anywhere along the route' " and " '[t]raffic flow[ed] through the post on this and other streets 24 hours a day' ") (citation omitted). Of course, I disagreed with the majority's assessment of the facts in Greer, as the plurality today points out. See ante, at 729, 111 L Ed 2d, at 583. But that the Court in Greer engaged in a debate over the degree to which the sidewalk was open to the public demonstrates that the Court believed that a sidewalk generally accessible to the public—as in the instant case—is a public forum. At any rate, I do not believe that our decision in Greer, colored as it was by the special security concerns of a military base, see 424 US, at 837, 47 L Ed 2d 505, 96 S Ct 1211 ("[T]his Court over the years has on countless occasions recognized the special constitutional function of the military in our national life, a function both explicit and indispensable"); see also Brown v Glines, 444 US 348, 353-354, 62 L Ed 2d 540, 100 S Ct 594 (1980) (discussing Greer), is helpful in identifying public forums outside the unique context of the military.

contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises." 39 CFR § 232.1(h)(1) (1989). The Government thus invites labor picketing, soapbox oratory, distributing literature, holding political rallies, playing music, circulating petitions, or any other form of speech not specifically mentioned in the regulation.

The plurality concludes that the sidewalk is not a limited-purpose forum only by ignoring its earlier observations. The plurality maintains that "a practice of allowing some speech activities on postal property do[es] not add up to the dedication of postal property to speech activities," ante, at 730, 111 L Ed 2d, at 583, and concludes that the Postal Service may close off postal premises to solicitors even though it has opened the forum to virtually every other type of speech. The plurality's conclusion is unsound.

The plurality has collapsed the distinction between exclusions that help define the contours of the forum and those that are imposed *after* the forum is defined. Because the plurality finds that the prohibition on solicitation is part of the definition of the forum, it does not view the regulation as

operating on a public forum and hence subjects the postal regulation to only a "reasonableness" inquiry. If, however, the ban on solicitation were found to be an independent restriction on speech occurring in a limited public forum, it would be judged according to stricter scrutiny. See Perry Education Assn., supra, at 45-46, 74 L Ed 2d 794, 103 S Ct 948. The plurality's approach highlights the fact that there is only a semantic distinction between the two ways in which exclusions from a limited-purpose forum can be characterized, although the two options carry with them different standards of review. The plurality's logic, as Justice Blackmun has noted in a previous case, would make restrictions on access to limited public forums self-justifying:

> "The Court makes it *virtually* impossible to prove that a forum restricted to a particular class of speakers is a limited public forum. If the Government does not create a limited public forum unless it intends to provide an 'open forum' for expressive activity, and if the exclusion of some speakers is evidence that the Government did not intend to create such a forum, . . . no speaker challenging denial of access will ever be able to prove that the forum is a limited public forum. The very fact that the Government denied access to the speaker indicates that the Government did not intend to provide an open forum for expressive activity, and under the Court's analysis that fact alone would demonstrate that the forum is not a limited public forum." Cornelius, 473 US, at 825, 87 L Ed 2d 567, 105 S Ct 3439 (dissenting opinion).

The plurality does not, and cannot, explain in the instant case why the postal regulation establishes a policy of " '[s]elective access,' " ante, at 730, 111 L Ed 2d, at 584 (citation omitted), rather than constituting a separate restriction on speech in a limited public forum. Nor can the plurality explain how its reasoning is consistent with our past cases. In Carey v Brown, 447 US 455, 460, 65 L Ed 2d 263, 100 S Ct 2286 (1980), Grayned v Rockford, 408 US, at 107, 33 L Ed 2d 222, 92 S Ct 2294, and Police Department of Chicago v Mosley, 408 US,

at 96, 33 L Ed 2d 212, 92 S Ct 2286, for example, we held that bans on picketing were invalid because they contained impermissible exemptions for labor picketing. We did not hold, as the plurality's position might suggest, that the bans were valid because the labor exemption was part of the forum's definition. Similarly, the restrictions at issue in Southeastern Promotions, Ltd. v Conrad, supra, at 549, n 4, 43 L Ed 2d 448, 95 S Ct 1239, and Widmar v Vincent, 454 US 263, 265-266, n 3, 70 L Ed 2d 440, 102 S Ct 269 (1981), could have been—but were not—used to show that the municipal theater and university meeting rooms, respectively, were not public forums because they practiced a policy of selective access.[6]

I would find that the postal sidewalk is a public forum, either of the "traditional" or "limited-purpose" variety.

B

[2b] Content-based restrictions on speech occurring in either a public forum or in a limited-purpose public forum are invalid unless they are narrowly drawn to serve a compelling interest. See Perry Education Assn. 460 US, at 45, 74 L Ed 2d 794, 103 S Ct 948. Government "may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." Ibid. I do not think the postal regulation can pass muster under either standard. Although I agree that the Government

has an interest in preventing the obstruction of post office entrances and the disruption of postal functions, there is no indication that respondents interfered with postal business in any way. The Court of Appeals found:

> "The record in this case reveals no evidence of a significant government interest best served by the ban on solicitation in a public forum. There is no evidence that Kokinda and Pearl's solicitation obstructed or impeded postal customers. [Respondents] were not charged with obstructing post office entrances, disturbing postal employees in the performance of their duties, or impeding the public in the transaction of postal business. There is nothing to suggest that they harassed, threatened, or physically detained unwilling listeners." 866 F2d, at 704 (citation omitted).

I agree with the Court of Appeals that the postal regulation is invalid as applied in this case because it "prohibits all solicitation anywhere on postal service property. It sweeps an entire category of expressive activity off a public forum solely in the interest of administrative convenience. It does not attempt to limit nondisruptive solicitation to a time, place, and manner consistent with post office operations; and it does not require that evidence of disruption be shown." Id., at 705-706.

---

[6] I am encouraged by the apparent fact that a majority of the Court does not adhere to the plurality's reasoning on this point. Justice Kennedy's citation to Justice Blackmun's Cornelius dissent, see ante, at 738, 111 L Ed 2d, at 589 (opinion concurring in judgment), citing Cornelius, 473 US, at 819-820, 87 L Ed 2d 567, 105 S Ct 3439, suggests that Justice Kennedy believes that access depends upon "the nature of the forum and the nature of the expressive activity" and whether "the activity [would be] compatible with normal uses of the property," id., at 820, 87 L Ed 2d 567, 105 S Ct 3439, not upon whether the government explicitly permits access. See ante, at 737-738, 111 L Ed 2d, at 588 ("If our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and its customary use by the public may control the case") (Kennedy, J., concurring in judgment).

Justice Kennedy contends that the postal regulation may be upheld as a content-neutral time, place, or manner regulation. But the regulation is not content neutral; indeed, it is tied explicitly to the content of speech. If a person on postal premises says to members of the public, "Please support my political advocacy group," he cannot be punished. If he says, "Please contribute $10," he is subject to criminal prosecution. His punishment depends entirely on what he says.

The plurality suggests that the regulation is not based on the content of speech, regardless of the terms of the restriction,

[497 US 754]

because the proffered governmental *interest* is unrelated to the communicative impact of expression. See ante, at 736, 111 L Ed 2d, at 587 (discussing "[t]he Service's concern about losing customers because of the potentially unpleasant situation created by solicitation"). This reasoning is flawed. Any restriction on speech, the application of which turns on the substance of the speech, is content based no matter what the Government's interest may be. See Boos, 485 US, at 335-338, 99 L Ed 2d 333, 108 S Ct 1157 (Brennan, J., concurring in part and concurring in judgment). In any event, the Government interest in this case is related to the suppression of expression because the evil at which the postal regulation is aimed—by the admission of both the Postal Service, see 43 Fed Reg 38824 (1978) and the plurality, see ante, at 736, 111 L Ed 2d, at 587 —is the danger that solicitors might annoy postal customers and discourage them from patronizing postal offices. But solicitors do not purportedly irk customers by speaking unusually loudly or uncomfortably close to their subjects. Rather, the fear is that solicitation is bothersome because of its *content:* The Post Office is concerned that being asked for money may be embarrassing or annoying to some people, particularly when the speaker is a member of a disfavored or unpopular political advocacy group. For example, the Government makes much of the 40 or 50 customer complaints received at the Bowie Post Office while respondents solicited the public. See Brief for United States 35-36, and n 11. But the record does not demonstrate that the complaints related to any difficulty in obtaining access to the post office. "For all we know, the complaints may have been generated by the hearers' disagreement with the message of the National Democratic Policy Committee or their disapproval of the appearance or affiliation of the speakers." 866 F2d, at 705. Although the Service's paternalism may be well intended, it is axiomatic that a listener's reaction to speech is not a content-neutral basis for regulation. Cf. United States v Eichman, 496 US 310, 110 L Ed 2d 287, 110 S Ct 2404 (1990); Texas v Johnson, 491 US 397,

[497 US 755]

408-410, 105 L Ed 2d 342, 109 S Ct 2533 (1989). Speech is not subject to regulation " 'simply because it may embarrass others or coerce them into action.' " Hustler Magazine, Inc. v Falwell, 485 US 46, 55, 99 L Ed 2d

41, 108 S Ct 876 (1988), quoting NAACP v Claiborne Hardware Co. 458 US 886, 910, 73 L Ed 2d 1215, 102 S Ct 3409 (1982).

In addition, the postal regulation is not a permissible time, place, or manner rule because its prohibition on solicitation is absolute and not "narrowly tailored," Perry Education Assn. 460 US, at 45, 74 L Ed 2d 794, 103 S Ct 948, to the Government's interest in avoiding disruption. Rather, the regulation is based on the Postal Service's generalized judgment that solicitation is more likely to be disruptive than are other types of speech. The postal regulation is a "time, place, or manner" rule only in the novel sense that it permits no *manner* of solicitation at any *time* or at any *place* in the forum.[7] It is conceivable that in some instances solicitation might cause a crowd to form and block a post office entrance because an individual who decides to respond must "reach for a wallet, search it for money, write a check, or produce a credit card," ante, at 734, 111 L Ed 2d, at 586, but the Postal Service has failed to document that this in fact has *ever* occurred, let alone that it would be more than an occasional problem. The record in the instant case demonstrates that solicitation certainly does not invariably disrupt postal functions. The plurality's trumpeting of Postal Service "real-world experience" as a valid basis for the regulation, ante, at 735, 111 L Ed 2d, at 587, is entirely unjustified, given that the Service's

experience is limited to solicitation *in postal lobbies.* The Postal Service has never found solicitation on *exterior* sidewalks to pose a danger to postal operations.[8]

---

[7] Justice Kennedy's suggestion, ante, at 738-739, 111 L Ed 2d, at 589 (opinion concurring in judgment), that respondents could distribute literature asking for financial support—perhaps requesting that contributions be mailed to a particular address—is unhelpful because Justice Kennedy has simply identified another way that respondents could raise funds short of solicitation. Such an alternative is indeed open to respondents, but in choosing it they would forfeit the unique advantages of in-person solicitation recognized by Justice O'Connor: "In a face-to-face encounter there is a greater opportunity for the exchange of ideas and the propagation of views than is available [through written] literature [that is] merely informative." Cornelius, 473 US, at 798, 87 L Ed 2d 567, 105 S Ct 3439.

[8] The Postal Service explained when it promulgated its regulations that:

"Since the act of soliciting alms or contributions usually has as its objective an immediate act of charity, it has the potentiality for evoking highly personal and subjective reactions. Reflection usually is not encouraged, and the person solicited often must make a hasty decision whether to share his resources with an unfamiliar organization while under the eager gaze of the solicitor. Such confrontations, *if occurring in the confines of a small post office lobby, at a post office writing desk or service window, or in a queue at a service window*—places from which the individual cannot escape if he or she wishes to transact postal business—would be likely to produce hostile reactions and to cause people to avoid post offices." 43 Fed Reg 38824 (1978) (emphasis added).

The concern expressed was limited to solicitation *inside* postal lobbies. See ibid. ("The use of *lobby space* for such activity has been highly unsatisfactory") (emphasis added); see also United States v Bjerke, 796 F2d 643, 650 (CA3 1986). The fact that "most post office lobbies . . . are too small to accommodate nonpostal public activities without disturbing postal employees in the performance of their duties and impeding the public in transacting postal business," 42 Fed Reg 63911 (1977); see also 43 Fed Reg 38824 (1978), says nothing about the sidewalks outside. The confined space of a lobby may well warrant measures that are not permissible elsewhere.

I do not think it appropriate to imagine for ourselves the possible ways in which solicitation on outside sidewalks might be disruptive. The Postal Service, the agency with "long experience" in this regard, ante, at 735, 111 L

When government seeks to prohibit categorically an entire class of expression, it bears, at the very least, a heavy burden of justification. See Schad v Mount Ephraim, 452 US 61, 67, 72-74, 68 L Ed 2d 671, 101 S Ct 2176 (1981) (the "exclusion of a broad category

of protected expression" demands heightened scrutiny and evidence supporting the need for complete exclusion).[9] I find that the Postal Service has not met this burden and that the postal regulation prohibiting an entire category of expression based on a broad assessment of its likely effects cannot qualify as a valid time, place, or manner regulation because such a prohibition "burden[s] substantially more speech than is necessary to further the government's legitimate interests." Ward v Rock Against Racism, 491 US 781, 799, 105 L Ed 2d 661, 109 S Ct 2746 (1989). " 'A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil.' " Id., at 800, 105 L Ed 2d 661, 109 S Ct 2746, quoting Frisby, 487 US, at 485, 101 L Ed 2d 420, 108 S Ct 2495. In other contexts we have stressed that problems associated with solicitation must be addressed through "measures less intrusive than a direct prohibition on solicitation." Schaumburg v Citizens for a Better Environment, 444 US 620, 637, 63 L Ed 2d 73, 100 S Ct 826 (1980); see also Riley v National Federation of Blind of North Carolina, Inc. 487 US 781, 795, 101 L Ed 2d 669, 108 S Ct 2667 (1988). Thus, in Heffron v International Society for Krishna Consciousness, Inc. 452 US 640, 69 L Ed 2d 298, 101 S Ct 2559 (1981), we upheld as a valid time, place, or manner regulation a rule requiring that solicitation in a public fairground take place only at assigned booths. We rejected the claim that the rule was a "total ban" because we found that it permitted groups "to solicit funds and distribute and sell literature from within the fairgrounds, albeit from a fixed location." Id., at 655, n 16, 69 L Ed 2d 298, 101 S Ct 2559. The postal regulation, by contrast, prohibits solicitation altogether.

In short, the Postal Service has made no attempt to justify its complete exclusion of solicitation from all locations on postal property, including exterior sidewalks. The plurality's conclusion that a complete ban on solicitation is warranted rests on speculation regarding the

---

Ed 2d, at 586-587, has been silent on the matter, except insofar as the Government has attempted to present post hoc rationalizations for the regulation long after its promulgation. See ibid. (citing Tr of Oral Arg 9). By analogy, were this a straightforward administrative law case, the failure of the Postal Service to document any danger of disruption from solicitation on outside sidewalks would be the end of the matter. See Pension Benefit Guaranty Corp. v LTV Corp. 496 US 633, 653-654, 110 L Ed 2d 579, 110 S Ct 2668 (1990); Citizens to Preserve Overton Park, Inc. v Volpe, 401 US 402, 419, 28 L Ed 2d 136, 91 S Ct 814 (1971); SEC v Chenery Corp. 318 US 80, 87, 87 L Ed 626, 63 S Ct 454 (1943).

[9] Indeed, we have noted that "[i]n a public forum, by definition, *all* parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to *a single class of speakers*, a single viewpoint, or a single subject." Perry Education Assn. 460 US, at 55, 74 L Ed 2d 794, 103 S Ct 948 (emphasis added). Thus, in United States v Grace, 461 US 171, 177, 75 L Ed 2d 736, 103 S Ct 1702 (1983), we contrasted "time, place, and manner regulations" with "[a]dditional restrictions such as an absolute prohibition on a particular type of expression." The latter, we said, "will be upheld only if narrowly drawn to accomplish a compelling governmental interest." Ibid.

possibility of disruption that is both inappropriate and unsupported. As I have commented previously, "[n]o doubt a plausible argument could be made that the political gatherings of some parties are more likely than others to attract large crowds causing congestion, that picketing for certain causes is more likely than other picketing to cause visual clutter, or that speakers delivering a particular message are more likely than others to attract an unruly audience. . . . [But] governments [must] regulate based on actual congestion, visual clutter, or violence rather than based on predictions that speech with a certain content will induce these effects." Boos v Barry, 485 US, at 335, 99 L Ed 2d 333, 108 S Ct 1157 (Brennan, J., concurring in part and concurring in judgment). The First Amendment demands that the Postal Service prohibit solicitation only when it actually threatens legitimate government interests; "[b]road prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone." NAACP v Button, 371 US 415, 438, 9 L Ed 2d 405, 83 S Ct 328 (1963).

Indeed, a great irony of this case is that the Postal Service has already promulgated legitimate time, place, and manner regulations that fully protect its interests in preventing disruption of postal operations. The postal regulations governing conduct on postal premises are codified in Part 232 of the Code of Federal Regulations (Conduct on Postal Property). Postal Service rules prohibit individuals from obstructing post office entrances, disturbing postal employees in the performance of their duties, or impeding the public in the transaction of postal business. Section 232.1(e), for example, provides that:

> "Disorderly conduct, or conduct which creates loud and unusual noise, or which obstructs the usual use of entrances,
>
>
>
> foyers, corridors, offices, elevators, stairways, and parking lots, or which otherwise tends to impede or disturb the public employees in the performance of their duties, or which otherwise impedes or disturbs the general public in transacting business or obtaining the services provided on property, is prohibited." 39 CFR § 232.1(e) (1989).

Similarly, § 232.1(k)(2) forbids "[t]he blocking of entrances, driveways, walks, loading platforms, or fire hydrants in or on [postal] property." See also § 232.1(c) (prohibition on "creating any hazard to persons or things"). Thus, although the postal regulation at issue here—§ 232.1(h)(1)—bans solicitation altogether, postal regulations restrict other forms of expression only when they actually disrupt postal operations. There is no reason why the rules prohibiting disruptive conduct cannot be used to address the governmental interest in this case, and hence there is no need for a categorical exclusion of solicitation from sidewalks on postal property.

II

Even if I did not believe that the sidewalk outside the Bowie Post Office was a public forum, I nevertheless could not agree with the plurality that the postal regulation at issue today is reasonable as applied to respondents. The Postal Service does not subject to the same categorical prohibition many other types of speech presenting the same risk of disruption as solicitation, such as soapbox oratory, pamphleteering, distributing literature for free, or even flag burning.[10] A solicitor who asks for funds and offers literature for sale outside the entrance to a post office is no more likely to block access than is a leafleteer who stands in the same place or a speaker who sets up his soapbox there. In fact, solicitors

[497 US 760]

may be quite unlikely to attract much of an audience, because public requests for money are often ignored. Certainly, solicitors are less likely to draw a crowd, and thus to disrupt postal functions, than are eloquent orators or persons distributing popular magazines for free. Under the regulation, a group may stage a political rally to call attention to the problem of drug abuse[11] and draw hundreds or even thousands of persons to the area just outside the entrance to the post office, because there is no general prohibition on large gatherings on postal premises.[12] But since there *is* a categorical ban on solicitation, the group would be unable to ask a single member of the public for a contribution to advance its cause.

This inconsistent treatment renders the prohibition on solicitation unreasonable. The Postal Service undeniably has a legitimate interest in avoiding disruption of its postal facilities and ensuring that its buildings remain accessible to the public. But the Government interest in preventing disruption of post office business or harassment of postal patrons is addressed by the direct prohibitions on such conduct in existing postal rules, see supra, at 758-759, 111 L Ed 2d, at 602, and the Service has not explained satisfactorily why these provisions are inadequate to deal with any disruption caused by solicitation.

The plurality suggests that the irksome nature of solicitation supports the reasonableness of the postal regulation. Even were the Postal Service's desire to prevent the annoyance of customers a legitimate basis for regulation,[13] such an

[497 US 761]

interest could not justify the blanket ban on solicitation alone. Many expressive activities permitted by § 232.1(h)(1) likely would trigger the same reactions in the audience. Pamphleteers might distribute embarrassing or disturbing handbills, and soapbox orators might shout caustic invectives at postal patrons as they walk past, yet those activities are not subject to a categorical prohibition. Indeed, the Postal Service permits other types of speech that demand an immediate response from the listener, such as inviting passersby to sign a petition to place an initiative proposal on the ballot. See Meyer v Grant, 486 US 414, 100 L Ed 2d 425, 108 S Ct 1886 (1988). The notion that solicitation is "inherently" more invasive of the public's peace of mind is untenable.

---

[10] I note that one of the prosecutions at issue in United States v Eichman, 496 US 310, 110 L Ed 2d 287, 110 S Ct 2404 (1990), involved a flag burning that occurred on a sidewalk in front of a post office. See United States v Haggerty, 731 F Supp 415, 416 (WD Wash 1990).

[11] The regulation subjects to a categorical ban only "campaigning for election to any public office." 39 CFR § 232.1(h)(1) (1989). A rally concerning a particular issue rather than a candidate is not covered.

[12] The organizers of such a rally might well be prosecuted for obstructing the entrance of the post office under § 232.1(e) or § 232.1(k)(2) if the gathering in fact caused a disruption. But that is precisely the point: *Other* regulations, *not* § 232.1(h)(1), protect the Postal Service's asserted interest.

[13] The Postal Service's desire to protect customers from speech with which they might disagree would not be a valid basis for regulation even were the sidewalk a nonpublic forum. While we have held that speech in a nonpublic forum may be regulated so as to prevent disruption of the forum, see Cornelius, 473 US, at 811, 87 L Ed 2d 567, 105 S Ct 3439, a restriction cannot be premised on the mere fact that some members of the public might disapprove of a speaker's message or means of delivery. Such expression "is still protected speech even in a nonpublic forum." Board of Airport Comm'rs of Los Angeles v Jews for Jesus, Inc. 482 US, at 576, 96 L Ed 2d 500, 107 S Ct 2568.

The Government contends that any attempt to regulate solicitation on a case-by-case basis according to the general "disruption" regulation would be "unadministrable" because the Service "lacks the resources to enforce such regulation in the tens of thousands of post offices throughout the nation." 43 Fed Reg 38824 (1978). But the Government's interest in bright-line rules is hardly creditable, given that the Postal Service has chosen to adopt categorical restrictions on speech only with respect to solicitation. If such application of the general disturbance and obstruction rules contained in §§ 232.1(e) and 232.1(k)(2) is "administrable" with respect to other types of speech, I fail to understand how a case-by-case inquiry suddenly becomes impracticable in the context of solicitation.[14]

Moreover, even were the Postal Service's administrability concerns real, the Service could quite easily design categorical rules governing solicitation that would both obviate the need for administrative discretion and yet fall far short of a total ban. The Service could formulate, for example, reasonable restrictions on the size and placement of tables, on solicitation during peak postal hours, on the use of parking spaces by nonpostal customers, or on the number of persons who may engage in solicitation at the same time and place. Although the Government would not be required to choose the least restrictive alternative were the plurality correct in its view that the sidewalk is a nonpublic forum, these other approaches

---

[14] The Postal Service has decided to require local postmasters to make case-by-case assessments regarding a whole range of expression and other conduct on postal premises, belying the Government's claim that such an approach would be "unadministrable" with respect to solicitation. Postal regulations provide, for example, that photographs "for news . . . purposes" may be taken "in entrances, lobbies, foyers, corridors, or auditoriums when used for public meetings." 39 CFR § 232.1(i) (1989). Local postmasters obviously must decide on a case-by-case basis how to cope with the disruption posed by camera equipment, cables, and the presence of news media personnel. Moreover, the regulation explicitly vests discretion in local post office officials with respect to photographs for other than news purposes: "Other photographs may be taken only with the permission of the local postmaster or installation head." Similarly, § 232.1(o) grants local officials discretion to make case-by-case judgments concerning the appropriateness of displaying community notices and other materials of public interest on postal bulletin boards:

"The Postal Service has no intention to discontinue . . . that valuable service [of providing a place for the display of public notices and announcements] to local communities. The adopted regulation contains, as did the proposed rule, language insuring that the authority of postmasters to allow the placement in post offices of bulletin boards for the display of public notices and announcements, will continue as before. Thus, both [§ 232.1(h)(1)(ii) and § 232.1(o)(1)] contain language excepting from their coverage, 'posting notices on bulletin boards as authorized in § 243.2(a) of this chapter.'

"The reference[d] section authorizes both public and employee bulletin boards. Postmasters are not required to provide bulletin board space for nongovernmental public announcements; but they are encouraged by postal policy to provide such space for the display of notices of public assemblies and judicial sales, official election notices issued by State or local government, and similar announcements so long as there is sufficient space for the effective display of scheduled postal materials and other Federal Government notices." 43 Fed Reg 38824-38825 (1978).

to the problem of disruption are so obvious that the no-solicitation regulation can scarcely be considered a reasonable way of addressing the Service's asserted interest in avoiding case-by-case determinations.

III

Some postal patrons may thank the Court for sparing them the inconvenience of having to encounter solicitors with whose views they do not agree. And postal officials can rest assured in the knowledge that they can silence an entire category of expression without having to apply the existing postal regulations governing disruptive conduct or having to craft more narrow time, place, or manner rules. Perhaps only three groups of people will be saddened by today's decision. The first includes solicitors, who, in a farce of the public forum doctrine, will henceforth be permitted at postal locations to solicit the public only from such inhospitable locations as the busy four-lane highway that runs in front of the Bowie Post Office. The next to be disappointed will be those members of the public who would prefer not to be deprived of the views of solicitors at postal locations. The last group, unfortunately, includes all of us who are conscious of the importance of the First Amendment.

I respectfully dissent.

SAMUEL A. LEWIS, Director, Arizona Department of Corrections, et al.,
Petitioners

v

JIMMIE WAYNE JEFFERS

497 US 764, 111 L Ed 2d 606, 110 S Ct 3092, reh den 497 US 1050, 111 L Ed 2d 829, 111 S Ct 14

[No. 89-189]

Argued February 21, 1990. Decided June 27, 1990.

Decision: Arizona's "especially heinous, cruel or depraved manner" aggravating circumstance held (1) not unconstitutionally vague as applied to accused's case, and (2) not applied in arbitrary or capricious manner.

SUMMARY

Arizona capital sentencing statutes define ten aggravating circumstances that the trial court shall consider, along with any mitigating circumstances, in determining whether a death sentence shall be imposed upon a conviction of first-degree murder. The accused was convicted by a jury in an Arizona state court of the first-degree murder of his girlfriend, who he had been told was informing on him to police. It was alleged that the accused invited the victim to his motel room in order to provide her with heroin; that a witness with whom the accused had been sharing the room left upon the victim's arrival and later returned to find the victim lying on a bed, unconscious and apparently cyanotic; that the accused injected a fluid into the victim's hand and told the witness he had "given [the victim] enough shit to kill a horse and this bitch won't die"; and that the accused had finally strangled the victim, and had beaten the corpse with his hands, calling her a "bitch" and a "dirty snitch" and saying, with each blow, "This one is for [naming names of several people on whom the accused believed the victim had informed]." At the accused's sentencing hearing, the trial court, in determining that statutory aggravating circumstances were present, found specifically that the accused had committed the murder in an "especially heinous, cruel, and depraved manner." Finding no mitigating circumstances, the trial court sentenced the accused to death. Affirming the accused's conviction and sentence, the Supreme Court of Arizona independently reviewed the evidence with respect to aggravating and mitigating

SUBJECT OF ANNOTATION

Beginning on page 947, infra

Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances

Briefs of Counsel, p 1006, infra.

circumstances and (1) concluded, with regard to the "heinous, cruel or depraved" aggravating circumstance, that the prosecution had failed to prove the element of cruelty beyond a reasonable doubt, but that the evidence supported the conclusion that the murder was especially heinous and depraved, as those terms had been construed in prior decisions; (2) rejected the accused's contention that the "heinous, cruel or depraved" aggravating circumstance was, as construed and applied by the court, unconstitutionally broad; (3) affirmed the trial court's determinations that there were no mitigating factors sufficiently substantial to call for leniency and that the factors in mitigation did not outweigh the aggravating circumstances; and (4) concluded that the accused's death sentence was not disproportionate to the sentences imposed in similar cases (135 Ariz 404, 661 P2d 1105). The accused sought a writ of habeas corpus in the United States District Court for the District of Arizona, alleging that Arizona's interpretation of its "heinous, cruel or depraved" aggravating circumstance was unconstitutionally overbroad and vague, but the writ was denied (627 F Supp 1334). On appeal, the United States Court of Appeals for the Ninth Circuit, although agreeing with the District Court that the "heinous, cruel or depraved" aggravating circumstance was not unconstitutionally vague on its face, vacated the accused's death sentence on the ground that this aggravating circumstance was unconstitutionally vague as applied to the accused (832 F2d 476).

On certiorari, the United States Supreme Court reversed and remanded for further proceedings. In an opinion by O'Connor, J., joined by Rehnquist, Ch. J., and White, Scalia, and Kennedy, JJ., it was held that (1) Arizona's "heinous, cruel or depraved" aggravating circumstance, as construed by the Arizona Supreme Court, does not fail, in violation of the Federal Constitution's Eighth and Fourteenth Amendments, to channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance and make rationally reviewable the process for imposing a sentence of death; (2) the aggravating circumstance was not unconstitutionally vague as applied to the accused; and (3) a claim that the state court misapplied the aggravating circumstance to the facts of the case failed, because (a) the proper standard of review of such a claim on habeas corpus is the "rational factfinder" standard, under which a habeas corpus applicant who asserts that his conviction in state court was based on insufficient evidence is entitled to relief if it is found that, upon the record evidence adduced at trial, no rational factfinder could have found proof of guilt beyond a reasonable doubt, and (b) in light of the Arizona Supreme Court's narrowing construction of the aggravating circumstance, a rational factfinder could have found that the accused committed the murder in an especially heinous or depraved manner.

Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissented, expressing the view that (1) the Arizona Supreme Court has placed no meaningful limitations on the application of the "heinous, cruel or depraved" aggravating circumstance; (2) a state court's application of a valid aggravating circumstance does not involve a question of state law only; (3)

the presumption of correctness generally accorded on habeas corpus to the factual findings of state courts was inapplicable in this case, because of the inadequacy of the Arizona Supreme Court's factfinding procedure; and (4) regardless of the standard of review to be employed, a habeas corpus court's review in a case of this kind necessarily involves a comparison between the case under review and prior state-court decisions applying the aggravating circumstances factor, as a means of determining whether the state court's application of its construction to the instant case expands the scope of the aggravating circumstances factor in such a way as to make a previously valid limiting construction unconstitutionally broad.

Brennan, J., joined by Marshall, J., dissented in an opinion appearing in Walton v Arizona, 111 L Ed 2d, at page 542, supra, expressing the view that (1) the death penalty is in all circumstances a cruel and unusual punishment; and (2) the concern for human dignity lying at the core of the Eighth Amendment requires that a decision to impose the death penalty be made only after an assessment of its propriety in each individual case.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

21 Am Jur 2d, Criminal Law §§ 609-612, 628; 21A Am Jur 2d, Criminal Law § 640

9 Federal Procedure, L Ed, Criminal Procedure § 22:925

7 Am Jur Trials 477, Homicide

USCS, Constitution, Amendments 8, 14

US L Ed Digest, Criminal Law §§ 82, 83; Habeas Corpus § 61

Index to Annotations, Capital Offenses and Punishment; Cruel and Unusual Punishment; Mitigation or Aggravation of Punishment; Sentence and Punishment

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed or carried out. 90 L Ed 2d 1001.

Federal constitutional guaranty against cruel and unusual punishment —Supreme Court cases. 33 L Ed 2d 932.

Indefiniteness of language as affecting validity of criminal legislation or judicial definition of common-law crime. 16 L Ed 2d 1231.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was heinous, cruel, depraved, or the like—post-Gregg cases. 63 ALR4th 478.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Courts § 775; Criminal Law §§ 82, 83 — death penalty — Eighth Amendment — aggravating circumstance — prior decision

1a-1e. A state capital-sentencing statute—which provides that, upon a conviction of first-degree murder, the sentencer may consider as an aggravating circumstance whether the offense was committed in an "especially heinous, cruel or depraved manner"—does not violate the Federal Constitution's Eighth and Fourteenth Amendments by failing to channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance and make rationally reviewable the process for imposing a sentence of death, so as to invalidate the death sentence imposed by state courts under that statute, on the basis of that aggravating circumstance, against a person accused of murder, where (1) the state's highest court applied its narrowing construction of the aggravating circumstance to the facts of the accused's case; (2) a Federal Court of Appeals, reviewing the case on the accused's petition for habeas corpus relief, has concluded that the aggravating circumstance, as interpreted by the state courts, is not unconstitutionally vague on its face; and (3) the United States Supreme Court has, in another case arising under the same state statute, upheld against a vagueness challenge the precise aggravating circumstance at issue. (Blackmun, Brennan, Marshall, and Stevens, JJ., dissented from this holding.)

[See annotation p 947, infra]

Criminal Law §§ 82, 83; Habeas Corpus §§ 36, 61 — death penalty — Eighth Amendment — aggravating circumstance — review of sentence

2a-2c. A state capital-sentencing statute—which provides that, upon a conviction of first-degree murder, the sentencer may consider as an aggravating circumstance whether the offense was committed in an "especially heinous, cruel or depraved manner"—is not unconstitutionally vague, under the Federal Constitution's Eighth and Fourteenth Amendments, as applied to the facts of an accused's case, where (1) the state has adopted a constitutionally narrow construction of the aggravating circumstance, and (2) the state has applied that construction to the facts of the accused's case; under these circumstances, the fundamental constitutional requirement of channeling and limiting the sentencer's discretion in imposing the death penalty has been satisfied, and, apart from analyzing state cases to determine whether the aggravating circumstance is facially valid—that is, whether the state courts have given a sufficiently narrow limiting construction to the circumstance—a United States Court of Appeals, in addressing on habeas corpus the question whether the application of the aggravating circumstance in a particular case violates the Eighth and Fourteenth Amendments, errs in conducting a de novo, case-by-case comparison of the facts of those cases with the facts of the case under review. (Blackmun, Brennan, Marshall, and Stevens, JJ., dissented from this holding.)

[See annotation p 947, infra]

Criminal Law §§ 82, 83, 93 — death penalty — due process — Eighth Amendment — finding of aggravating circumstance

3a-3c. A de novo finding by a state's highest court that a statutory aggravating circumstance—the commission of first-degree murder in an "especially heinous, cruel or depraved manner"—is present in an accused's case is not arbitrary and capricious, so as to allow a federal court to determine on habeas corpus review that the state court has violated the accused's rights under the Federal Constitution's due process clause and Eighth Amendment, where (1) the state's highest court has previously held that factors to be considered in determining whether the offense was committed in a heinous or depraved manner include (a) the infliction of gratuitous violence on the victim, and (b) the apparent relish with which the accused committed the murder; and (2) in the case at hand, after the victim was dead, the accused had beaten her corpse and while doing so called her a "bitch" and a "dirty snitch" and with each blow said, "This one is for [naming several persons on whom the accused felt the victim had informed]." (Blackmun, Brennan, Marshall, and Stevens, JJ., dissented from this holding.)

[See annotation p 947, infra]

Criminal Law §§ 82, 83 — death penalty — Eighth Amendment

4. The Federal Constitution's Eighth and Fourteenth Amendments cannot tolerate the infliction by a state of a sentence of death under a legal system that permits this unique penalty to be wantonly and freakishly imposed.

Criminal Law §§ 82, 83 — Eighth Amendment — death sentence — discretion of sentencer

5a, 5b. Under the Federal Constitution's Eighth and Fourteenth Amendments, where discretion is afforded a sentencing body on a matter so grave as the determination whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action; this principle requires a state to channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance and that make rationally reviewable the process for imposing a sentence of death; a state's definitions of its aggravating circumstances—those circumstances that make a criminal defendant eligible for the death penalty—play a significant role in channeling the sentencer's discretion.

[See annotation p 947, infra]

Criminal Law §§ 82, 83, 93; Habeas Corpus §§ 35, 36, 61 — death penalty — Eighth Amendment — due process — aggravating circumstance — review

6. Because federal habeas corpus relief does not lie for errors of state law, federal habeas corpus review of a state court's application, in a capital case, of a constitutionally narrowed aggravating circumstance is limited, at most, to determining whether the state court's finding that the aggravating circumstance was present was so arbitrary or capricious as to constitute, under the Federal Constitution, an independent due process or Eighth Amendment violation. (Blackmun, Brennan, Marshall, and Stevens, JJ., dissented from this holding.)

Criminal Law § 93; Habeas Corpus §§ 35, 36, 61 — death penalty — aggravating circumstance — standard of review — elements of offense

7a-7c. In determining on habeas corpus whether a state court's application of its constitutionally adequate aggravating circumstance was so erroneous as to raise, under the Federal Constitution, an independent due process or Eighth Amendment violation, the appropriate standard of review to be employed by a federal court is the "rational factfinder" standard, under which, where a federal habeas corpus claimant alleges that his state conviction is unsupported by the evidence, a federal court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt; a federal court should adhere to this standard even when reviewing the decision of a state appellate court that has independently reviewed the evidence; although aggravating circumstances are not elements of any offense, the standard of federal review for determining whether a state court has violated the Fourteenth Amendment's guarantee against wholly arbitrary deprivations of liberty is equally applicable in safeguarding the Eighth Amendment's bedrock guarantee against the arbitrary or capricious imposition of the death penalty. (Blackmun, Brennan, Marshall, and Stevens, JJ., dissented from this holding.)

Criminal Law § 93 — death penalty — application of aggravating circumstance

8. The narrowing construction, by a state's highest court, of a state statutory aggravating circumstance—the commission of first-degree murder in an "especially heinous, cruel or depraved manner"—requires the state courts, in considering whether this aggravating circumstance was present in a particular case, so as to justify a sentence of death, to determine whether the victim suffered physical pain or mental distress and to assess the mental state and attitude of the perpetrator as reflected by his words and actions.

[See annotation p 947, infra]

Habeas Corpus §§ 35, 61 — review of sentence — state-law question

9. Even if a determination by a state court whether a particular statutory aggravating circumstance—commission of first-degree murder in an "especially heinous, cruel or depraved manner"—is present in a particular case, so as to justify a sentence of death, could be characterized as a mixed question of law and fact, any such determination would nevertheless remain a question of state law, errors of which are not cognizable in federal habeas corpus proceedings. (Blackmun, Brennan, Marshall, and Stevens, JJ., dissented from this holding.)

Criminal Law §§ 82, 83, 93 — death penalty — due process — Eighth Amendment — aggravating circumstance

10. A state court's finding that a statutory aggravating circumstance is present in a particular capital case, so as to justify a sentence of death—including a de novo finding by an appellate court that a particular offense was "especially heinous . . . or depraved"—is arbitrary and capricious under the Federal Constitution's due process clause and Eighth Amendment if, and only if, no reasonable sentencer could have so concluded.

SYLLABUS BY REPORTER OF DECISIONS

In affirming respondent Jeffers' first-degree murder conviction and death sentence, the Arizona Supreme Court, inter alia, independently reviewed the evidence supporting the trial court's finding of the statutory aggravating circumstance that the crime was committed "in an especially heinous, cruel or depraved manner." The court noted its recent ruling that the infliction of gratuitous violence on the victim is among the factors to be considered in determining whether the murder was "especially heinous . . . and depraved," and found the presence of this factor in light of evidence that Jeffers had climbed on top of the dead victim and hit her in the face several times, causing additional wounds and bleeding. Noting further that the apparent relish with which the defendant commits the murder is another relevant factor under its decisions, the court concluded that Jeffers' relish for his crime was evidenced by testimony that, while he was beating the dead victim, he called her a "bitch" and a "dirty snitch" and stated, as each blow landed, that "[t]his one is for" someone on whom he felt she had informed. The Federal District Court denied Jeffers' habeas corpus petition. The Court of Appeals agreed with the District Court that the "especially heinous . . . or depraved" aggravating circumstance, as interpreted and narrowed by the State Supreme Court, was not void on its face, but vacated Jeffers' death sentence on the ground that the circumstance was unconstitutionally vague as applied to him.

Held:

1. The Court of Appeals erred in holding that Arizona's construction of the "especially heinous . . . or depraved" aggravating circumstance in this case contravened Godfrey v Georgia, 446 US 420, 428, 64 L Ed 2d 398, 100 S Ct 1759, and Maynard v Cartwright, 486 US 356, 364, 100 L Ed 2d 372, 108 S Ct 1853. There is no dispute here that the Arizona Supreme Court applied its narrowing construction to the facts of Jeffers' case. More important, the Court of Appeals noted that the circumstance, as construed by the state courts, was not unconstitutionally vague on its face. Even if it had not so held, Jeffers' claim that Arizona has not construed the circumstance in a constitutionally narrow manner is disposed of by Walton v Arizona, ante, at 652-655, 111 L Ed 2d 511, 110 S Ct 3047, which upheld, against a vagueness challenge, the precise aggravating circumstance at issue here. Moreover, a claim identical to Jeffers' assertion that the aggravating circumstance may nevertheless be vague "as applied" to him was rejected in Walton, ante, at 655-656, 111 L Ed 2d 511, 110 S Ct 3047, which makes clear that if a State has adopted a constitutionally narrow construction of a facially vague aggravating circumstance and has applied that construction to the facts of the particular case, the fundamental constitutional requirement of channeling and limiting the capital sentencer's discretion has been satisfied.

2. The Court of Appeals erred in conducting a de novo, case-by-case comparison of the facts of those cases with the facts of this case to decide Jeffers' as-applied challenge. That challenge reduces, in essence, to a claim that the state court simply misapplied its own aggravating

circumstance to the facts of Jeffers' case. Because federal habeas corpus relief does not lie for errors of state law, federal habeas review of a state court's application of a constitutionally narrowed aggravating circumstance is limited, at most, to determining whether the state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation. In making that determination, the appropriate standard of review is the "rational factfinder" standard of Jackson v Virginia, 443 US 307, 319, 61 L Ed 2d 560, 99 S Ct 2781, under which the federal court must view the evidence in the light most favorable to the prosecution to determine whether "*any* rational trier of fact could have found the elements of the crime beyond a reasonable doubt." Under the standard, a rational factfinder could have found that Jeffers both relished his crime and inflicted gratuitous violence, given the evidence of his conduct toward the victim's body.

832 F2d 476, reversed and remanded.

O'Connor, J., delivered the opinion of the Court, in which Rehnquist, C. J., and White, Scalia, and Kennedy, JJ., joined. Brennan, J., filed a dissenting opinion, in which Marshall, J., joined (see No. 88-7351). Blackmun, J., filed a dissenting opinion, in which Brennan, Marshall, and Stevens, JJ., joined.

APPEARANCES OF COUNSEL

Gerald R. Grant argued the cause for petitioners.
James S. Liebman argued the cause for respondent.
Briefs of Counsel, p 1006, infra.

OPINION OF THE COURT

[497 US 766]

Justice **O'Connor** delivered the opinion of the Court.

[1a, 2a, 3a] This case presents issues pertaining to federal court review of a state court's determination that an offense was committed "in an especially heinous, cruel or depraved manner," Ariz Rev Stat Ann § 13-703(F)(6) (1989).

I

The relevant facts are undisputed. The evidence at trial showed that in May 1976, police arrested respondent Jimmie Wayne Jeffers and his girlfriend, Penelope Cheney, on state law charges of possession of narcotics and receipt of stolen property. Respondent posted bond for Cheney, but was unable to post bond for himself and remained in custody at the Pima County Jail. While in jail, respondent received reports that Cheney had been cooperating with police by providing the police with information about respondent and certain heroin transactions. Respondent wrote a note to another jail inmate offering him money if he would kill Cheney. The detention officer who was supposed to deliver the note read it and seized it.

In October 1976, respondent was released from jail on bond pending appeal of his convictions. About a week later, he met Doris Van Der Veer and began living with her at a motel in Tucson. Respondent subsequently invited Cheney to the motel in order to provide her with some heroin.

On the day of the murder, respondent told Van Der Veer that Cheney was coming over and that they wished to be alone. When Cheney arrived, respondent introduced her to Van Der Veer, who then excused herself. After about 2½ hours, Van Der Veer returned to the motel room and knocked on the door. Respondent admitted her, pointed a gun at her, and ordered her to sit in a chair and be quiet.

Upon entering the motel room, Van Der Veer saw Cheney lying unconscious on the bed. Cheney appeared cyanotic. Respondent injected a fluid into Cheney's hand and told Van Der Veer that he had "given her enough shit to kill a horse

and this bitch won't die." Van Der Veer noticed foam coming from Cheney's mouth, which she recognized from her training as a nurse to be a sign of heroin overdose. Van Der Veer checked Cheney's condition and determined that she was still alive. Van Der Veer asked respondent if he was going to help Cheney, to which he responded, "No, I'm going to kill her."

Respondent then removed the belt from around Cheney's waist and began to choke her with it. He soon discarded the belt and choked her with his bare hands. Van Der Veer urged him to stop, saying Cheney would probably die anyway, but respondent replied, "No, I've seen her this way before and she's come out of it."

After strangling Cheney, respondent instructed Van Der Veer to check Cheney's pulse. Van Der Veer found no pulse and reported that Cheney was dead. Respondent then ordered Van Der Veer to inject more heroin into Cheney and to choke her while he took pictures. Van Der Veer complied. Respondent told Van Der Veer that he did this to have proof that she was an accomplice. Respondent then beat Cheney with his hands several times, calling her a "bitch" and a "dirty snitch" and stating, as each blow landed, that "[t]his one is for so and so [naming several names]." Respondent then dragged the body off the bed and placed it in the shower stall. After three days, when the body began to smell, respondent and Van Der Veer wrapped the body in newspaper and plastic garbage bags, placed it in a sleeping bag, and transported it to a secluded area, where they buried it in a shallow grave.

A jury convicted respondent of the first-degree murder of Cheney. After a sentencing hearing, the trial court found two aggravating circumstances and no mitigating factors. In accordance with the Arizona death penalty statute, Ariz Rev Stat Ann § 13-454 (Supp 1973) (currently Ariz Rev Stat Ann § 13-703 (1989)), respondent was sentenced to death. App 5-10.

On direct review of his conviction and sentence, the Arizona Supreme Court, following this Court's decision in Lockett v Ohio, 438 US 586, 57 L Ed 2d 973, 98 S Ct 2954 (1978), vacated respondent's death sentence and remanded for resentencing. See State v Watson, 120 Ariz 441, 586 P2d 1253 (1978) (requiring the trial court to consider nonstatutory mitigating factors), cert denied, 440 US 924, 59 L Ed 2d 478, 99 S Ct 1254 (1979). At the second sentencing hearing, the trial court again found two aggravating circumstances beyond a reasonable doubt: that respondent had created a grave risk of death to another person (Van Der Veer) in the commission of the murder and that respondent committed the murder in an especially heinous, cruel, and depraved manner. See

Ariz Rev Stat Ann §§ 13-703(F)(3) and (6) (1989).[1] The [497 US 769] court found no mitigating factors and thereupon resentenced respondent to death.[2]

On direct appeal, the Arizona Supreme Court affirmed the convictions and sentences. State v Jeffers, 135 Ariz 404, 661 P2d 1105, cert denied, 464 US 865, 78 L Ed 2d 174, 104 S Ct 199 (1983). With regard to respondent's death sentence, the court stated that, under Arizona law, "this court independently reviews the facts that the trial court found established the presence or absence of aggravating and mitigating circumstances, and we determine for ourselves if the latter outweigh the former when we find both to be present." 135 Ariz, at 428, 661 P2d, at 1129 (citations omitted). Applying this standard, the court reversed the trial court's finding that respondent "knowingly created a grave risk of death to another person . . . in addition to the victim of the offense," Ariz Rev Stat Ann § 13-703(F)(3) (1989).

The court then reviewed the trial court's finding that respondent "committed the offense in an especially heinous, cruel or depraved manner," § 13-703(F)(6). The court noted that it had interpreted and applied this provision in light of the dictionary definitions of the words used:

> "The element of cruelty involves the pain and the mental and physical distress visited upon the victims. Heinous and depraved involve the mental state and attitude of the perpetrator as reflected in his words and actions. 'Heinous' means 'hatefully or shockingly evil; grossly bad'; 'cruel' means 'disposed to inflict pain esp. in a wanton, insensate or vindictive manner; sadistic'; and 'depraved' [497 US 770] means 'marked by debasement,

---

[1] Section 13-703(F) provides:

"F. Aggravating circumstances to be considered shall be the following:

"1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

"2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

"3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

"4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

"5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

"6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

"7. The defendant committed the offense while in the custody of the state department of corrections, a law enforcement agency or county or city jail.

"8. The defendant has been convicted of one or more homicides, as defined in § 13-1101, which were committed during the commission of the offense.

"9. The defendant was an adult at the time the offense was committed or was tried as an adult and the victim was under fifteen years of age.

"10. The murdered individual was an on duty peace officer who was killed in the course of performing his official duties and the defendant knew, or should have known, that the victim was a peace officer."

[2] Arizona Rev Stat Ann § 13-703(E) (1989) provides:

"E. In determining whether to impose a sentence of death or life imprisonment without possibility of release on any basis . . . the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency."

> corruption, perversion or deterioration.'" 135 Ariz, at 429, 661 P2d, at 1130 (citations omitted).

Independently reviewing the evidence, the court concluded that the State had failed to prove the element of cruelty beyond a reasonable doubt:

> "There was no evidence that the victim suffered any pain. It appears from the record that after the injection of heroin, the victim lost consciousness and never regained it before she died. Therefore, the victim experienced no pain or mental suffering and the murder was not 'cruel' for purposes of ARS § 13-703(F)(6)." Id., at 429, 661 P2d, at 1130.

The court found, however, that "the events surrounding the murder itself support the trial court's finding that the murder was 'especially heinous . . . and depraved.'" Id., at 430, 661 P2d, at 1131. The court noted that it had recently delineated factors to be considered in determining whether the offense was committed in a heinous or depraved manner and that the infliction of gratuitous violence on the victim was one factor. See ibid. (citing State v Gretzler, 135 Ariz 42, 659 P2d 1, cert denied, 461 US 971, 77 L Ed 2d 1327, 103 S Ct 2444 (1983), and State v Ceja, 126 Ariz 35, 612 P2d 491 (1980)). The court then observed that, in the instant case, "the defendant climbed on top of the dead victim and hit her in the face several times which eventually resulted in additional wounds and bleeding." 135 Ariz, at 430, 661 P2d, at 1131. The court further noted that the apparent relish with which the defendant commits the murder was another factor. Ibid. (citing State v Bishop, 127 Ariz 531, 622 P2d 478 (1980)). Finding that "while Jeffers was beating the victim he called her 'a bitch and a dirty snitch' and with each striking blow said, 'This one is for so and so. [naming several names],'" the court concluded: "This evidences the relish with which [respondent] committed the murder. In light of these prior decisions and

the Gretzler considerations, we find that the remarks made by [respondent], while at the same time beating his victim, establish that the offense was committed in an especially heinous and depraved manner." 135 Ariz, at 430, 661 P2d, at 1131.

The court then rejected respondent's contention that the "especially heinous, cruel or depraved" aggravating circumstance, as construed and applied by the court, was unconstitutionally broad. Relying on its decision in State v Gretzler, supra, the court held that "[e]ach element—cruel, heinous, and depraved —has been narrowly defined and construed . . . to meet constitutional standards." 135 Ariz, at 430, 661 P2d, at 1131. The court explained:

> "We have been insistent that the murder be *especially* cruel or *especially* depraved before [§ 13-703(F)(6)] would apply. We have clearly defined the terms and have delineated factors to guide us in determining if the crime was indeed committed in such a manner. . . Further the case law reveals that § (F)(6) is not applicable to any and all murders, this court has narrowly limited its applicability to cases which stand apart from the norm." Ibid. (citations omitted).

Finally, based on its own review of

the evidence, the court affirmed the trial court's determinations that no mitigating factors existed that were sufficiently substantial to call for leniency and that the factors in mitigation did not outweigh the aggravating circumstances. Id., at 431-432, 661 P2d, at 1132-1133. The court concluded that respondent's death sentence was not disproportionate to the sentence imposed in similar cases and that "[w]e have reviewed the entire record pursuant to ARS § 13-4035 and found no fundamental error. In our independent determination we found one aggravating factor—that the offense was committed in an especially heinous and depraved manner—and no mitigating factors sufficiently substantial to call for leniency." Id., at 432, 661 P2d, at 1133.

Respondent then petitioned for a writ of habeas corpus in the United States District Court for the District of Arizona, alleging, among other claims, that Arizona's interpretation of its "especially heinous . . . or depraved" aggravating circumstance was unconstitutionally overbroad and vague. The District Court reiterated that, under Arizona law, "[a] murder that is especially heinous and depraved includes the infliction of gratuitous violence upon the victim and the indication that the defendant committed the crime with relish." Jeffers v Ricketts, 627 F Supp 1334, 1360 (Ariz 1986) (citations omitted). The District Court then noted:

> "The evidence in this case indicates that the victim, Penny, had either taken or was injected by Jeffers with such a sufficiently large dose of heroin that she lost consciousness. Even after she lost consciousness, Jeffers injected her with more heroin. When this did not kill her, he attempted to strangle her with a belt and finally accomplished his intended purpose by strangulation with his hands. He then required the eyewitness, at gun point, to perform the same acts on the corpse while he took pictures. He then climed on top of the corpse and inflicted blows to the face. While striking the corpse, he stated that each blow was for one of the persons that Jeffers believed Penny to have been responsible for their arrest due to narcotic trafficking activities with Jeffers. He then pulled the corpse across the floor to the shower where it remained for three days." Ibid.

Based on these facts, the court rejected respondent's vagueness and overbreadth challenge to the "especially heinous . . . or depraved" aggravating circumstance. Ibid.

A divided panel of the Court of Appeals for the Ninth Circuit vacated respondent's death sentence on the ground that the "especially heinous . . . or depraved" circumstance was unconstitutionally vague as applied to him. Jeffers v Ricketts, 832 F2d 476, 482-486 (1987). As an initial matter, the Court of Appeals agreed with the District Court that the subsection (F)(6) aggravating circumstance was not unconstitutionally vague on its face. Id., at 482 (citing Chaney v Lewis, 801 F2d 1191, 1194-1196 (CA9 1986), cert denied, 481 US 1023, 95 L Ed 2d 516, 107 S Ct 1911 (1987)).

The Court of Appeals then held, however, that "[w]hile Chaney establishes that the Arizona statute is not void on its face and is capable of constitutional application, it naturally does not answer the question whether the Arizona statute was constitutionally applied to Jeffers in this case." 832 F2d, at 482. Reviewing a number of Arizona Supreme Court cases defining and applying the "especially heinous . . . or depraved" circumstance, the Court of Appeals compared the facts of those cases to the facts of this case and concluded that "the standard of heinousness and depravity delineated in prior Arizona cases cannot be applied in a principled manner to Jeffers." Id., at 485. The Court of Appeals therefore struck down respondent's death sentence as arbitrary: "To apply the standard of especial heinousness and depravity to Jeffers' case when the facts do not permit it is arbitrary or capricious, and is therefore an unconstitutional application of the standard. . . . Arizona's existing standard . . . cannot be extended to Jeffers' case without losing its ability to distinguish in a principled manner between those it condemns to death and those it does not." Id., at 486 (citing Godfrey v Georgia, 446 US 420, 428, 64 L Ed 2d 398, 100 S Ct 1759 (1980)). The dissenting member of the panel maintained that "the majority [was] doing little more than second-guessing the Arizona Supreme Court's interpretation of facts that quite reasonably fit within the statutory definition of aggravating circumstances." 832 F2d, at 487.

We granted certiorari, Ricketts v Jeffers, 493 US 889, 107 L Ed 2d 183, 110 S Ct 232 (1989), and now reverse.

II

[1b, 2b] Petitioners contend that this case presents the question whether a federal court may make a de novo review of the evidence supporting a state court's finding of a facially constitutional aggravating circumstance. Respondent maintains that this case presents only the question whether the Court of Appeals correctly held that Arizona's construction of the subsection (F)(6) aggravating circumstance in this case contravened this Court's decisions in Godfrey v Georgia, supra, and Maynard v Cartwright, 486 US 356, 100 L Ed 2d 372, 108 S Ct 1853 (1988). We begin our analysis with respondent's contention.

A

[1c, 4, 5a] Our capital punishment doctrine is rooted in the principle that " '[t]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed.' " Gregg v Georgia, 428 US 153, 188, 49 L Ed 2d 859, 96 S Ct 2909 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (quoting Furman v Georgia, 408 US 238, 310, 33 L Ed 2d 346, 92 S Ct 2726 (1972) (Stewart, J., concurring)); see also Furman, supra, at 313, 33 L Ed 2d 346, 92 S Ct 2726 (White, J., concurring) (invalidating capital punishment statute where "there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not"). Accordingly, "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg, supra, at 189, 49 L Ed 2d 859, 96 S Ct 2909.

[1d, 5b] This principle requires a State to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey, supra, at 428, 64 L Ed 2d 398, 100 S Ct 1759 (footnotes omitted). A State's definitions of its aggravating circumstances—those circumstances that make a criminal defendant "eligible" for the death penalty—therefore play a significant role in channeling the sentencer's discretion. The Court in Gregg, for example, held that Georgia's "outrageously or wantonly vile" aggravating

circumstance, Ga Code Ann § 27-2534.1(b)(7) (Supp 1975) ("outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim"), was not unconstitutionally vague because the Georgia courts could give it a narrowing construction. See 428 US, at 201, 49 L Ed 2d 859, 99 S Ct 2909 (joint opinion of Stewart, Powell, and Stevens, JJ.) (Although "arguabl[y] . . . any murder involves depravity of mind or an aggravating battery," there was "no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction"); see also Proffitt v Florida, 428 US 242, 255, 49 L Ed 2d 913, 96 S Ct 2960 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (upholding Florida's "especially heinous, atrocious or cruel" aggravating circumstance, Fla Stat Ann § 921.141(5)(h) (Supp 1976-1977), on the ground that the Supreme Court of Florida had restricted the circumstance to include only "'the conscienceless or pitiless crime which is unnecessarily torturous to the victim'").

In Godfrey v Georgia, supra, however, a plurality of the Court held that although the Georgia Supreme Court had adopted a narrowing construction of Georgia's subsection (b)(7) aggravating circumstance, the death sentence at issue could not stand because no evidence existed that the state courts had applied the narrowing construction to the facts of that case. 446 US, at 432, 64 L Ed 2d 398, 100 S Ct 1759 ("The circumstances of this case . . . do not satisfy the criteria laid out by the Georgia Supreme Court itself" in the cases adopting the narrowing construction). Because the Georgia courts had not applied the narrowing construction, the plurality considered whether the Georgia Supreme Court, in affirming the death sentence, had nevertheless applied a constitutional construction of the subsection (b)(7) aggravating circumstance. Id., at 432-433, 64 L Ed 2d 398, 100 S Ct 1759. The plurality concluded that the state court had not, because "[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Id., at 433, 64 L Ed 2d 398, 100 S Ct 1759.

We have reiterated the general principle that aggravating circumstances must be construed to permit the sentencer to make a principled distinction between those who deserve the death penalty and those who do not. See Spaziano v Florida, 468 US 447, 460, 82 L Ed 2d 340, 104 S Ct 3154 (1984) ("If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not"); Zant v Stephens, 462 US 862, 877, 77 L Ed 2d 235, 103 S Ct 2733 (1983) ("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder") (footnote omitted); see also Barclay v Florida, 463 US 939, 960, 77 L Ed 2d 1134, 103 S Ct 2418 (1983) (Stevens, J., concurring in judgment) ("A constant theme of our cases—from Gregg and Proffitt through Godfrey, Eddings, and most recently Zant—has been emphasis on procedural protections that are intended to ensure that the death penalty will be imposed in a consistent, rational manner"); Lowenfield v Phelps, 484 US 231, 244-246, 98 L Ed 2d 568, 108 S Ct 546 (1988).

Indeed, in Maynard v Cartwright, 486 US 356, 100 L Ed 2d 372, 108 S Ct 1853 (1988), we applied the teachings of Godfrey to hold that the Oklahoma courts had not construed Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance in a manner sufficient "to cure the unfettered discretion of the jury and to satisfy the commands of the Eighth Amendment." 486 US, at 364, 100 L Ed 2d 372, 108 S Ct 1853. We concluded that the Oklahoma court's "conclusion that on th[e] facts [of the case] the jury's verdict that the murder was especially heinous, atrocious, or cruel was supportable did not cure the constitutional infirmity of the aggravating circumstance." Ibid.

[1e] Respondent's reliance on Godfrey and Cartwright, however, does not yield the result he seeks. Unlike in Godfrey, there is no dispute in this case that the Arizona Supreme Court applied its narrowing construction of Arizona's subsection

[497 US 777]

(F)(6) aggravating circumstance to the facts of respondent's case. See State v Jeffers, 135 Ariz, at 429-430, 661 P2d, at 1130-1131. More important, the Court of Appeals noted that the subsection (F)(6) aggravating circumstance, as interpreted by the Arizona courts, was not unconstitutionally vague on its face. See 832 F2d, at 482 (citing Chaney v Lewis, 801 F2d, at 1194-1196). "The Arizona Supreme Court appears to have sufficiently channeled sentencing discretion to prevent arbitrary and capricious capital sentencing decisions. The court has defined each of the factors set forth in section 13-703(F)(6). These definitions have been applied consistently." Chaney, supra, at 1195 (citations and quotations omitted).

Even had the Court of Appeals not so held, we resolved any doubt about the matter in Walton v Arizona, ante, p 639, 111 L Ed 2d 511, 110 S Ct 3047, where we upheld, against a vagueness challenge, the precise aggravating circumstance at issue in this case. See ante, at 652-655, 111 L Ed 2d 511, 110 S Ct 3047. Our holding in Walton, which disposes of respondent's claim that Arizona has not construed its subsection (F)(6) aggravating circumstance in a constitutionally narrow manner, bears repeating here:

> "Recognizing that the proper degree of definition of an aggravating factor of this nature is not susceptible of mathematical precision, we conclude that the definition given to the 'especially cruel' provision by the Arizona Supreme Court is constitutionally sufficient because it gives meaningful guidance to the sentencer. Nor can we fault the state court's statement that a crime is committed in an especially 'depraved' manner when the perpetrator 'relishes the murder, evidencing debasement or

> perversion,' or 'shows an indifference to the suffering of the victim and evidences a sense of pleasure' in the killing." Ante, at 655, 111 L Ed 2d 511, 110 S Ct 3047 (citation omitted).

Walton therefore squarely forecloses any argument that Arizona's subsection (F)(6) aggravating circumstance, as construed by the Arizona Supreme Court, fails to "channel the **[497 US 778]** sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.' " Godfrey, 446 US, at 428, 64 L Ed 2d 398, 100 S Ct 1759 (footnotes omitted).

The dissent's suggestion that our reliance on Walton is misplaced is without merit. We granted certiorari in Walton to decide "[w]hether Arizona's 'especially heinous, cruel or depraved' aggravating circumstance, as interpreted by the Arizona courts, fails to channel the sentencer's discretion as required by the Eighth Amendment," Brief for Petitioner in Walton v Arizona, OT 1989, No. 88-7351, p i, and our judgment in that case plainly rested on a negative answer to that question. See ante, at 652-656, 111 L Ed 2d 511, 110 S Ct 3047; ante, at 674, 111 L Ed 2d 511, 110 S Ct 3047 (Scalia, J., concurring in part and concurring in judgment); see also ante, at 692-699, 111 L Ed 2d 511, 110 S Ct 3047 (Blackmun, J., dissenting) (discussing vagueness of the state courts' construction of the "especially heinous . . . or depraved" aggravating circumstance). We decline the dissent's apparent invitation to reconsider arguments addressed and rejected in a decision announced only today.

B

[2c] In light of the Court of Appeals' rejection of respondent's facial challenge, respondent defends the decision below on the ground that, even if Arizona has adopted a constitutionally narrow construction of its subsection (F)(6) aggravating circumstance, and even if the Arizona Supreme Court applied that narrowing construction to the facts of his case, the aggravating circumstance may nevertheless be vague "as applied" to him. We rejected an identical claim in Walton, however, and the conclusion we reached in Walton applies with equal force in this case:

> "Walton nevertheless contends that the heinous, cruel, or depraved factor has been applied in an arbitrary manner and, as applied, does not distinguish his case from cases in which the death sentence has not been imposed. In effect Walton challenges the proportionality review of **[497 US 779]** the Arizona Supreme Court as erroneous and asks us to overturn it. This we decline to do, for we have just concluded that the challenged factor has been construed by the Arizona courts in a manner that furnishes sufficient guidance to the sentencer. This being so, proportionality review is not constitutionally required, and we 'lawfully may presume that [Walton's] death sentence was not "wantonly and freakishly" imposed—and thus that the sentence is not disproportionate within any recognized meaning of the Eighth Amendment.' McCleskey v Kemp, 481 US 279, 306, 308 [95 L Ed 2d 262, 107 S Ct 1756] (1987); Pulley v Harris, 465 US 37, 43 [79 L Ed 2d 29, 104 S Ct 871] (1984). Furthermore, the Arizona Supreme

Court plainly undertook its proportionality review in good faith and found that Walton's sentence was proportional to the sentences imposed in cases similar to his. The Constitution does not require us to look behind that conclusion." Ante, at 655-656, 111 L Ed 2d 511, 110 S Ct 3047.

Our decision in Walton thus makes clear that if a State has adopted a constitutionally narrow construction of a facially vague aggravating circumstance, and if the State has applied that construction to the facts of the particular case, then the "fundamental constitutional requirement" of "channeling and limiting . . . the sentencer's discretion in imposing the death penalty," Cartwright, 486 US, at 362, 100 L Ed 2d 372, 108 S Ct 1853, has been satisfied. Apart from its analysis of Arizona's subsection (F)(6) cases to determine whether the aggravating circumstance was facially valid—i. e., whether the Arizona courts had given a sufficiently narrow limiting construction to the circumstance—the Court of Appeals in this case therefore erred in conducting a de novo, case-by-case comparison of the facts of those cases with the facts of the instant case. See McCleskey v Kemp, 481 US 279, 306-307, 95 L Ed 2d 262, 107 S Ct 1756 (1987) ("[A]bsent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, McCleskey cannot prove a constitutional violation by demonstrating that

other defendants who may be similarly situated did not receive the death penalty").

C

[3b, 6] In light of our rejection of respondent's constitutional challenge to Arizona's "especially heinous . . . or depraved" aggravating circumstance, see Walton, respondent's contention—that the Arizona Supreme Court's application of its narrowing construction to the facts of his case nevertheless failed to distinguish his case from cases in which the court did not find the aggravating circumstance—reduces, in essence, to a claim that the state court simply misapplied its own aggravating circumstance to the facts of his case. Because federal habeas corpus relief does not lie for errors of state law, see, e. g., Pulley v Harris, 465 US 37, 41, 79 L Ed 2d 29, 104 S Ct 871 (1984); Rose v Hodges, 423 US 19, 21-22, 46 L Ed 2d 162, 96 S Ct 175 (1975) (per curiam), federal habeas review of a state court's application of a constitutionally narrowed aggravating circumstance is limited, at most, to determining whether the state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation. Cf. Donnelly v DeChristoforo, 416 US 637, 642, 643, 40 L Ed 2d 431, 94 S Ct 1868 (1974) (absent a specific constitutional violation, federal habeas review of trial error is limited to whether the error "so infected the trial with unfairness as to make the resulting conviction a denial of due process").

In making such a determination, respect for a state court's findings of fact and application of its own law counsels against the sort of de novo review undertaken by the Court of Appeals in this case. Cf. 832 F2d, at 484 ("Illumined . . . by the case examples furnished by the Arizona Supreme Court, [the "especially heinous . . . or depraved" standard] seems to call for conduct or attitudes more shocking than those exhibited by Jeffers"). Where the issue is solely whether a state court has properly found the existence of a constitutionally narrowed aggravating circumstance, we have never required federal courts "to peer majestically over the [state] court's shoulder so that [they] might second-guess

[497 US 781]

its interpretation of facts that quite reasonably—perhaps even quite plainly—fit within the statutory language." Godfrey, 446 US, at 450, 64 L Ed 2d 398, 100 S Ct 1759 (White, J., dissenting) (footnote omitted). See Barclay, 463 US, at 947, 77 L Ed 2d 1134, 103 S Ct 3418 (plurality opinion) (review of state court findings of aggravating circumstances is "limited to the question whether they are so unprincipled or arbitrary as to somehow violate the United States Constitution"); id., at 968, 77 L Ed 2d 1134, 103 S Ct 3418 (Stevens, J., concurring in judgment) ("It is not our role to reexamine the trial court's findings of fact, which have been affirmed by the Florida Supreme Court. Assuming those facts to be true, there is no federal constitutional infirmity in these two findings of statutory aggravating circumstances").

[7a] Rather, in determining whether a state court's application of its constitutionally adequate aggravating circumstance was so erroneous as to raise an independent due process or Eighth Amendment violation, we think the more appropriate standard of review is the "rational factfinder" standard established in Jackson v Virginia, 443 US 307, 61 L Ed 2d 560, 99 S Ct 2781 (1979). We held in Jackson that where a federal habeas corpus claimant alleges that his state conviction is unsupported by the evidence, federal courts must determine whether the conviction was obtained in violation of In re Winship, 397 US 358, 25 L Ed 2d 368, 90 S Ct 1068 (1970), by asking "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 US, at 319, 61 L Ed 2d 560, 99 S Ct 2781 (citation omitted); see also id., at 324, 61 L Ed 2d 560, 99 S Ct 2781 ("We hold that in a challenge to a state criminal conviction brought under 28 USC § 2254 [28 USCS § 2254]—if the settled procedural prerequisites for such a claim have otherwise been satisfied—the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt") (footnote omitted). The Court reasoned:

[497 US 782]

> "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution." Id., at 319, 61 L Ed 2d 560, 99 S Ct 2781 (footnote omitted).

[7b, 8, 9] These considerations apply with equal force to federal habeas review of a state court's finding of aggravating circumstances. Although aggravating circumstances are not "elements" of any offense, see Walton, ante, at 648-649, 111 L Ed 2d 511, 110 S Ct 3047, the standard of federal review for determining whether a state court has violated the Fourteenth Amendment's guarantee against wholly arbitrary deprivations of liberty is equally applicable in safeguarding the Eighth Amendment's bedrock guarantee against the arbitrary or capricious imposition of the death penalty. Like findings of fact, state court findings of aggravating circumstances often require a sentencer to "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Jackson, supra, at 319, 61 L Ed 2d 560, 99 S Ct 2781. See Ariz Rev Stat Ann § 13-703(F) (1989) (listing aggravating circumstances); cf. 28 USC § 2254(d) [28 USCS § 2254(d)] (federal courts in habeas corpus proceedings must generally accord a presumption of correctness to a state court's factual findings). The Arizona Supreme Court's narrowing construction of the subsection (F)(6) aggravating circumstance, for example, requires Arizona courts to determine whether the victim suffered physical pain or mental distress and to assess the mental state and attitude of the perpetrator as reflected by his words and actions. See, e.g., State v Carriger, 143 Ariz 142, 160, 692 P2d 991, 1009 (1984) (discussing narrowing construction of " 'cruel[ty]' " and " 'heinous and depraved' "), cert denied, 471 US 1111, 85 L Ed 2d 864, 105 S Ct 2347 (1985). Even if a determination under Arizona's

narrowing construction could be characterized as a "mixed" question of law and fact, cf. Sumner v Mata, 455 US 591, 597, 71 L Ed 2d 480, 102 S Ct 1303 (1982) (per curiam) (declining to apply § 2254(d)'s presumption of correctness to mixed questions of law and fact), any such determination would nevertheless remain a question of state law, errors of which are not cognizable in federal habeas proceedings.

[7c, 10] Moreover, a federal court should adhere to the Jackson standard even when reviewing the decision of a state appellate court that has independently reviewed the evidence, for the underlying question remains the same: If a State's aggravating circumstances adequately perform their constitutional function, then a state court's application of those circumstances raises, apart from due process and Eighth Amendment concerns, only a question of the proper application of state law. A state court's finding of an aggravating circumstance in a particular case—including a de novo finding by an appellate court that a particular offense is "especially heinous . . . or depraved"—is arbitrary or capricious if and only if no reasonable sentencer could have so concluded. Indeed, respondent agrees that "a state court's 'especially heinous . . . or depraved' finding, *insofar as it is a matter of state law,* is reviewable by the federal courts only under the 'rational factfinder' rule of Jackson v Virginia." Brief for Respondent 95-96 (emphasis added; footnote omitted).

[3c] Applying the Jackson standard in this case, we hold that a rational factfinder could have found that respondent both relished the crime and inflicted gratuitous violence on the victim. Given the evidence that "while Jeffers was beating the [dead] victim he called her 'a bitch and a dirty snitch' and with each striking blow said, 'This one is for so and so. [naming several names],' " State v Jeffers, 135 Ariz, at 430, 661 P2d, at 1131, we think that the Arizona Supreme Court's finding that respondent had relished the killing is one that a rational factfinder could have made. Moreover, the Arizona Supreme Court's finding that respondent had inflicted gratuitous [497 US 784] violence is rationally supported by the evidence that respondent "climbed on top of the dead victim and hit her in the face several times which eventually resulted in additional wounds and bleeding," ibid. In light of the Arizona Supreme Court's narrowing construction of the "especially heinous . . . or depraved" aggravating circumstance, see State v Gretzler, 135 Ariz, at 52-53, 659 P2d, at 11-12 (listing factors), the Arizona Supreme Court could reasonably have concluded that respondent committed the murder in an "especially heinous . . . or depraved manner."

For the foregoing reasons, we reverse the judgment of the Court of Appeals and remand for proceedings consistent with this opinion.

It is so ordered.

Justice **Brennan,** joined by Justice **Marshall,** dissented in an opinion appearing in Walton v Arizona (No. 88-7351), 111 L Ed 2d, at page 542, supra.

SEPARATE OPINION

Justice **Blackmun,** with whom Justice **Brennan,** Justice **Marshall,** and Justice **Stevens** join, dissenting.

Seeking habeas corpus relief in the United States Court of Appeals for the Ninth Circuit, respondent Jimmie Wayne Jeffers raised two challenges to Arizona's "especially heinous . . . or depraved" aggravating circumstance. Ariz Rev Stat Ann § 13-703(F)(6) (1989) ((F)(6) circumstance or factor).[1] First, Jeffers contended that the Arizona Supreme [497 US 785] Court has failed to articulate a constitutionally sufficient limiting construction of the (F)(6) circumstance. In the alternative, Jeffers argued that, even if a suitable limiting construction had been developed, its application to *his* case failed to satisfy constitutional requirements. The Court of Appeals, deeming itself bound by Circuit precedent, rejected respondent's first contention. Jeffers v Ricketts, 832 F2d 476, 482 (1987), citing Chaney v Lewis, 801 F2d 1191, 1194-1196 (CA9 1986), cert denied, 481 US 1023, 95 L Ed 2d 516, 107 S Ct 1911 (1987). With respect to the second contention, however, the court concluded that the standard enunciated by the Arizona Supreme Court "seems to call for conduct or attitudes more shocking than those exhibited by Jeffers," 832 F2d, at 484, and that "[b]ecause we conclude that the standard of heinousness and depravity delineated in prior Arizona cases cannot be applied in a principled manner to Jeffers, his death sentence must be struck down as arbitrary." Id., at 485.

---

[1] The (F)(6) circumstance applies when the sentencer finds that "[t]he defendant committed the offense in an especially heinous, cruel or depraved manner." In the present case, the Arizona Supreme Court found that cruelty had not been proved because "[t]here was no evidence that the victim suffered any pain." State v Jeffers, 135 Ariz 404, 429, 661 P2d 1105, 1130 (1983). The court did find that the murder was "heinous" and "depraved," and the adequacy of that finding is the issue in this case. The Arizona Supreme Court disagreed with the trial court's determination that Jeffers had "knowingly created a grave risk of death to another person or persons in addition to the victim of the offense," Ariz Rev Stat Ann § 13-703(F)(3) (1989). See 135 Ariz, at 428-429, 661 P2d, at 1129-1130. Consequently, Jeffers' sentence of death rests entirely on the (F)(6) factor.

The State then filed a petition for rehearing and rehearing en banc. The panel indicated that its ruling on the rehearing petition would be deferred " 'pending further decision of this court, sitting en banc, in Adamson v Ricketts.' " Order of March 30, 1988 quoted in Brief for Respondent 21. Several months later the en banc court issued its decision in Adamson v Ricketts, 865 F2d 1011 (CA9 1988), cert pending, No. 88-1553. After exhaustive analysis of the relevant Arizona precedents, the en banc court concluded:

> "[T]he (F)(6) circumstance has not been given a sufficiently narrow construction by the Arizona Supreme Court such that its application will be kept within identifiable boundaries. Among the more than fifty cases in which an (F)(6) finding was appealed, we are unable to distinguish rationally those cases in which the Arizona Supreme Court upheld the finding from the few in which it did not. Because neither the legislative standard nor the case law has properly channeled decisionmaking on the imposition of the 'especially heinous, cruel or depraved' **[497 US 786]** aggravating circumstance, we find that this circumstance has been arbitrarily and capriciously applied by the Arizona courts." Id., at 1038.[2]

The Court of Appeals subsequently denied the State's request for rehearing in Jeffers' case.

As respondent in this Court, Jeffers defends the judgment of the Court of Appeals on the grounds that no satisfactory limiting construction of the (F)(6) circumstance can be derived from the Arizona precedents, and, alternatively, that if such a construction does exist, it was improperly applied in his case.[3] Jeffers' first claim is logically antecedent to the second; it raises an issue of greater general importance, and, given the decision of the en banc Court of Appeals in Adamson, it can hardly be regarded as insubstantial. The Court today, however, simply refuses to discuss the merits of respondent's broad challenge to the (F)(6) circumstance; in lieu of analysis, it relies on a single sentence of dictum in an opinion

---

[2] Eleven judges sat on the en banc panel in Adamson. Seven judges concluded that none of the three terms ("heinous," "cruel," or "depraved") in the (F)(6) circumstance had been construed by the Arizona Supreme Court in a manner that satisfied constitutional requirements. 865 F2d, at 1036. The other four judges argued that the state court had announced a satisfactory construction of the word "cruel"; these four declined to express a view as to the adequacy of the Arizona Supreme Court's application of the terms "heinous" and "depraved." Id., at 1058 (opinion concurring and dissenting).

[3] Petitioner contends that Jeffers is not entitled to argue in this Court that the Arizona Supreme Court has failed to articulate a constitutionally sufficient limiting construction of the (F)(6) circumstance. Petitioner argues that the point has been waived, since the Ninth Circuit panel ruled against respondent on this claim and Jeffers did not seek rehearing or cross-petition for certiorari. Reply Brief for Petitioner 4. The majority correctly (though silently) rejects this proposition. There is no basis for the suggestion that respondent should have sought rehearing at the Court of Appeals, or filed a cross-petition here, after he prevailed below. It is well established that respondent may defend the judgment of the Court of Appeals on any ground supported by the record. See, e.g., Smith v Phillips, 455 US 209, 215, n 6, 71 L Ed 2d 78, 102 S Ct 940 (1982).

[497 US 787]

in another case issued today. Because I believe that Arizona's application of the (F)(6) factor cannot be squared with this Court's governing precedents—and because I regard the majority's approach as a parody of constitutional adjudication —I dissent.

I

This Court consistently has recognized that "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v Stephens, 462 US 862, 877, 77 L Ed 2d 235, 103 S Ct 2733 (1983). The application to respondent of Arizona's (F)(6) circumstance can be sustained only if that aggravating factor provides a "principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Godfrey v Georgia, 446 US 420, 433, 64 L Ed 2d 398, 100 S Ct 1759 (1980) (plurality opinion). The majority does not contend that the statutory language, which requires only that the murder be "especially heinous . . . or depraved," is itself sufficiently precise to meet constitutional standards.[4] Rather, the Court refers repeatedly to a "narrowing construction" of the (F)(6) circumstance announced by the Arizona Supreme Court. See, e.g., ante, at 776, 780, 783,

[497 US 788]

and 784, 111 L Ed 2d, at 620, 622, 624, and 625. The Court nowhere states precisely what that narrowing construction is, nor does it examine other Arizona cases to see whether that construction has been consistently applied. The majority suggests, however, that the "narrowing construction" was announced by the Arizona Supreme Court in State v Gretzler, 135 Ariz 42, 659 P2d 1, cert denied, 461 US 971, 77 L Ed 2d 1327, 103 S Ct 2444 (1983). See ante, at 784, 111 L Ed 2d, at 625. Analysis of the Arizona Supreme Court's opinion in Gretzler, and of its relationship to prior Arizona capital cases, belies that characterization.

Prior to Gretzler, the Arizona Supreme Court's application of the (F)(6) circumstance was based principally on its decision in State v Knapp, 114 Ariz 531, 562 P2d 704 (1977), cert denied, 435 US 908, 55 L Ed 2d 500, 98 S Ct 1458 (1978), in which the court recited dictionary definitions of each of the statutory terms. "Heinous" was defined as "hatefully or shockingly evil; grossly bad"; "cruel" was defined as "disposed to inflict pain esp. in a wanton, insensate or vindictive manner: sadistic"; and "depraved" was defined as "marked by debasement, corruption, perversion or deterioration." 114 Ariz, at 543, 562 P2d, at 716. The court concluded: "What our legislature intended to include as an aggravating circumstance was a killing wherein additional circumstances of the nature enumerated above set the crime apart from the usual or the norm." Ibid.

---

[4] No such contention would be plausible. In Godfrey the plurality, considering Georgia's "outrageously or wantonly vile, horrible or inhuman" aggravating circumstance, concluded that "[t]here is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" 446 US, at 428-429, 64 L Ed 2d 398, 100 S Ct 1759. In Maynard v Cartwright, 486 US 356, 100 L Ed 2d 372, 108 S Ct 1853 (1988), the Court considered Oklahoma's "especially heinous, atrocious, or cruel" aggravating factor. It unanimously concluded: "[T]he language of the Oklahoma aggravating circumstance at issue . . . gave no more guidance than the 'outrageously or wantonly vile, horrible or inhuman' language that the jury returned in its verdict in Godfrey." Id., at 363-364, 100 L Ed 2d 372, 108 S Ct 1853. The statutory language here is no more precise.

The Gretzler court did not suggest that the Knapp definitions were insufficient to guide the sentencer's discretion or that further narrowing was required. To the contrary, the court quoted these definitions with approval and stated: "We believe that the statutory phrase 'especially heinous, cruel, or depraved' has been construed in a constitutionally narrow fashion, and has been properly applied in individual cases. A summary of the law which has been developing in the area supports this conclusion." 135 Ariz, at 50, 659 P2d, at 9. In explaining what kinds of murders properly would be regarded as "especially heinous . . . or depraved," the court

stated that "[i]n contrast to the emphasis upon the victim's suffering and feelings in the case of cruelty, the statutory concepts of heinous and depraved involve a killer's vile state of mind at the time of the murder, as evidenced by the killer's actions. Our cases have suggested specific factors which lead to a finding of heinousness or depravity." Id., at 51, 659 P2d, at 10. Next, drawing on examples from prior Arizona cases, the court identified five factors the presence of which would indicate that a particular killing was "especially heinous . . . or depraved." These factors were (1) "the apparent relishing of the murder by the killer," (2) "the infliction of gratuitous violence on the victim," (3) "the needless mutilation of the victim," (4) "the senselessness of the crime," and (5) "the helplessness of the victim." Id., at 52, 659 P2d, at 11. Finally, the court noted: "[W]here no circumstances, *such as the specific factors discussed above,* separate the crime from the 'norm' of first degree murders, we will reverse a finding that the crime was committed in an 'especially heinous, cruel, or depraved manner.'" Id., at 53, 659 P2d, at 12 (emphasis added).

The Arizona Supreme Court's opinion in Gretzler obviously did *not* announce a "narrowing construction" of the (F)(6) circumstance. The court did not suggest that the standards previously applied were inadequate, or that further constraints on the sentencer's discretion were essential. Instead, the Arizona Supreme Court cited the Knapp definitions with approval and then gave *examples* of their application. No matter how vaguely defined an aggravating circumstance is, there will be a finite number of cases in which that circumstance has been applied. It hardly limits the application of that aggravating factor to list those prior decisions, or to provide illustrative examples from among them. I do not see how the Arizona Supreme Court's *description* of the manner in which a vague aggravating factor has been applied can be regarded as the establishment of a constitutionally sufficient narrowing construction.

Nor did the Gretzler court narrow the discretion of future sentencers simply by grouping its prior decisions into categories. The use of categories could serve to guide the sentencer *if* (a) the categories themselves are narrow enough that a significant number of homicides will not fall within any of them, and (b) the court indicates that a murder is covered by the aggravating circumstance *only* if it falls within one of the enumerated categories. The Arizona Supreme Court's decision in Gretzler satisfies neither of these criteria. Most first-degree murders will fall within at least one of the five categories listed in Gretzler—hardly a surprising result, since the Gretzler categories were simply descriptive of the prior period during which the Knapp definitions had governed the application of this aggravating factor. Since Gretzler, moreover, the Arizona Supreme Court has continued to identify additional circumstances that will support the conclusion that a particular murder is "especially heinous . . . or depraved." That fact is also unsurprising. The court in Gretzler did not purport to lay down rules for the future; it simply summarized prior case law and indicated that an (F)(6) finding would be proper when "circumstances, *such as the specific factors discussed above,* separate the crime from the 'norm' of first degree murders." 135 Ariz, at 53, 659 P2d, at 12 (emphasis added).

The majority does not contend that the Knapp definitions furnished constitutionally sufficient guidance to capital sentencers in Arizona prior to Gretzler. Just as a reasonable sentencer might conclude that every first-degree murder is "especially heinous, cruel or depraved," see n 4, supra, a reasonable judge could surely believe that all such killings are "hatefully or shockingly evil" or "marked by debasement, corruption, perversion or deterioration."[5] Yet the majority

apparently concludes that the Arizona Supreme Court cured the constitutional infirmity by summarizing its prior decisions, reiterating with approval the constitutionally deficient construction relied on previously and pleding to follow the same approach in the future.[6]

The majority undertakes no close examination of Gretzler or of other Arizona cases, prior or subsequent. It makes no attempt to explain how the Arizona Supreme Court's construction of the terms "especially heinous . . . or depraved" can be said to satisfy the constitutional requirements announced in this Court's prior decisions. Indeed, the majority's conclusion that the Arizona court has satisfactorily limited the reach of the statutory language is supported by no analysis at all. The Court instead relies on the assertion that "we resolved any doubt about the matter in Walton v Arizona, ante, p 639, 111 L Ed 2d 511, 110 S Ct 3047, where we upheld, against a vagueness challenge, the precise aggravating circumstance at issue in this case." Ante, at 777, 111 L Ed 2d, at 620.[7] The majority's claim that Walton

---

[5] In 1980, when respondent was sentenced to death by the trial judge, the Arizona Supreme Court had provided no guidance in the application of the (F)(6) circumstance beyond the definitions quoted in State v Knapp, 114 Ariz 531, 562 P2d 704 (1977). Respondent's trial-level sentencing procedure was therefore conducted under an invalid scheme, and I would affirm the judgment below on that ground even if I believed that the Arizona Supreme Court had subsequently announced a valid limiting construction of this aggravating factor. See Clemons v Mississippi, 494 US 738, 738, 762-772, 108 L Ed 2d 725, 110 S Ct 1441 (1990) (dissenting opinion).

[6] In describing the kinds of murders that will qualify as "especially heinous . . . or depraved," the Arizona Supreme Court has continued to employ the formulations relied upon in Knapp. See, e.g., State v Fulminante, 161 Ariz 237, 254-255, 778 P2d 602, 619-620 (1988) (quoting Knapp definitions), cert granted, 494 US 1055, 108 L Ed 2d 762, 110 S Ct 1522 (1990); State v Beaty, 158 Ariz 232, 242, 762 P2d 519, 529 (1988) (same), cert denied, 491 US 910, 105 L Ed 2d 708, 109 S Ct 3200 (1989); State v Poland, 144 Ariz 388, 405, 698 P2d 183, 200 (1985) (same); State v Johnson, 147 Ariz 395, 401, 710 P2d 1050, 1056 (1985) ((F)(6) finding is appropriate in cases where the killer "acted in such a fashion that his acts set him apart from the 'norm' of first degree murderers").

involves "the precise aggravating circumstance at issue in this case," however, fundamentally misrepresents the operation of the Arizona statute.

The Arizona Supreme Court consistently has asserted that the terms "heinous," "cruel," and "depraved" "are considered disjunctive; the presence of any one of three factors is an aggravating circumstance." State v Beaty, 158 Ariz 232, 242, 762 P2d 519, 529 (1988), cert denied, 491 US 910, 105 L Ed 2d 708, 109 S Ct 3200 (1989). It is therefore more accurate to characterize the (F)(6) circumstance as three aggravating factors than as one.[8] In Walton, the Arizona Supreme Court, in determining that the (F)(6) factor had been established, relied primarily on the conclusion that the murder was especially cruel. Although the court also indicated that the murder was especially depraved, it stated clearly that this conclusion was not necessary to its finding of the (F)(6) circumstance. See State v Walton, 159 Ariz 571, 587-588, 769 P2d 1017, 1033-1034 (1989) ("The clear evidence of cruelty is sufficient to sustain the trial judge's finding of that aggravating factor, but we believe that the evidence also supports the finding of depravity"). In affirming Jeffrey Walton's death sentence today, this Court also focuses its attention on the constitutional sufficiency of the Arizona Supreme Court's construction of "cruelty." The Court concludes:

> "Recognizing that the proper degree of definition of an aggravating factor of this nature is not susceptible of mathematical precision, we conclude that the definition given to the 'especially cruel' provision by the Arizona Supreme Court is constitutionally sufficient because it gives meaningful guidance to the sentencer. *Nor can we fault the state court's statement that a crime is committed in an especially 'depraved' manner when the perpetrator 'relishes the murder, evidencing debasement or perversion,' or 'shows an indifference to the suffering of the victim and evidences a sense of pleasure'*

---

[7] The majority also places peculiar emphasis on the Court of Appeals' conclusion that the (F)(6) aggravating factor, as construed by the Arizona Supreme Court, is not unconstitutionally vague. See ante, at 776-777, 111 L Ed 2d, at 620. It is most unusual for this Court to show deference to the legal conclusion of a Court of Appeals, particularly a conclusion made in the decision under review. And it is simply perverse for this Court to rely upon a Court of Appeals decision for a proposition that is no longer good law within the Circuit. The majority inexplicably neglects to mention that the panel's conclusion on this point has been superseded by the decision of the en banc court in Adamson v Ricketts, 865 F2d 1011 (CA9 1988), in which all seven judges who expressed a view on the question concluded that the Arizona Supreme Court had failed to articulate a constitutionally sufficient narrowing construction of the terms "heinous" and "depraved."

[8] It might be even more accurate to say that the (F)(6) aggravating circumstance includes two distinct concepts: (1) cruelty and (2) heinousness/depravity. The Arizona Supreme Court has made only the most superficial effort to explain the difference between a murder that is "heinous" and a murder that is "depraved." See Adamson v Ricketts, 865 F2d, at 1034-1035, n 38.

in the killing." Ante, at 655, 111 L Ed 2d 511, 110 S Ct 3047 (emphasis added).

In the present case, however, the adequacy of the Arizona Supreme Court's construction of "cruelty" is not at issue. That court expressly found that Jeffers' crime was *not* "especially cruel"; its affirmance of the death sentence was based entirely on the conclusion that this murder was especially "heinous" and "depraved." In stating that Arizona has placed constitutionally sufficient limits on the State's "especially heinous . . . or depraved" aggravating factor, today's majority therefore is not in a position to rely, and cannot rely, on either the holding or the analysis of Walton. Rather, the majority relies *entirely* on the italicized sentence quoted above—the *only* sentence in the Walton opinion that discusses the Arizona Supreme Court's construction of the word "depraved." That sentence is wholly gratuitous: The Arizona Supreme Court's holding in Walton, and this Court's affirmance, do not depend upon a determination that Walton's crime was "especially . . . depraved." The opinion in Walton, moreover, makes no effort whatsoever to justify its suggestion that the state court's construction of "depravity" is sufficient to meet constitutional standards.

I think it is important that we be frank about what is happening here. The death penalty laws of many States establish aggravating circumstances similar to the one at issue in

this case.[9] Since the statutory language defining these factors does not provide constitutionally adequate guidance, the constitutionality of the aggravating circumstances necessarily depends on the construction given by the State's highest court. We have expressed apparent approval of a limiting construction requiring "torture or serious physical abuse." Maynard v Cartwright, 486 US 356, 365, 100 L Ed 2d 372, 108 S Ct 1853 (1988). This Court has not held that this is the only permissible construction of an aggravating circumstance of this kind, but prior to today we have never suggested that the aggravating factor can permissibly be construed in a manner that does not make reference to the suffering of the victim. The decision today will likely result in the execution of numerous inmates, in Arizona,[10] and elsewhere, who would not otherwise be put

---

[9] One commentator has stated: "Twenty-four states permit imposition of the death penalty based on a finding that the murder was, in some ill-defined way, worse than other murders. The states use a variety of terms to denote this aggravating circumstance, with most statutes containing, either alone or in some combination, the terms 'especially heinous, atrocious, or cruel,' 'depravity of mind,' or 'outrageously vile wanton or inhuman.' These aggravating circumstances . . . have generated more controversy than any other aggravating circumstance. Commentators have universally criticized them as vague, overbroad, and meaningless." Rosen, The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard, 64 NCL Rev 941, 943-944 (1986) (footnotes omitted).

[10] In addition to the present case, on at least 12 occasions the Arizona Supreme Court has found that a particular murder was especially heinous and/or depraved but not especially cruel. See State v Ceja, 126 Ariz 35, 39-40, 612 P2d 491, 495-496 (1980); State v Clark, 126 Ariz 428, 436-437, 616 P2d 888, 896-897, cert denied, 449 US 1067, 66 L Ed 2d 612, 101 S Ct 796 (1980); State v Bishop, 127 Ariz 531, 534, 622 P2d 478, 481 (1980); State v Tison, 129 Ariz 546, 555, 633 P2d 355, 364 (1981), cert denied, 459 US 882, 74 L Ed 2d 147, 103 S Ct 180 (1982); State v Ortiz, 131 Ariz 195, 210, 639 P2d 1020, 1035 (1981), cert denied, 456 US 984, 72 L Ed 2d 863, 102 S Ct 2259

to death. Yet neither in this case nor in Walton has the Court articulated any argument in support of its decision. Nor has the majority undertaken any examination of the way in which this aggravating circumstance has been applied by the Arizona Supreme Court. Instead, the Court relies on a conspicuous bootstrap. Five Members have joined the majority opinion in Walton, which in a single sentence asserts without explanation that the majority cannot "fault" the Arizona Supreme Court's construction of the statutory term "depraved." In the present case the same five Members proclaim themselves to be bound by this scrap of dictum. In any context this would be a poor excuse for constitutional adjudication. In a capital case it is deeply disturbing.

It is to some degree understandable that the majority chooses to rely exclusively on the brief and passing dictum in Walton. Had the Court examined the range of homicides which the Arizona Supreme Court has held to be "especially heinous . . . or depraved," it could not plausibly have argued that the state court has placed meaningful limits on the application of this aggravating circumstance. My dissent in Walton explains in some detail the reasons for its conclusion that this aggravating factor, as defined by the Arizona Supreme Court, fails to satisfy constitutional requirements. The United States Court of Appeals for the Ninth Circuit, sitting en banc, after exhaustive analysis of the relevant state precedents, also concluded that the "especially heinous . . . or depraved" circumstance is unconstitutionally vague. See Adamson v Ricketts, 865 F2d, at 1031-1039. There is no need to reiterate these arguments here. It is sufficient to

note that neither this Court nor the Arizona Supreme Court has attempted to refute that analysis.

Indeed, the constitutional defects in the Arizona Supreme Court's application of the (F)(6) circumstance are illustrated by the state court's conclusion that respondent "relished" the murder, and that this factor supports a finding that the killing was "especially heinous . . . or depraved." The court based its conclusion on testimony indicating that respondent struck the victim several times after she appeared to be dead, that while striking her he called her a "bitch" and a "dirty snitch," and that with each striking blow he said, "This one is for ——," naming several of his friends on whom the victim had informed to the police. 135 Ariz, at 430, 661 P2d, at 1131. The Arizona Supreme Court

---

(1982); State v Woratzeck, 134 Ariz 452, 457, 657 P2d 865, 870 (1982); State v Zaragoza, 135 Ariz 63, 69, 659 P2d 22, 28, cert denied, 462 US 1124, 77 L Ed 2d 1356, 103 S Ct 3097 (1983); State v Harding, 137 Ariz 278, 294, 670 P2d 383, 399 (1983), cert denied, 465 US 1013, 79 L Ed 2d 246, 104 S Ct 1017 (1984); State v Fisher, 141 Ariz 227, 252, 686 P2d 750, 775, cert denied, 469 US 1066, 83 L Ed 2d 436, 105 S Ct 548 (1984); State v Villafuerte, 142 Ariz 323, 331, 690 P2d 42, 50 (1984), cert denied, 469 US 1230, 84 L Ed 2d 371, 105 S Ct 1234 (1985); State v Martinez-Villareal, 145 Ariz 441, 450-451, 702 P2d 670, 679-680, cert denied, 474 US 975, 88 L Ed 2d 324, 106 S Ct 339 (1985); State v Wallace, 151 Ariz 362, 367-368, 728 P2d 232, 237-238 (1986), cert denied, 483 US 1011, 97 L Ed 2d 748, 107 S Ct 3243 (1987). In four cases besides the present one, that has been the only aggravating circumstance. See State v Ceja, supra; State v Bishop, supra; State v Villafuerte, supra; State v Wallace, supra.

did not explain precisely what it meant by saying that the respondent "relished" his crime. But the evidence does not suggest that Jeffers killed for the sake of killing or found some intrinsic pleasure in the act of murder. Rather, the evidence indicates that respondent killed out of hatred for a particular individual and a desire for revenge. There is a difference.

It may be that a State could rationally conclude that a murder committed out of personal hatred is more reprehensible than is a killing committed for other reasons.[11] But the State of Arizona cannot be said to have arrived at any such conclusion. The Arizona Supreme Court has also held that a murder is "especially heinous . . . or depraved" if it is committed to eliminate a witness, see State v Correll, 148 Ariz 468, 481, 715 P2d 721, 734 (1986); State v Gillies, 142 Ariz 564, 570, 691 P2d 655, 661 (1984), cert denied, 470 US

1059, 84 L Ed 2d 834, 105 S Ct 1775 (1985); State v Smith, 141 Ariz 510, 511-512, 687 P2d 1265, 1266-1267 (1984), or if it is "senseless," see Gretzler, 135 Ariz, at 52, 659 P2d, at 11-12; and the statute itself provides that it shall be an aggravating circumstance if the murder is committed for pecuniary gain. See Ariz Rev Stat Ann § 13-703(F)(5) (1989).[12] The Arizona Supreme Court has also identified other blameworthy motives which, in the court's view, suggest that a murder is "especially heinous . . . or depraved."[13] Taken together, the decisions of the Arizona Supreme Court hold that a murder will be deemed *especially* blameworthy if it is committed for virtually any reason, or for no reason at all.

The Arizona Supreme Court's decisions dealing with especially improper motives are symptomatic of a larger pattern in that court's construction of the (F)(6) circumstance. At least since Gretzler, the court has generally avoided the error of simply recounting the events surrounding a particular crime and then announcing, in conclusory fashion, that the murder was "especially heinous . . . or depraved." Rather, the court typically identifies specific factors to support its conclusion that the aggravating circumstance has been established. And if any one decision is examined in isolation, it may appear that the state court has narrowly construed the (F)(6) circumstance in a manner that satisfies constitutional requirements. The problem is that the Arizona

---

[11] The identification of particularly blameworthy motives for murder would seem, however, to be more appropriately a task for the legislature than for the State's judiciary. See Rosen, 64 NCL Rev, at 990-991. The codification of an aggravating factor as vaguely defined as the (F)(6) circumstance is in essence an act of legislative abdication, since it requires the state courts to make fundamental policy choices under the guise of "interpreting" the statute.

[12] The Arizona Supreme Court has construed this aggravating factor as applying whenever "the expectation of financial gain was a cause of the murders." State v Clark, 126 Ariz, at 436, 616 P2d, at 896. The court in Clark rejected the specially concurring justice's position, id., at 437, 616 P2d, at 897, that this aggravating circumstance applied only to murders committed by hired killers.

[13] See State v Martinez-Villareal, 145 Ariz, at 451, 702 P2d, at 680 (murder to demonstrate "manliness" reflects "a manifest disregard for the fundamental principles upon which our society is based"); State v McCall, 139 Ariz 147, 162, 677 P2d 920, 935 (1983) ((F)(6) finding supported in part by the fact that the mutilation of the victims' bodies "was designed to be a 'message' to warn other people"), cert denied, 467 US 1220, 81 L Ed 2d 375, 104 S Ct 2670 (1984).

Supreme Court has identified so many such factors, and has shown itself so willing to add new factors when a perceived need arises, that the body of its precedents places no meaningful limitations on the application of this aggravating circumstance.[14] The constitutional infirmity of the court's approach cannot be recognized through examination of any one opinion. It becomes very apparent upon examination of the relevant decisions taken as a whole. Unfortunately, the inquiry required for an informed assessment of the Arizona Supreme Court's application of this aggravating factor is one that this Court simply refuses to undertake.

II

The majority devotes most of its energy arguing that a federal habeas court, having concluded that a State has adopted

a constitutionally sufficient limiting construction of an aggravating circumstance, largely should refrain from engaging in case-specific comparisons between the homicide under review and prior decisions in which the aggravating factor has been found. The Court concludes that since a rational factfinder could have determined that respondent "relished" the murder and engaged in "gratuitous violence," the death sentence must be allowed to stand. I concede that respondent's crime was not plainly distinguishable from the other murders that the Arizona Supreme Court has found to be "especially heinous . . . or depraved." Indeed, my conclusion could hardly be otherwise: having argued that the (F)(6) circumstance has been construed so broadly as to cover virtually every first-degree murder, I could scarcely contend that the court's finding in *this* case was bizarre or aberrational. I, however, do have some brief observations concerning the role of federal habeas courts in reviewing state-court findings of aggravating circumstances.

(1) I think that the majority is wrong in arguing that a state court's application of a valid aggravating circumstance involves a question of state law only. See ante, at 780, 111 L Ed 2d, at 622. The statutory aggravating circumstances do perform the

---

[14] A State might reasonably conclude that a murder is *especially* reprehensible if the victim is 10 years old (because a child is physically vulnerable and has most of his life ahead of him); or 75 years old (because of the respect traditionally accorded to the elderly); or 40 years old (because a person of that age is likely to have others dependent upon him for support). A cogent argument could also be made that the killing of a 21- or 55-year-old victim is especially blameworthy. But while none of these choices would be unreasonable, the State, with a statute of this kind, must choose. If the state court invoked first one argument and then the other, and ultimately found in virtually every case that the age of the victim made the murder "especially heinous . . . or depraved," the aggravating circumstance would be too broad.

Under the approach developed by the majority here and in Walton, however, the Arizona Supreme Court with impunity could apply its aggravating circumstance in just such a fashion. If the state court held that the youth of the victim made a particular murder "especially heinous . . . or depraved," this Court presumably would assert that such a construction narrowed the application of the aggravating factor in a manner that satisfied constitutional standards. And if the defendant cited decisions in which the same state court had held that other murders were "especially heinous . . . or depraved" because the victim was 21, 40, 55, or 75 years old, this Court apparently would refuse to read the cases on the ground that the defendant was not entitled to "'challeng[e] the proportionality review of the Arizona Supreme Court.'" See ante, at 778, 111 L Ed 2d, at 621 (quoting Walton, ante, at 655, 111 L Ed 2d 511, 110 S Ct 3047).

state-law function of determining who will be sentenced to death. But the aggravating factors also perform the distinct function of determining which murderers are *eligible* for the death penalty as a matter of federal law. See Zant v Stephens, 462 US, at 878, 77 L Ed 2d 235, 103 S Ct 2733 ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty"); Lowenfield v Phelps, 484 US 231, 244, 98 L Ed 2d 568, 108 S Ct 546 (1988). That point is particularly clear in cases like the present one, where the F6 circumstance is the *only* aggravating factor that the Arizona Supreme Court found to exist. If the state court erred in its determination that this aggravating circumstance had been proved, that error is of federal constitutional significance: The defendant who claims

that no aggravating factor has been established is contending that the Eighth Amendment (and not simply state law) prohibits his execution.[15]

(2) As the majority points out, under 28 USC § 2254(d) [28 USCS § 2254(d)] "federal courts in habeas corpus proceedings must *generally* accord a presumption of correctness to a state court's factual findings." Ante, at 782, 111 L Ed 2d, at 624 (emphasis added). The presumption of correctness does not apply, however, if the habeas petitioner demonstrates "that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing." 28 USC § 2254(d)(2) [28 USCS § 2254(d)(1)].[16] In the present case the trial-level sentencing procedure was conducted under a clearly unconstitutional scheme. See n 5, supra. The relevant factfinder is therefore the Arizona Supreme Court, as the majority appears to acknowledge. See ante, at 783, 111 L Ed 2d, at 624 (arguing that "a federal court should adhere to the Jackson standard even when reviewing the decision of a state appellate court that has independently reviewed the evidence"). This Court has held that the general presumption of correctness mandated by 28 USC § 2254(d) [28 USCS § 2254(d)] is applicable to the factual findings of state appellate courts. Summer v Mata, 449 US 539, 545-547, 66 L Ed 2d 722, 101 S Ct 764 (1981). The Court has also recognized, however: "[T]here might be instances . . . in which the presumption would not apply to appellate factfinding . . . because appellate factfinding procedures were not 'adequate,' see 28 USC § 2254(d)(2) [28 USCS § 2254(d)(2)]. For example, the question . . . might in a given case turn on credibility determinations that

could not be accurately made by an appellate court on the basis of a paper record." Cabana v Bullock, 474 US 376, 388, n 5, 88 L Ed 2d 704, 106 S Ct 689 (1986).

---

[15] Similarly, the Eighth Amendment prohibits the imposition of a capital sentence unless the defendant is found to have killed, attempted to kill, or intended that a killing take place. Enmund v Florida, 458 US 782, 73 L Ed 2d 1140, 102 S Ct 3368 (1982). It may be that the laws of many States require a similar finding. But the adequacy of the procedure by which that finding is made is a question of federal as well as state law.

[16] The presumption of correctness is also inapplicable if "the material facts were not adequately developed at the State court hearing," § 2254(d)(3), or if "the applicant did not receive a full, fair, and adequate hearing in the State court proceeding." § 2254(d)(6).

Indeed, in the present case the inadequacy of the Arizona Supreme Court's procedure goes beyond the fact that the court did not see the witnesses and was forced to rely upon a paper record. At the times of respondent's trial and sentencing hearing, and even when his appellate briefs were submitted and oral argument was conducted, respondent had no reason to believe that the sentencer would attach particular importance to its conclusion that the defendant had "relished" the killing and inflicted "gratuitous violence" on the victim after her death.[17] The Arizona Supreme Court's opinion in Gretzler was issued 18 days prior to its decision in Jeffers' case—far too late for Jeffers to submit evidence or argument regarding the presence of the Gretzler factors.

In the present case there appears to be no dispute regarding the primary facts underlying the Arizona Supreme Court's finding of the (F)(6) circumstance. That is, respondent apparently does not deny that he struck the victim after she was dead or that he cursed her while doing so. But if there were a conflict in the testimony regarding this point, I would not regard the Arizona Supreme Court's factfinding procedures as "adequate" to resolve that conflict.

(3) In determining that Jeffers "relished" his crime and inflicted "gratuitous violence" on the victim, the Arizona Supreme Court did not simply apply determinate standards to a new set of facts. Rather, the assertion that respondent "relished"

the killing of Penelope Cheney said as much about the court's understanding of the word "relish" as it did about Jeffers' state of mind at the time of the murder. Thus, despite the prior Ninth Circuit decision holding that the (F)(6) circumstance had been adequately narrowed, the federal court could not properly limit itself to the question whether a rational factfinder might conclude that Jeffers "relished" the killing or employed "gratuitous violence." Rather, the habeas court had both the right and the duty to ask whether the Arizona Supreme Court's construction of the (F)(6) circumstance remained adequate to satisfy the Constitution *in light of its application to the case at hand.* Thus, the habeas court's review in cases of this kind *necessarily* involves a comparison between the case under review and prior state-court decisions applying the aggravating factor—not as a means of determining whether the state court "incorrectly" applied its construction of the statutory terms, but as a means of determining whether the state court's application of its construction to the instant case expands the scope of the aggravating factor in such a way as to make a previously valid limiting construction unconstitutionally broad.

(4) Indeed, I think that a comparative approach is necessary no matter what standard of review the habeas

---

[17] The Arizona Supreme Court in Gretzler summarized prior Arizona decisions in support of its conclusion that the (F)(6) circumstance would be established if the murderer "relished" the killing or employed "gratuitous violence." But those prior decisions did not use the terms "relish" or "gratuitous violence"; for the most part, they simply recounted the facts of the case and then concluded that the murder was "especially cruel . . . or depraved." Prior to the decision in Gretzler, Jeffers had no notice that the Gretzler factors would be accorded any particular significance in determining whether the (F)(6) factor had been established.

court employs. Even if the state court's finding is reviewed under a "rational factfinder" standard, the majority is wrong to say that the Court of Appeals erred in comparing Jeffers' crime to other cases in which the (F)(6) factor was established. Words like "relish" may be somewhat more precise than are "heinous" and "depraved," but they still are of less than crystalline clarity. A court attempting to apply the Jackson standard must ask whether a rational factfinder could believe that Jeffers "relished" the crime *as that term has been construed by the Arizona Supreme Court.* If the Arizona Supreme Court had used the word "relish" to mean one thing in each of its other decisions, and something very different in Jeffers' case, its application to Jeffers would be

arbitrary—even if both meanings could be found in a given dictionary. If the Court of Appeals departed from the "rational factfinder" standard here, it was by requiring *too close* a correlation between this case and others, not simply by employing a comparative approach.

Suppose, for example, that the Arizona Supreme Court had consistently construed the (F)(6) circumstance as requiring "physical abuse," but had found that standard satisfied only in cases where the killer subjected the victim to prolonged, severe physical suffering. Presumably that construction would be valid. See Maynard v Cartwright, 486 US, at 365, 100 L Ed 2d 372, 108 S Ct 1853. Suppose that the court in a subsequent case found that the (F)(6) factor had been proved when the defendant slapped the victim once and then shot him dead. The defendant, on federal habeas, could raise two related but distinct challenges. First, the defendant might argue that no reasonable factfinder could conclude that a single slap constituted "physical abuse" *as that term had previously been construed by the Arizona Supreme Court.* (This would amount to a contention that the state court had misapplied its own rule.) Alternatively, the defendant might argue that "physical abuse" could no longer be deemed an adequate limiting construction if that phrase was construed as including a single slap. However the challenge was framed, though, the habeas court could not limit itself to the question whether a rational factfinder could conclude that the slap fell within *some* plausible definition of "physical abuse."

III

The majority's discussion of the way in which a federal habeas court should review the application of a valid aggravating circumstance to the facts of a particular case seems to me to be flawed in significant respects. My principal disagreement, however, is with the Court's insistence on addressing the issue. The majority makes no effort to justify its holding that the Arizona Supreme Court has placed constitutionally

sufficient limitations on its "especially heinous . . . or depraved" aggravating circumstance. Instead the Court relies entirely on a sentence of dictum from today's opinion in Walton—an opinion which itself offers no rationale in support of the Court's conclusion. My dissenting opinion in Walton notes the Court's increasing tendency to review the constitutional claims of capital defendants in a perfunctory manner, but the Court's action in this case goes far beyond anything that is there observed.

I dissent.

EDITOR'S NOTE

An annotation on "Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances," appears p 947, infra.

[497 US 805]

IDAHO, Petitioner

v

LAURA LEE WRIGHT

497 US 805, 111 L Ed 2d 638, 110 S Ct 3139

[No. 89-260]

Argued April 18, 1990. Decided June 27, 1990.

Decision: Admission, at Idaho criminal trial for sexual abuse of child, of 2½-year-old declarant's hearsay statements made to examining pediatrician held to violate confrontation clause of Sixth Amendment.

SUMMARY

A mother was charged, under Idaho law, with lewd conduct with her two minor daughters, who were 5½ and 2½ years old at the time that the crimes were charged. At trial, the court concluded, and the parties agreed, that the younger daughter, who was then 3 years old, was "not capable of communicating to the jury." However, under Idaho's residual hearsay exception—which provides that, under certain conditions, a statement having circumstantial guarantees of trustworthiness is not excluded from evidence at trial by the general rule prohibiting the admission of hearsay statements—the trial court admitted certain statements that the younger daughter had made to a pediatrician who had examined her following the reporting of her mother's alleged offenses to the police. The pediatrician, who had extensive experience in child abuse cases, testified that the younger daughter had reluctantly answered questions about her own abuse but had spontaneously volunteered information about her sister's abuse. On cross-examination, the pediatrician indicated that (1) a picture that he had drawn during his conversation had been discarded, and (2) his notes summarizing the conversation were not detailed. The mother, who was convicted of lewd conduct with each daughter, appealed from only the conviction involving the younger daughter, asserting that the admission of the pediatrician's testimony had violated her rights under the confrontation clause of the Federal Constitution's Sixth Amendment. The Supreme Court of Idaho, reversing the mother's conviction and ordering the case to be remanded for a new trial, expressed the view that (1) the admission of the inculpatory

Briefs of Counsel, p 1006, infra.

hearsay testimony had violated the mother's federal constitutional right to confrontation, because (a) the testimony did not fall within a traditional hearsay exception and was based on an interview that lacked procedural safeguards, and (b) the younger daughter's statements lacked sufficient particularized guarantees of trustworthiness; and (2) the trial court's error in admitting the statements was not harmless (116 Idaho 382, 775 P2d 1224).

On certiorari, the United States Supreme Court affirmed. In an opinion by O'Connor, J., joined by Brennan, Marshall, Stevens, and Scalia, JJ., it was held that the admission, at the mother's trial, of the younger daughter's statements to the pediatrician violated the mother's rights under the Sixth Amendment's confrontation clause, because (1) the state's residual hearsay exception was not a firmly rooted hearsay exception for confrontation clause purposes; (2) if the admission of hearsay statements under the residual exception automatically passed confrontation clause scrutiny, virtually every codified hearsay exception would assume constitutional stature; and (3) given the presumption of inadmissibility accorded accusatory hearsay statements not admitted pursuant to a firmly rooted hearsay exception, the state had failed to show that the younger daughter's statements possessed sufficient particularized guarantees of trustworthiness, for confrontation clause purposes, to overcome that presumption, since (a) viewing the totality of the circumstances surrounding the younger daughter's responses to the pediatrician's questions, there was no special reason for supposing that the statements were particularly trustworthy, and (b) to be admissible under the confrontation clause, hearsay evidence used to convict an accused must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to corroborating evidence at trial.

Kennedy, J., joined by Rehnquist, Ch. J., and by White and Blackmun, JJ., dissented, expressing the view that (1) there was no constitutional justification for the Supreme Court's decision to prescind corroborating evidence from consideration of the question whether a child's hearsay statements are reliable, and (2) whatever doubt the court had with the weight to be given the corroborating evidence in the case at hand was no justification for rejecting the position of virtually the entire legal community that corroborating evidence is relevant to reliability and trustworthiness.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Criminal Law § 50 — confrontation of witness — hearsay exceptions — statement by child to pediatrician

1a-1h. At the state criminal trial of a mother charged with lewd conduct with her daughter, who was 2½ years old at the time the crime was charged and 3 years old at the time of trial, the admission, under the state's residual hearsay exception—which provides that, under certain conditions, a statement having circumstantial guarantees of trustwor-

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

21A Am Jur 2d, Criminal Law §§ 720-723, 729, 731, 956-958; 29 Am Jur 2d, Evidence §§ 493, 496, 683

9 Federal Procedure, L Ed, Criminal Procedure §§ 22:814, 22:814.3; 12 Federal Procedure, L Ed, Evidence §§ 33:354, 33:356, 33:459, 33:476

24 Am Jur Proof of Facts 2d 515, Defense to Charges of Sex Offense

USCS, Constitution, Amendment 6

US L Ed Digest, Criminal Law § 50

Index to Annotations, Confrontation of Witnesses; Criminal Procedure Rules; Hearsay; Residual Hearsay

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Federal constitutional right to confront witnesses—Supreme Court cases. 98 L Ed 2d 1115.

What issues will the Supreme Court consider, though not, or not properly, raised by the parties. 42 L Ed 2d 946.

Supreme Court cases determining whether admission of evidence at criminal trial in violation of federal constitutional rule is prejudicial or harmless error. 31 L Ed 2d 921.

Comment note.—What provisions of the Federal Constitution's Bill of Rights are applicable to the states. 18 L Ed 2d 1388, 23 L Ed 2d 985.

Uniform Evidence Rule 803(24): the residual hearsay exception. 51 ALR4th 999.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution. 45 ALR4th 310.

thiness is not excluded from evidence at trial by the general rule prohibiting the admission of hearsay statements—of statements made by the child to a pediatrician concerning the mother's alleged conduct violates the mother's rights under the confrontation clause of the Federal Constitution's Sixth Amendment, where the trial court's conclusion that the child was "not capable of communicating to the jury" is not disputed, because (1) the state's residual hearsay exception is not a firmly rooted hearsay exception for confrontation clause purposes, where hearsay statements admitted under the residual exception, almost by definition, do not share the same tradition of reliability that supports the admissibility of statements under a firmly rooted hearsay exception; (2) if the admission of hearsay statements under the residual exception automatically passed confrontation clause scrutiny, virtually every codified hearsay exception would assume constitutional stature, a step that the United States Supreme Court has repeatedly declined to take; and (3) given the presumption of inadmissibility accorded accusatory hearsay statements not admitted pursuant to a firmly rooted hearsay exception, the state has failed to show that the child's incriminating statements to the pediatrician possess sufficient particularized guarantees of trustworthiness, for confrontation clause purposes, to overcome that presumption, since (a) viewing the totality of the circumstances surrounding the child's responses to the pediatrician's questions, there is no special reason for supposing that the incriminating statements are particularly trustworthy, given that out-of-court statements are presumptively unreliable and that the pediatrician interviewed the child in a suggestive manner, and (b) to be admissible under the confrontation clause, hearsay evidence used to convict an accused must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to corroborating evidence at trial, where the use of corroborating evidence to support a hearsay statement's particularized guarantees of trustworthiness would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial. (Kennedy, J., Rehnquist, Ch. J., and White and Blackmun, JJ., dissented in part from this holding.)

Constitutional Law § 37 — right to confront witnesses — states

2. The confrontation clause of the Federal Constitution's Sixth Amendment is made applicable to the states through the Constitution's Fourteenth Amendment.

Criminal Law § 50; Evidence § 686 — hearsay rules — right to confront witnesses

3. Although the hearsay rules and the confrontation clause of the Federal Constitution's Sixth Amendment are generally designed to protect similar values, the confrontation clause bars the admission of some evidence that would otherwise be admissible under an exception to the general rule prohibiting the admission of hearsay statements.

Appeal § 1297 — presumption — admission of evidence

4. On certiorari to review a decision of a state's highest court as to whether the admission at a state criminal trial of certain hearsay statements made by a child declarant to an examining pediatrician

violates the accused's right, under the confrontation clause of the Federal Constitution's Sixth Amendment, to confront at trial the witnesses against the accused, the United States Supreme Court will assume, without deciding, that to the extent that the availability requirement—the requirement that the declarant whose statement the prosecution wishes to use against an accused must be shown by the prosecution to be unavailable to testify at trial—applies in the case, the child was an unavailable witness within the meaning of the confrontation clause, where (1) the trial court found, and the accused's counsel agreed, that the child was incapable of communicating with the jury; and (2) the state's highest court has neither questioned this finding nor discussed the general requirement of unavailability.

Criminal Law § 50 — confrontation clause — reliability — exception to hearsay rule

5. Admission at a criminal trial of a declarant's out-of-court statement under a firmly rooted exception to the general rule prohibiting the admission of hearsay statements satisfies the requirement of reliability for admission under the confrontation clause of the Federal Constitution's Sixth Amendment, because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements.

Criminal Law § 50 — confrontation of witness — reliability — firmly rooted exception to hearsay rule

6. At the criminal trial of a mother charged, under state law, with lewd conduct with her 2½-year-old daughter, where the child's statements made to a pediatrician concerning the mother's alleged conduct have been admitted in evidence by the trial court under the state's residual hearsay exception—which provides that, under certain conditions, a statement having circumstantial guarantees of trustworthiness is not excluded from evidence at trial by the general rule prohibiting the admission of hearsay statements—the child's statements are presumptively unreliable and inadmissible for purposes of the confrontation clause of the Federal Constitution's Sixth Amendment and must be excluded, at least absent a showing of particularized guarantees of trustworthiness, because the statements do not fall within a firmly rooted exception to the general hearsay rule.

Criminal Law § 50 — confrontation of witness — sexual abuse cases — hearsay statements by child — procedural requirements

7a, 7b. Although proposed requirements—that, for a child's statements made to a pediatrician concerning alleged sexual abuse to be admissible against an accused at a criminal trial in a child sexual abuse case under the confrontation clause of the Federal Constitution's Sixth Amendment, the pediatrician (1) record the interview of the child on videotape, (2) avoid asking the child leading questions, and (3) not question the child with a preconceived idea of what the child should be disclosing—may well enhance the reliability of out-of-court statements of children regarding sexual abuse, the United States Supreme Court will decline to read into the confrontation clause a preconceived and artificial litmus test for the procedural propriety of professional interviews in which children make hearsay statements against a defendant, because (1) out-of-court statements made by children regarding sexual abuse arise in a wide variety of circumstances, and the Constitution does not impose a fixed set of procedural prerequisites to the admission of such statements at trial; and (2) the procedural requirements in question, to the extent regarded as conditions precedent to the admission of child hearsay statements in child sexual abuse cases, may in many instances be inappropriate or unnecessary to a determination whether a given statement is sufficiently trustworthy for confrontation clause purposes.

Evidence § 686 — hearsay statement — particularized guarantees of trustworthiness

8. For purposes of determining whether a hearsay statement bears particularized guarantees of trustworthiness justifying the making of an exception to the general rule prohibiting the admission at trial of hearsay statements, the particularized guarantees of trustworthiness must be shown from the totality of the circumstances, but the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief, where the rationale for permitting exceptions to the general hearsay rule is that in a given instance, it may be sufficiently clear from the surrounding circumstances that the test of cross-examination would be of marginal utility; under such circumstances, the hearsay rule does not bar admission of the statement at trial; the circumstantial guarantees of trustworthiness on which the various specific exceptions to the hearsay rule are based are those that existed at the time the statement was made and do not include those that may be added by using hindsight.

Evidence § 687 — hearsay statement — excited utterance

9. The basis for the "excited utterance" exception to the general rule prohibiting the admission of hearsay statements at trial is that (1) such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and (2) therefore, the circumstances surrounding the making of such a statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous.

Evidence §§ 750, 755 — hearsay statement — dying declaration — declaration concerning medical treatment

10. The "dying declaration" and "medical treatment" exceptions to the general rule prohibiting the admission of hearsay statements at trial are based on the belief that persons making dying declarations or declarations concerning medical treatment are highly unlikely to lie.

Criminal Law § 50 — confrontation of witness — hearsay statement — reliability

11. Unless an affirmative reason, arising from the circumstances in which a hearsay statement was made, provides a basis for rebutting the presumption that the statement is not worthy of reliance at a criminal trial, the confrontation clause of the Federal Constitution's Sixth Amendment requires exclusion of the out-of-court statement, because, given that evidence possessing the particularized guarantees of trust-

worthiness required, under the confrontation clause, for admission must be at least as reliable as evidence admitted under a firmly rooted hearsay exception, evidence admitted under the former requirement must be so trustworthy that adversarial testing would add little to its reliability, where the United States Supreme Court has recognized that statements admitted under a firmly rooted hearsay exception are so trustworthy that adversarial testing would add little to their reliability.

Criminal Law § 50; Evidence § 720 — confrontation of witness — hearsay statements — factors indicating reliability

12. Among the factors that properly relate to whether hearsay statements made by a child witness in a child sexual abuse case are reliable, where such statements must be reliable to be admitted at a criminal trial, are (1) spontaneity and consistent repetition, (2) the mental state of the declarant, (3) use of terminology unexpected of a child of similar age, and (4) lack of a motive to fabricate; these factors also apply to whether such statements bear the particularized guarantees of trustworthiness required, under the confrontation clause of the Federal Constitution's Sixth Amendment, to be admissible at such a trial; because these factors are not exclusive and courts have considerable leeway in their consideration of appropriate factors, the United States Supreme Court will decline to endorse a mechanical test for determining particularized guarantees of trustworthiness under the confrontation clause, where the unifying principle concerning the appropriate factors is that they relate to whether the child declarant was particularly likely to be telling the truth when the statement was made.

Appeal § 1562; Criminal Law § 50 — confrontation of witness — admission of evidence — corroboration — harmless error

13a, 13b. Rather than supporting the particularized guarantees of trustworthiness required, under the confrontation clause of the Federal Constitution's Sixth Amendment for the admission of a hearsay statement at a criminal trial, the presence of corroborating evidence more appropriately indicates that any error in admitting the statement might be harmless, where there is a very real danger that a jury will rely on partial corroboration to infer mistakenly the trustworthiness of the entire statement. (Kennedy, J., Rehnquist, Ch. J., and White and Blackmun, JJ., dissented in part from this holding.)

Criminal Law § 50 — confrontation of witness — hearsay statements by child — reliability

14. A 2½-year-old child's out-of-court statements made to a pediatrician concerning alleged sexual abuse for which the child's mother is being tried are not per se or presumptively unreliable, so as to be inadmissible at a criminal trial, under the confrontation clause of the Federal Constitution's Sixth Amendment, on the ground that the trial court has found the child incompetent to testify at trial, given that (1) the trial court has found only that the child was "not capable of communicating to the jury"; and (2) the confrontation clause does not erect a per se rule barring the admission of prior statements of a declarant who is

unable to communicate to the jury at the time of trial, where such a per se rule would not only frustrate the truth-seeking purpose of the confrontation clause, but would also hinder states in their own development in the law of evidence.

Criminal Law § 50 — confrontation of witness — out-of-court statement by child

15. Although, with respect to the admissibility at a criminal trial of an out-of-court statement made by a 2½-year-old child to a pediatrician concerning alleged sexual abuse for which the child's mother is being tried, the spontaneity of the statement and the change in the child's demeanor when she made the statement suggest that the child was telling the truth, it is possible that, if there is evidence of prior interrogation, prompting, or manipulation by adults, spontaneity may be an inaccurate indicator of the trustworthiness required for admissibility of the statement, under the confrontation clause of the Federal Constitution's Sixth Amendment.

Appeal §§ 1092, 1673 — certiorari — failure to challenge conclusion — affirmance

16. On certiorari to review the decision of a state's highest court that the admission, at a state trial of a child sexual abuse case, of certain hearsay statements made by a child declarant to an examining pediatrician violated the accused's right, under the confrontation clause of the Federal Constitution's Sixth Amendment, to confront the witnesses against the accused, where the state does not challenge the highest state court's conclusion that the trial court's confrontation clause error was not harmless beyond a reasonable doubt, the United States Supreme Court will not revisit the issue and will affirm the state's highest court's judgment reversing the accused's conviction and remanding the case for further proceedings, given that the Supreme Court has determined that the state has failed to show that the child's incriminating statements to the pediatrician possessed sufficient particularized guarantees of trustworthiness to overcome the presumption of inadmissibility accorded, under the confrontation clause, to accusatory hearsay statements not admitted pursuant to a firmly rooted hearsay exception.

SYLLABUS BY REPORTER OF DECISIONS

Respondent Wright was charged under Idaho law with two counts of lewd conduct with a minor, specifically her 5½ and 2½ year old daughters. At the trial, it was agreed that the younger daughter was not "capable of communicating to the jury." However, the court admitted, under Idaho's residual hearsay exception, certain statements she had made to a pediatrician having extensive experience in child abuse cases. The doctor testified that she had reluctantly answered questions about her own abuse, but had spontaneously volunteered information about her sister's abuse. Wright was convicted on both counts, but appealed only from the conviction involving the younger child. The State Supreme Court reversed, finding that the admission of the doctor's testimony under the residual hearsay exception violated Wright's rights under the Confrontation Clause. The court noted that the child's statements did not fall within a traditional hearsay exception and lacked "particularized guarantees of trustworthiness" because the doctor had conducted the interview without procedural safeguards: He failed to videotape the interview, asked leading questions, and had a preconceived idea of what the child should be disclosing. This error, the court found, was not harmless beyond a reasonable doubt.

Held: The admission of the child's hearsay statements violated Wright's Confrontation Clause rights.

(a) Incriminating statements admissible under an exception to the hearsay rule are not admissible under the Confrontation Clause unless the prosecution produces, or demonstrates the unavailability of, the declarant whose statement it wishes to use and unless the statement bears adequate indicia of reliability. The reliability requirement can be met where the statement either falls within a firmly rooted hearsay exception or is supported by a showing of "particularized guarantees of trustworthiness." Ohio v Roberts, 448 US 56, 65 L Ed 2d 597, 100 S Ct 2531. Although it is presumed here that the child was unavailable within the meaning of the Clause, the evidence will be barred unless the reliability requirement is met.

(b) Idaho's residual hearsay exception is not a firmly rooted hearsay exception for Confrontation Clause purposes. It accommodates ad hoc instances in which statements not otherwise falling within a recognized hearsay exception might be sufficiently reliable to be admissible at trial, and thus does not share the same tradition of reliability supporting the admissibility of statements under a firmly rooted hearsay exception. To rule otherwise would require that virtually all codified hearsay exceptions be found to assume constitutional stature, something which this Court has declined to do. California v Green, 399 US 149, 155-156, 26 L Ed 2d 489, 90 S Ct 1930.

(c) In determining that "particularized guarantees of trustworthiness" were not shown, the State Supreme Court erred in placing dispositive weight on the lack of procedural safeguards at the interview, since such safeguards may in many instances be inappropriate or unnecessary to a determination whether a given statement is sufficiently trustworthy for Confrontation Clause purposes. Rather, such trustworthiness guarantees must be shown from the totality of those circumstances that surround the making of the statement and render the declarant particularly worthy of belief. As is the case with statements admitted under a firmly rooted hearsay exception, see, e. g., Green, supra, at 161, 26 L Ed 2d 489, 90 S Ct 1930, evidence possessing "particularized guarantees of trustworthiness" must be so trustworthy that adversarial testing would add little to its reliability. In child abuse cases, factors used to determine trustworthiness guarantees—such as the declarant's mental state and the use of terminology unexpected of a child of similar age—must relate to whether the child was particularly likely to be telling the truth when the statement was made. The State's contention that evidence corroborating a hearsay statement may properly support a finding that the statement bears such trustworthiness guarantees is rejected, since this would permit admission of presumptively unreliable statements, such as those made under duress, by bootstrapping on the trustworthiness of other evidence at trial. That result is at odds with the requirement that hearsay evidence admitted under the Clause be so trustworthy that cross-examination of the declarant would be of marginal utility. Also rejected is Wright's contention that the child's statements are per se or presumptively unreliable on the ground that the trial court found the child incompetent to testify at trial. The court found only that she was not capable of communicating to the jury and implicitly found that at the time she made the statements she was capable of receiving just impressions of the facts and of relating them truly. Moreover, the Clause does not erect a per se rule barring the admission of prior statements of a declarant who is unable to communicate to the jury at the time of trial. See, e. g., Mattox v United States, 156 US 237, 243-244, 39 L Ed 409, 15 S Ct 337.

(d) In admitting the evidence, the trial court identified only two factors —whether the child had a motive to make up her story and whether, given her age, the statements were of the type that one would expect a child to fabricate—relating to circumstances surrounding the making of the statements. The State Supreme Court properly focused on the presumptive unreliability of the out-of-court statements and on the suggestive manner in which the doctor conducted his interview. Viewing the totality of the circumstances, there is no special reason for supposing that the incriminating statements about the child's own abuse were particularly trustworthy. Her statement about her sister presents a closer question. Although its spontaneity and the change in her demeanor suggest that she may have been telling the truth, spontaneity may be an inaccurate indicator of trustworthiness where there has been prior interrogation, prompting, or manipulation by adults. Moreover, the statement was not made under circumstances of reliability comparable to those required, for example, for the admission of excited utterances or statements made for purposes of medical diagnosis or treatment. Because the State does not challenge the State Supreme Court's determination that the Confrontation Clause error was not harmless beyond a reasonable doubt, this Court will not revisit the issue.

116 Idaho 382, 775 P2d 1224, affirmed.

O'Connor, J., delivered the opinion of the Court, in which Brennan, Marshall, Stevens, and Scalia, JJ., joined. Kennedy, J., filed a dissenting opinion, in which Rehnquist, C. J., and White and Blackmun, JJ., joined.

APPEARANCES OF COUNSEL

James T. Jones argued the cause for petitioner.

William C. Bryson argued the cause for the United States as amicus curiae supporting the petitioner, by special leave of court.

Rolf Michael Kehne argued the cause for respondent.

Briefs of Counsel, p 1006, infra.

OPINION OF THE COURT

Justice **O'Connor** delivered the opinion of the Court.

This case requires us to decide whether the admission at trial of certain hearsay statements made by a child declarant to an examining pediatrician violates a defendant's rights under the Confrontation Clause of the Sixth Amendment.

I

[1a] Respondent Laura Lee Wright was jointly charged with Robert L. Giles of two counts of lewd conduct with a minor under 16, in violation of Idaho Code § 18-1508 (1987). The alleged victims were respondent's two daughters, one of whom was 5½ and the other 2½ years old at the time the crimes were charged.

Respondent and her ex-husband, Louis Wright, the father of the older daughter, had reached an informal agreement whereby each parent would have custody of the older daughter for six consecutive months. The allegations surfaced in November 1986 when the older daughter told Cynthia Goodman, Louis Wright's female companion, that Giles had had sexual intercourse with her while respondent held her down and covered her mouth, App 47-55; 3 Tr 456-460, and that she had seen respondent and Giles do the same thing to respondent's younger daughter, App 48-49, 61; 3 Tr 460. The younger daughter was living with her parents—respondent and Giles—at the time of the alleged offenses.

Goodman reported the older daughter's disclosures to the police the next day and took the older daughter to the hospital. A medical examination of the older daughter revealed evidence of sexual abuse. One of the examining physicians was Dr. John Jambura, a pediatrician with extensive experience in child abuse cases. App 91-94. Police and welfare officials took the younger daughter into custody that day for protection and investigation. Dr. Jambura examined her the following day and found conditions "strongly suggestive of sexual abuse with vaginal contact," occurring approximately two to three days prior to the examination. Id., at 105, 106.

At the joint trial of respondent and Giles, the trial court conducted a *voir dire* examination of the younger daughter, who was three years old at the time of trial, to determine whether she was capable of testifying. Id., at 32-38. The court concluded, and the parties agreed, that the younger daughter was "not capable of communicating to the jury." Id., at 39.

At issue in this case is the admission at trial of certain statements made by the younger daughter to Dr. Jambura in response to questions he asked regarding the alleged abuse. Over objection by respondent and Giles, the trial court permitted Dr. Jambura to testify before the jury as follows:

> "Q. [By the prosecutor] Now, calling your attention then to your examination of [the younger daughter] on November 10th. What—would you describe any interview dialogue that you had with [her] at that time? Excuse me, before you get into that, would you lay a setting of where this took place and who else might have been present?
>
> "A. This took place in my office,

in my examining room, and, as I recall, I believe previous testimony I said that I recall a female attendant being present, I don't recall her identity.

"I started out with basically, 'Hi, how are you,' you know, 'What did you have for breakfast this morning?' Essentially a few minutes of just sort of chitchat.

"Q. Was there response from [the daughter] to that first—those first questions?

"A. There was. She started to carry on a very relaxed animated conversation. I then proceeded to just gently start asking questions about, 'Well, how are things at home,' you know, those sorts. Gently moving into the domestic situation and then moved into four questions in particular, as I reflected in my records, 'Do you play with daddy? Does daddy play with you? Does daddy touch you with his pee-pee? Do you touch his pee-pee?' And again we then established what was meant by pee-pee, it was a generic term for genital area.

"Q. Before you get into that, what was, as best you recollect, what was her response to the question 'Do you play with daddy?'

"A. Yes, we play—I remember her making a comment about yes we play a lot and expanding on that and talking about spending time with daddy.

"Q. And 'Does daddy play with you?' Was there any response?

"A. She responded to that as well, that they played together in a variety of circumstances and, you know, seemed very unaffected by the question.

"Q. And then what did you say and her response?

"A. When I asked her 'Does daddy touch you with his pee-pee,' she did admit to that. When I asked, 'Do you touch his pee-pee,' she did not have any response.

"Q. Excuse me. Did you notice any change in her affect or attitude in that line of questioning?

"A. Yes.

"Q. What did you observe?

"A. She would not—oh, she did not talk any further about that. She would not elucidate what exactly—what kind of touching was taking place, or how it was happening. She did, however, say that daddy does do this with me, but he does it a lot more with my sister than with me.

"Q. And how did she offer that last statement? Was that in response to a question or was that just a volunteered statement?

"A. That was a volunteered statement as I sat and waited for her to respond, again after she sort of clammed-up, and that was the next statement that she made after just allowing some silence to occur." Id., at 121-123.

On cross-examination, Dr. Jambura acknowledged that a picture that he drew during his questioning of the younger daughter had been discarded. Id., at 124. Dr. Jambura also stated that although he had dictated notes to summarize the conversation, his notes were not detailed and did not record any changes in the child's affect or attitude. Id., at 123-124.

The trial court admitted these statements under Idaho's residual hearsay exception, which provides in relevant part:

> "Rule 803. Hearsay exceptions; availability of declarant immaterial.—The following are not excluded by the
>
> [497 US 812]
>
> hearsay rule, even though the declarant is available as a witness.
>
> . . . . .
>
> "(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence." Idaho Rule Evid 803(24).

Respondent and Giles were each convicted of two counts of lewd conduct with a minor under 16 and sentenced to 20 years' imprisonment. Each appealed only from the conviction involving the younger daughter. Giles contended that the trial court erred in admitting Dr. Jambura's testimony under Idaho's residual hearsay exception. The Idaho Supreme Court disagreed and affirmed his conviction. State v Giles, 115 Idaho 984, 772 P2d 191 (1989). Respondent asserted that the admission of Dr. Jambura's testimony under the residual hearsay exception nevertheless violated her rights under the Confrontation Clause. The Idaho Supreme Court agreed and reversed respondent's conviction. 116 Idaho 382, 775 P2d 1224 (1989).

The Supreme Court of Idaho held that the admission of the inculpatory hearsay testimony violated respondent's federal constitutional right to confrontation because the testimony did not fall within a traditional hearsay exception and was based on an interview that lacked procedural safeguards. Id., at 385, 775 P2d, at 1227. The court found Dr. Jambura's interview technique inadequate because "the questions and answers were not recorded on videotape for preservation and perusal by the defense at or before trial; and,

[497 US 813]

blatantly leading questions were used in the interrogation." Ibid. The statements also lacked trustworthiness, according to the court, because "this interrogation was performed by someone with a preconceived idea of what the child should be disclosing." Ibid. Noting that expert testimony and child psychology texts indicated that children are susceptible to suggestion and are therefore likely to be misled by leading questions, the court found that "[t]he circumstances surrounding this interview demonstrate dangers of unreliability which, because the interview was not [audio or video] recorded, can never be fully assessed." Id., at 388, 775 P2d, at 1230. The court concluded that the younger daughter's statements lacked the particularized guarantees of trustworthiness necessary to satisfy the requirements of the Confrontation Clause and that therefore the trial court erred in admitting them. Id., at 389, 775 P2d, at 1231. Because the court was not convinced, beyond a reasonable doubt, that the jury would have reached the same result had the error not occurred, the court reversed respondent's conviction on the count involving the younger daughter and remanded for a new trial. Ibid.

We granted certiorari, 493 US 1041, 107 L Ed 2d 829, 110 S Ct 833 (1990), and now affirm.

II

[2] The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

From the earliest days of our Confrontation Clause jurisprudence, we have consistently held that the Clause does not necessarily prohibit the admission of hearsay statements against a criminal defendant, even though the admission of such statements might be thought to violate the literal terms of the Clause. See, e.g., Mattox v United States, 156 US 237, 243, 39 L Ed 409, 15 S Ct 337 (1895); Pointer v Texas, 380 US 400, 407, 13 L Ed 2d 923, 85 S Ct 1065 (1965).

We reaffirmed only recently that "[w]hile a literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable, this Court has rejected that view as 'unintended and too extreme.'" Bourjaily v United States, 483 US 171, 182, 97 L Ed 2d 144, 107 S Ct 2775 (1987) (quoting Ohio v Roberts, 448 US 56, 63, 65 L Ed 2d 597, 100 S Ct 2531 (1980)); see also Maryland v Craig, post, at 847, 111 L Ed 2d 666, 110 S Ct 3157 ("[T]he [Confrontation] Clause permits, where necessary, the admission of certain hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial").

[3] Although we have recognized that hearsay rules and the Confrontation Clause are generally designed to protect similar values, we have also been careful not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements. See California v Green, 399 US 149, 155-156, 26 L Ed 2d 489, 90 S Ct 1930 (1970); Dutton v Evans, 400 US 74, 86, 27 L Ed 2d 213, 91 S Ct 210 (1970) (plurality opinion); United States v Inadi, 475 US 387, 393, n 5, 89 L Ed 2d 390, 106 S Ct 1121 (1986). The Confrontation Clause, in other words, bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule. See, e. g., Green, supra, at 155-156, 26 L Ed 2d 489, 90 S Ct 1930; Bruton v United States, 391 US 123, 20 L Ed 2d 476, 88 S Ct 1620 (1968); Barber v Page, 390 US 719, 20 L Ed 2d 255, 88 S Ct 1318 (1968); Pointer, supra.

In Ohio v Roberts, we set forth "a general approach" for determining when incriminating statements admissible under an exception to the hearsay rule also meet the requirements of the Confrontation Clause. 448 US, at 65, 65 L Ed 2d 597, 100 S Ct 2531. We noted that the Confrontation Clause "operates in two separate ways to restrict the range of admissible hearsay." Ibid. "First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case . . . , the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." Ibid. (citations omitted). Second, once a witness is shown to be unavailable, "his statement is admissible only

if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." Id., at 66, 65 L Ed 2d 597, 100 S Ct 2531 (footnote omitted); see also Mancusi v Stubbs, 408 US 204, 213, 33 L Ed 2d 293, 92 S Ct 2308 (1972).

Applying this general analytical framework to the facts of Roberts, supra, we held that the admission of testimony given at a preliminary hearing, where the declarant failed to appear at trial despite the State's having issued five separate subpoenas to her, did not violate the Confrontation Clause. Id., at 67-77, 65 L Ed 2d 597, 100 S Ct 2531. Specifically, we found that the State had carried its burden of showing that the declarant was unavailable to testify at trial, see Barber, supra, at 724-725, 20 L Ed 2d 255, 88 S Ct 1318; Mancusi, supra, at 212, 33 L Ed 2d 293, 92 S Ct 2308, and that the testimony at the preliminary hearing bore sufficient indicia of reliability, particularly because defense counsel had had an adequate opportunity to cross-examine the declarant at the preliminary hearing, see Mancusi, supra, at 216, 26 L Ed 2d 489, 90 S Ct 1930.

We have applied the general approach articulated in Roberts to subsequent cases raising Confrontation Clause and hearsay issues. In United States v Inadi, supra, we held that the general requirement of unavailability did not apply to incriminating out-of-court statements made by a nontestifying co-conspirator and that therefore the Confrontation Clause did not prohibit the admission of such statements, even though the Government had not shown that the declarant was unavailable to testify at trial. 475 US, at 394-400, 89 L Ed 2d 390, 106 S Ct 1121. In Bourjaily v United States, supra, we held that such statements also carried with them sufficient "indicia of reliability" because the hearsay exception for co-conspirator statements was a firmly rooted one. 483 US, at 182-184, 97 L Ed 2d 144, 107 S Ct 2775.

[4] Applying the Roberts approach to this case, we first note that this case does not raise the question whether, before a child's out-of-court statements are admitted, the Confrontation

Clause requires the prosecution to show that a child witness is unavailable at trial—and, if so, what that showing requires. The trial court in this case found that respondent's younger daughter was incapable of communicating with the jury, and defense counsel agreed. App 39. The court below neither questioned this finding nor discussed the general requirement of unavailability. For purposes of deciding this case, we assume without deciding that, to the extent the unavailability requirement applies in this case, the younger daughter was an unavailable witness within the meaning of the Confrontation Clause.

The crux of the question presented is therefore whether the State, as the proponent of evidence presumptively barred by the hearsay rule and the Confrontation Clause, has carried its burden of proving that the younger daughter's incriminating statements to Dr. Jambura bore sufficient indicia of reliability to withstand scrutiny under the Clause. The court below held that, although the trial court had properly admitted the statements under the State's residual hearsay exception, the statements were "fraught with the dangers of unreliability which the Confrontation Clause is designed to highlight and obviate." 116 Idaho, at 389, 775 P2d, at 1231. The State asserts that the court below erected too stringent a standard for admitting the statements and that the statements were, under the totality of the circumstances, sufficiently reliable for Confrontation Clause purposes.

In Roberts, we suggested that the "indicia of reliability" requirement could be met in either of two circumstances: where the hearsay statement "falls within a firmly rooted hearsay exception," or where it is supported by "a showing of particularized guarantees of trustworthiness." 448 US, at 66, 65 L Ed 2d 597, 100 S Ct 2531; see also Bourjaily, 483 US, at 183, 97 L Ed 2d 144, 107 S Ct 2775 ("[T]he co-conspirator exception to the hearsay rule is firmly enough rooted in our jurisprudence that, under this Court's holding in Roberts, a court need not independently inquire into the reliability of such statements"); Lee v Illinois, 476 US 530, 543, 90 L Ed 2d 514, 106 S Ct 2056 (1986)

("[E]ven if certain hearsay evidence does not fall within 'a firmly rooted hearsay exception' and is thus presumptively unreliable and inadmissible for Confrontation Clause purposes, it may nonetheless meet Confrontation Clause reliability standards if it is supported by a 'showing of particularized guarantees of trustworthiness' ") (footnote and citation omitted).

[1b, 5] We note at the outset that Idaho's residual hearsay exception, Idaho Rule Evid 803(24), under which the challenged statements were admitted, App 113-115, is not a firmly rooted hearsay exception for Confrontation Clause purposes. Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements. See Mattox, 156 US, at 243, 39 L Ed 409, 15 S Ct 337; Roberts, 448 US, at 66, 65 L Ed 2d 597, 100 S Ct 2531; Bourjaily, supra, at 183, 97 L Ed 2d 144, 107 S Ct 2775; see also Lee, supra, at 552, 90 L Ed 2d 514, 106 S Ct 2056 (Blackmun, J., dissenting) ("[S]tatements squarely within established hearsay exceptions possess 'the imprimatur of judicial and legislative experience' . . . and that fact must weigh heavily in our assessment of their reliability for constitutional purposes") (citation omitted). The residual hearsay exception, by contrast, accommodates ad hoc instances in which statements not otherwise falling within a recognized hearsay exception might nevertheless be sufficiently reliable to be admissible at trial. See, e. g., Senate Judiciary Committee's Note on Fed Rule Evid 803(24), 28 USC App, pp 786-787 [28 USCS Appx, Fed Rules of Evid, Notes following Rule 803]; E. Cleary, McCormick on Evidence § 324.1, pp 907-909 (3d ed 1984). Hearsay statements admitted under the residual exception, almost by definition, therefore do not share the same tradition of reliability that supports the admissibility of statements under a firmly rooted hearsay exception. Moreover, were we to agree that the admission of hearsay statements under the residual exception automatically passed Confrontation Clause scrutiny, virtually every codified hearsay exception would assume constitutional

stature, a step this Court has repeatedly declined to take. See Green, 399 US, at 155-156, 26 L Ed 2d 489, 90 S Ct 1930; Evans, 400 US, at 86-87, 27 L Ed 2d 213, 91 S Ct 210 (plurality opinion); Inadi, 475 US, at 393, n 5, 89 L Ed 2d 390, 106 S Ct 1121; see also Evans, supra, at 94-95, 27 L Ed 2d 213, 91 S Ct 210 (Harlan, J., concurring in result).

[6, 7a] The State in any event does not press the matter strongly and recognizes that, because the younger daughter's hearsay statements do not fall within a firmly rooted hearsay exception, they are "presumptively unreliable and inadmissible for Confrontation Clause purposes," Lee, supra, at 543, 90 L Ed 2d 514, 106 S Ct 2056, and "must be excluded, at least absent a showing of particularized guarantees of trustworthiness," Roberts, 448 US, at 66, 65 L Ed 2d 597, 100 S Ct 2531. The court below concluded that the State had not made such a showing, in large measure because the statements resulted from an interview lacking certain procedural safeguards. The court below specifically noted that Dr. Jambura failed to record the interview on videotape, asked leading questions, and questioned the child with a preconceived idea of what she should be disclosing. See 116 Idaho, at 388, 775 P2d, at 1230.

[1c, 7b] Although we agree with the court below that the Confrontation Clause bars the admission of the younger daughter's hearsay statements, we reject the apparently dispositive weight placed by that court on the lack of procedural safeguards at the interview. Out-of-court statements made by children regarding sexual abuse arise in a wide variety of circumstances, and we do not believe the Constitution imposes a fixed set of procedural prerequisites to the admission of such statements at trial. The procedural requirements identified by the court below, to the extent regarded as conditions precedent to the admission of child hearsay statements in child sexual abuse cases, may in many instances be inappropriate or unnecessary to a determination whether a given statement is sufficiently trustworthy for Confrontation Clause purposes. See, e.g., Nelson v Farrey, 874 F2d 1222, 1229 (CA7 1989) (videotape requirement not feasible,

especially where defendant had not yet been criminally charged), cert denied, 493 US 1042, 107 L Ed 2d 831, 110 S Ct 835 (1990); J. Myers, Child Witness Law and Practice § 4.6, pp 129-134 (1987) (use of leading questions with children, when appropriate, does not necessarily render responses untrustworthy). Although the procedural guidelines propounded by the court below may well enhance the reliability of out-of-court statements of children regarding sexual abuse, we decline to read into the Confrontation Clause a preconceived and artificial litmus test for the procedural propriety of professional interviews in which children make hearsay statements against a defendant.

[8-10] The State responds that a finding of "particularized guarantees of trustworthiness" should instead be based on a consideration of the totality of the circumstances, including not only the circumstances surrounding the making of the statement, but also other evidence at trial that corroborates the truth of the statement. We agree that "particularized guarantees of trustworthiness" must be shown from the totality of the circumstances, but we think the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief. This conclusion derives from the rationale for permitting exceptions to the general rule against hearsay:

> "The theory of the hearsay rule . . . is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation." 5 J. Wigmore, Evidence § 1420, p 251 (J. Chadbourn rev 1974).

[497 US 820]

In other words, if the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the hearsay rule does not bar admission of the statement at trial. The basis for the "excited utterance" exception, for example, is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous. See, e.g., 6 Wigmore, supra, §§ 1745-1764; 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(2)[01] (1988); Advisory Committee's Note on Fed Rule Evid 803(2), 28 USC App, p 778 [28 USCS Appx, Fed Rules of Evid, Notes following Rule 803]. Likewise, the "dying declaration" and "medical treatment" exceptions to the hearsay rule are based on the belief that persons making such statements are highly unlikely to lie. See, e.g., Mattox, 156 US, at 244, 39 L Ed 409, 15 S Ct 337 ("[T]he sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of oath"); Queen v Osman, 15 Cox Crim Cas 1, 3 (Eng N Wales Cir 1881) (Lush, L. J.) ("[N]o person, who is immediately going into the presence of his Maker, will do so with a lie upon his lips"); Mosteller, Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment, 67 NC L Rev 257 (1989). "The circumstantial guarantees of trustworthiness on which the various specific exceptions to the hearsay rule are based are those that existed at the time the statement was made and do not include those that may be added by using hindsight." Huff v White Motor Corp., 609 F2d 286, 292 (CA7 1979).

[1d, 11] We think the "particularized guarantees of trustworthiness" required for admission under the Confrontation Clause must likewise be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief. Our precedents

have recognized that statements admitted under a "firmly rooted" hearsay exception are so trustworthy that adversarial testing would add little to their reliability. See Green, 399 US, at 161, 26 L Ed 2d 489, 90 S Ct 1930 (examining "whether subsequent cross-examination at the defendant's trial will still afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement"); see also Mattox, supra, at 244, 39 L Ed 409, 15 S Ct 337; Evans, 400 US, at 88-89, 27 L Ed 2d 213, 91 S Ct 210 (plurality opinion); Roberts, 448 US, at 65, 73, 65 L Ed 2d 597, 100 S Ct 2531. Because evidence possessing "particularized guarantees of trustworthiness" must be at least as reliable as evidence admitted under a firmly rooted hearsay exception, see Roberts, supra, at 66, 65 L Ed 2d 597, 100 S Ct 2531, we think that evidence admitted under the former requirement must similarly be so trustworthy that adversarial testing would add little to its reliability. See Lee v Illinois, 476 US, at 544, 90 L Ed 2d 514, 106 S Ct 2056 (determining indicia of reliability from the circumstances surrounding the making of the statement); see also State v Ryan, 103 Wash 2d 165, 174, 691 P2d 197, 204 (1984) ("Adequate indicia of reliability [under Roberts] must be found in reference to circumstances surrounding the making of the out-of-court statement, and not from subsequent corroboration of the criminal act"). Thus, unless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement.

[12] The state and federal courts have identified a number of factors that we think properly relate to whether hearsay statements made by a child witness in child sexual abuse cases are reliable. See, e.g., State v Robinson, 153 Ariz 191, 201, 735 P2d 801, 811 (1987) (spontaneity and consistent repetition); Morgan v Foretich, 846 F2d 941, 948 (CA4 1988) (mental state of the declarant); State v Sorenson, 143 Wis 2d 226, 246, 421 NW2d 77, 85 (1988) (use of terminology unexpected of a child of similar age); State v Kuone, 243 Kan 218, 221-222, 757 P2d 289, 292-293 (1988) (lack

of motive to fabricate). Although these cases (which we cite for the factors they discuss and not necessarily to approve the results that they reach) involve the application of various hearsay exceptions to statements of child declarants, we think the factors identified also apply to whether such statements bear "particularized guarantees of trustworthiness" under the Confrontation Clause. These factors are, of course, not exclusive, and courts have considerable leeway in their consideration of appropriate factors. We therefore decline to endorse a mechanical test for determining "particularized guarantees of trustworthiness" under the Clause. Rather, the unifying principle is that these factors relate to whether the child declarant was particularly likely to be telling the truth when the statement was made.

[1e] As our discussion above suggests, we are unpersuaded by the State's contention that evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears "particularized guarantees of trustworthiness." To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial. Cf. Delaware v Van Arsdall, 475 US 673, 680, 89 L Ed 2d 674, 106 S Ct 1431 (1986). "[T]he Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'" Roberts, supra, at 65, 65 L Ed 2d 597, 100 S Ct 2531 (quoting Snyder v Massachusetts, 291 US 97, 107, 78 L Ed 674, 54 S Ct 330, 90 ALR 575 (1934)). A statement made under duress, for example, may happen to be a true statement, but the circumstances under which it is made may provide no basis for supposing that the declarant is particularly likely to be telling the truth—indeed, the circumstances may even be such that the declarant is particularly *un*likely to be telling the truth. In such a case, cross-examination at trial would be highly useful to probe the declarant's state of mind when he made the statements; the presence of evidence tending

to corroborate the truth of the statement would be no substitute for cross-examination of the declarant at trial.

[1f, 13a] In short, the use of corroborating evidence to support a hearsay statement's "particularized guarantees of trustworthiness" would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility. Indeed, although a plurality of the Court in Dutton v Evans looked to corroborating evidence as one of four factors in determining whether a particular hearsay statement possessed sufficient indicia of reliability, see 400 US, at 88, 27 L Ed 2d 213, 91 S Ct 210, we think the presence of corroborating evidence more appropriately indicates that any error in admitting the statement might be harmless,* rather than that any basis exists for presuming the declarant to be trustworthy. See id., at 90, 27 L Ed 2d 213, 91 S Ct 210 (Blackmun, J., joined by Burger, C. J., concurring) (finding admission of the statement at issue to be harmless error, if error at all); see also 4 D.

---

* The dissent suggests that the Court unequivocally rejected this view in Cruz v New York, 481 US 186, 192, 95 L Ed 2d 162, 107 S Ct 1714 (1987), but the quoted language on which the dissent relies, post, at 832, 111 L Ed 2d, at 663, is taken out of context. Cruz involved the admission at a joint trial of a nontestifying codefendant's confession that incriminated the defendant, where the jury was instructed to consider that confession only against the codefendant, and where the defendant's own confession, corroborating that of his codefendant, was introduced against him. The Court in Cruz, relying squarely on Bruton v United States, 391 US 123, 20 L Ed 2d 476, 88 S Ct 1620 (1968), held that the admission of the codefendant's confession violated the Confrontation Clause. 481 US, at 193, 95 L Ed 2d 162, 107 S Ct 1714. The language on which the dissent relies appears in a paragraph discussing whether the "interlocking" nature of the confessions was relevant to the applicability of Bruton (the Court concluded that it was not). The Court in that case said nothing about whether the codefendant's confession would be admissible against the defendant simply because it may have "interlocked" with the defendant's confession.

Louisell & C. Mueller, Federal Evidence § 418, p 143 (1980) (discussing Evans).

[13b] Moreover, although we considered in Lee v Illinois the "interlocking" nature of a codefendant's and a defendant's confessions to determine whether the codefendant's confession was sufficiently trustworthy for confrontation purposes, we declined to rely on corroborative physical evidence and indeed rejected the "interlock" theory in that case. 476 US, at 545-546, 90 L Ed 2d 514, 106 S Ct 2056. We cautioned that "[t]he true danger inherent in this type of hearsay is, in fact, its selective reliability." Id., at 545, 90 L Ed 2d 514, 106 S Ct 2056. This concern applies in the child hearsay context as well: Corroboration of a child's allegations of sexual abuse by medical evidence of abuse, for example, sheds no light on the reliability of the child's allegations regarding the identity of the abuser. There is a very real danger that a jury will rely on partial corroboration to mistakenly infer the trustworthiness of the entire statement. Furthermore, we recognized the similarity between harmless-error analysis and the corroboration inquiry when we noted in Lee that the harm of "admission of the [hearsay] statement [was that it] poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment." Ibid. (emphasis added).

[14] Finally, we reject respondent's contention that the younger daughter's out-of-court statements in this case are per se unreliable, or at least presumptively unreliable, on the ground that the trial court found the younger daughter incompetent to testify at trial. First, respondent's contention rests upon a questionable reading of the record in this case. The trial court found only that the younger daughter was "not capable of communicating to the jury." App 39. Although Idaho law provides that a child witness may not testify if he "appear[s] incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly," Idaho Code § 9-202 (Supp 1989); Idaho Rule Evid 601(a), the trial court in this case made no such findings. Indeed, the more reasonable inference is that, by ruling that the statements were admissible under Idaho's residual hearsay

exception, the trial court implicitly found that the younger daughter, at the time she made the statements, was capable of receiving just impressions of the facts and of relating them truly. See App 115. In addition, we have in any event held that the Confrontation Clause does not erect a per se rule barring the admission of prior statements of a declarant who is unable to communicate to the jury at the time of trial. See, e.g., Mattox, 156 US, at 243-244, 39 L Ed 409, 15 S Ct 337; see also 4 Louisell & Mueller, supra, § 486, at 1041-1045. Although such inability might be relevant to whether the earlier hearsay statement possessed particularized guarantees of trustworthiness, a per se rule of exclusion would not only frustrate the truth-seeking purpose of the Confrontation Clause, but would also hinder States in their own "enlightened development in the law of evidence," Evans, 400 US, at 95, 27 L Ed 2d 213, 91 S Ct 210 (Harlan J., concurring in result).

III

[1g] The trial court in this case, in ruling that the Confrontation Clause did not prohibit admission of the younger daughter's hearsay statements, relied on the following factors:

> "In this case, of course, there is physical evidence to corroborate that sexual abuse occurred. It also would seem to be the case that there is no motive to make up a story of this nature in a child of these years. We're not talking about a pubescent youth who may fantasize. The nature of the statements themselves as to sexual abuse are such that they fall outside the general believability that a child could make them up or would make them up. This is simply not the type of statement, I believe, that one would expect a child to fabricate.
>
> "We come then to the identification itself. Are there any indicia of reliability as to identification? From the doctor's testimony it appears that the injuries testified to occurred at the time that the victim was in the custody of the Defendants. The [older daughter] has testified as to identification of [the] perpetrators. Those—the identification
>
> **[497 US 826]**
>
> of the perpetrators in this case are persons well known to the [younger daughter]. This is not a case in which a child is called upon to identify a stranger or a person with whom they would have no knowledge of their identity or ability to recollect and recall. Those factors are sufficient indicia of reliability to permit the admission of the statements." App 115.

Of the factors the trial court found relevant, only two relate to circumstances surrounding the making of the statements: whether the child had a motive to "make up a story of this nature," and whether, given the child's age, the statements are of the type "that one would expect a child to fabricate." Ibid. The other factors on which the trial court relied, however, such as the presence of physical evidence of abuse, the opportunity of respondent to commit the offense, and the older daughter's corroborating identification, relate instead to whether other evidence existed to corroborate the truth of the statement. These factors, as we have discussed, are irrelevant to a showing of the "particularized guarantees of trustworthiness" necessary for admission of hearsay statements under the Confrontation Clause.

[1h, 15] We think the Supreme Court of Idaho properly focused on the presumptive unreliability of the out-of-court statements and on the suggestive manner in which Dr. Jambura conducted the interview. Viewing the totality of the circumstances surrounding the younger daughter's responses to Dr. Jambura's questions, we find no special reason for supposing that the incriminating statements were particularly trustworthy. The younger daughter's last statement regarding the abuse of the older daughter, however, presents a closer question. According to Dr. Jambura, the younger daughter "volunteered" that statement "after she sort of clammed-up." Id., at 123. Although the spontaneity of the statement and the change in demeanor suggest that the younger daughter was telling the truth when she made the statement, we note that it is possible that "[i]f there is evidence of prior interrogation,

[497 US 827]

prompting, or manipulation by adults, spontaneity may be an inaccurate indicator of trustworthiness." Robinson, 153 Ariz, at 201, 735 P2d, at 811. Moreover, the statement was not made under circumstances of reliability comparable to those required, for example, for the admission of excited utterances or statements made for purposes of medical diagnosis or treatment. Given the presumption of inadmissibility accorded accusatory hearsay statements not admitted pursuant to a firmly rooted hearsay exception, Lee, 476 US, at 543, 90 L Ed 2d 514, 106 S Ct 2056, we agree with the court below that the State has failed to show that the younger daughter's incriminating statements to the pediatrician possessed sufficient "particularized guarantees of trustworthiness" under the Confrontation Clause to overcome that presumption.

[16] The State does not challenge the Idaho Supreme Court's conclusion that the Confrontation Clause error in this case was not harmless beyond a reasonable doubt, and we see no reason to revisit the issue. We therefore agree with that court that respondent's conviction involving the younger daughter must be reversed and the case remanded for further proceedings. Accordingly, the judgment of the Supreme Court of Idaho is affirmed.

It is so ordered.

SEPARATE OPINION

Justice **Kennedy,** with whom The **Chief Justice,** Justice **White,** and Justice **Blackmun** join, dissenting.

The issue is whether the Sixth Amendment right of confrontation is violated when statements from a child who is unavailable to testify at trial are admitted under a hearsay exception against a defendant who stands accused of abusing her. The Court today holds that it is not, provided that the child's statements bear "particularized guarantees of trustworthiness." Ohio v Roberts, 448 US 56, 66, 65 L Ed 2d 597, 100 S Ct 2531 (1980). I agree. My disagreement is with the rule the Court invents to control this inquiry and with the Court's ultimate determination that the statements in question here must be inadmissible as violative of the Confrontation Clause.

Given the principle, for cases involving hearsay statements that do not come within one of the traditional hearsay exceptions, that admissibility depends upon finding particular guarantees of trustworthiness in each case, it is difficult to state rules of general application. I believe the Court recognizes this. The majority errs, in my view, by adopting a rule that corroboration of the statement by other evidence is an impermissible part of the trustworthiness inquiry. The Court's apparent ruling is that corroborating evidence may not be considered in whole or in part for this purpose.[1]

---

[1] The Court also states that the child's hearsay statements are "presumptively unreliable." Ante, at 818, 111 L Ed 2d, at 654. I take this to mean only that the government bears the burden of coming forward with indicia of reliability sufficient for the purposes of the Confrontation Clause, and that if it fails to do so the statements are inadmissible. A presumption of unreliability exists as a counterweight to the indicia of reliability offered by the government only where there is an affirmative reason to believe that a particular category of hearsay may be unreliable. See, e. g., Lee v Illinois, 476 US 530, 545, 90 L Ed 2d 514, 106 S Ct 2056 (1986) ("[A] codefendant's confession is presumptively unreliable

This limitation, at least on a facial interpretation of the Court's analytic categories, is a new creation by the Court; it likely will prove unworkable and does not even square with the examples of reliability indicators the Court itself invokes; and it is contrary to our own precedents.

I see no constitutional justification for this decision to prescind corroborating evidence from consideration of the question whether a child's statements are reliable. It is a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence. In the context of child abuse, for example, if part of the child's hearsay statement is that the assailant tied her wrists or had a scar on his lower abdomen, and there is physical evidence or testimony to corroborate the child's statement, evidence which the child

could not have fabricated, we are more likely to believe that what the child says is true. Conversely, one can imagine a situation in which a child makes a statement which is spontaneous or is otherwise made under circumstances indicating that it is reliable, but which also contains undisputed factual inaccuracies so great that the credibility of the child's statements is substantially undermined. Under the Court's analysis, the statement would satisfy the requirements of the Confrontation Clause despite substantial doubt about its reliability. Nothing in the law of evidence or the law of the Confrontation Clause countenances such a result; on the contrary, most federal courts have looked to the existence of corroborating evidence or the lack thereof to determine the reliability of hearsay statements not coming within one of the traditional hearsay exceptions. See 4 D. Louisell & C. Mueller, Federal Evidence § 472, p 929 (1980) (collecting cases); 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 804(b)(5)[01] (1988) (same). Specifically with reference to hearsay statements by children, a review of the cases has led a leading commentator on child witness law to conclude flatly: "If the content of an out-of-court statement is supported or corroborated by other evidence, the reliability of the hearsay is strengthened." J. Myers, Child Witness Law and Practice § 5.37, p 364 (1987).[2] The Court's apparent misgiv-

---

as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another").

[2] A sampling of cases using corroborating evidence as to support a finding that a child's statements were reliable includes: United States v Dorian, 803 F2d 1439, 1445 (CA8 1986); United States v Cree, 778 F2d 474, 477 (CA8 1985); United States v Nick, 604 F2d 1199, 1204 (CA9 1979); State v Allen, 157 Ariz 165, 176-178, 755 P2d 1153, 1164-1166 (1988); State v Robinson, 153 Ariz 191, 204, 735 P2d 801, 814 (1987); State v Bellotti, 383 NW2d 308, 315 (Minn App 1986); State v Soukup, 376 NW2d 498, 501 (Minn App 1985); State v Doe, 94 NM 637, 639, 614 P2d 1086, 1088 (App 1980); State v McCafferty, 356 NW2d 159, 164 (SD 1984); United States v Quick, 22 MJ 722, 724 (ACMR 1986). Numerous other cases rely upon corroboration pursuant to state statutory rules regarding hearsay statements by children. See Myers § 5.38.

Aside from Lee v Illinois, supra, discussed infra, at 831, 111 L Ed 2d, at 662-663, the only case cited by the Court for the proposition that corroborative evidence is irrelevant to reliability is State v Ryan, 103 Wash 2d 165, 174, 691 P2d 197, 204 (1984). The Court quotes the opinion out of context. In holding that corroborating evidence could not be used to demonstrate reliability, the Washington Supreme Court was not interpreting the Confrontation Clause; rather, its opinion clearly ings [497 US 830] about the weight to be given corroborating evidence, see ante, at 824, 111 L Ed 2d, at 658, may or may not be correct, but those misgivings do not justify wholesale elimination of this evidence from consideration, in derogation of an overwhelming judicial and legislative consensus to the contrary. States are of course free, as a matter of state law, to demand corroboration of an unavailable child declarant's statements as well as other indicia of reliability before allowing the statements to be admitted [497 US 831] into evidence. Until today, however, no similar distinction could be found in our precedents interpreting the Confrontation Clause. If anything, the many state statutes requiring corroboration of a child declarant's statements emphasize the relevance, not the irrelevance, of corroborating evidence to the determination whether an unavailable child witness' statements bear particularized guarantees of trustworthiness, which is the ultimate inquiry under the Confrontation Clause. In sum, whatever doubt the Court has with the weight to be given the corroborating evidence found in this case is no justification for rejecting the considered wisdom of virtually the entire legal community that corroborating evidence is relevant to reliability and trustworthiness.

Far from rejecting this commonsense proposition, the very cases relied upon by the Court today embrace it. In Lee v Illinois, 476 US 530, 90 L Ed 2d 514, 106 S Ct 2056 (1986), we considered whether the confession of a codefendant that "interlocked" with a defendant's own confession bore particularized guarantees of trustworthiness so that its admission into evidence against the defendant did not violate the Confrontation Clause. Although the Court's ultimate conclusion was that the confession did not bear sufficient indicia of reliability, its analysis was far different from that utilized by the Court in the present case. The Court today notes that, in Lee, we determined the trustworthiness of the confession by looking to the cir-

---

reveals that the court's holding was an interpretation of a Washington statute, Wash Rev Code § 9A.44.120 (1989), which provided that hearsay statements from an unavailable child declarant could be admitted into evidence at trial only if they were reliable *and* corroborated by other evidence. The portion of the opinion following the sentence quoted by the majority reveals the true nature of its holding:

> "The trial court was apparently persuaded that the statements of the children must be reliable, if, in hindsight they prove to be true. *RCW 9A.44.120 demands more.*
>
> "*The statute* requires separate determinations of reliability *and* corroboration when the child is unavailable. The word "and" is conjunctive. . . . The Legislature would have used the word "or" had it intended the disjunctive. . . . Although defendant's confession was offered as corroboration, wholly absent are the requisite circumstantial guarantees of reliability." State v Ryan, supra, at 174, 691 P2d, at 204. (citations omitted; emphasis added).

Other States also have expressly recognized the need for, and legitimacy of, considering corroborating evidence in determining whether a child declarant's statements are trustworthy and should be admitted into evidence. See Ariz Rev Stat Ann § 13-1416 (1989); Ark Rule Evid 803(25)(A); Cal Evid Code Ann § 1228 (West 1990); Colo Rev Stat § 13-25-129 (1987); Fla Stat § 90.803(23) (1989); Idaho Code § 19-3024 (1987); Ill Rev Stat, ch 38, ¶ 115-10 (1989); Ind Code § 35-37-4-6 (1988); Md Cts & Jud Proc Code Ann § 9-103.1 (1989); Minn Stat § 595.02(3) (1988); Miss Code Ann § 13-1-403 (Supp 1989); NJ Rule Evid 63 (1989); ND Rule Evid 803(24), Okla Stat, Tit 12, § 2803.1 (1989); Or Rev Stat § 40.460 (1989); 42 Pa Cons Stat § 5985.1 (1989); SD Codified Laws § 19-16-38 (1987); Utah Code Ann § 76-5-411 (1990).

cumstances surrounding its making, see ante, at 821, 111 L Ed 2d, at 656; what the Court omits from its discussion of Lee is the fact that we also considered the extent of the "interlock," that is, the extent to which the two confessions corroborated each other. The Court in Lee was unanimous in its recognition of corroboration as a legitimate indicator of reliability; the only disagreement was whether the corroborative nature of the confessions and the circumstances of their making were sufficient to satisfy the Confrontation Clause. See 476 US, at 546, 90 L Ed 2d 514, 106 S Ct 2056 (finding insufficient indicia of reliability, *"flowing from either* [497 US 832] *the circumstances surrounding the confession or the 'interlocking' character of the confessions,"* to support admission of the codefendant's confession) (emphasis added); id., at 557, 90 L Ed 2d 514, 106 S Ct 2056 (Blackmun, J., dissenting) (finding the codefendant's confession supported by sufficient indicia of reliability including, inter alia, "extensive and convincing corroboration by petitioner's own confession" and "further corroboration provided by the physical evidence"). See also New Mexico v Earnest, 477 US 648, 649, n, 91 L Ed 2d 539, 106 S Ct 2734 (1986) (Rehnquist, J., concurring); Dutton v Evans, 400 US 74, 88-89, 27 L Ed 2d 213, 91 S Ct 210 (1970) (plurality opinion).

The Court today suggests that the presence of corroborating evidence goes more to the issue of whether the admission of the hearsay statements was harmless error than whether the statements themselves were reliable and therefore admissible. See ante, at 823, 111 L Ed 2d, at 657. Once again, in the context of interlocking confessions, our previous cases have been unequivocal in rejecting this suggestion:

> "Quite obviously, what the 'interlocking' nature of the codefendant's confession pertains to is not its *harmfulness* but rather its *reliability:* If it confirms essentially the same facts as the defendant's own confession it is more likely to be true." Cruz v New York, 481 US 186, 192, 95 L Ed 2d 162, 107 S Ct 1714 (1987) (emphasis in original).

It was precisely because the "interlocking" nature of the confessions heightened their reliability as hearsay that we noted in Cruz that "[o]f course, the defendant's confession may be considered at trial in assessing whether his codefendant's statements are supported by sufficient 'indicia of reliability' to be directly admissible against him." Id., at 193-194, 95 L Ed 2d 162, 107 S Ct 1714 (citing Lee, supra, at 543-544, 90 L Ed 2d 514, 106 S Ct 2056). In short, corroboration has been an essential element in our past hearsay cases, and there is no justification for a categorical refusal to consider it here.

Our Fourth Amendment cases are also premised upon the idea that corroboration is a legitimate indicator of reliability. [497 US 833] We have long held that corroboration is an essential element in determining whether police may act on the basis of an informant's tip, for the simple reason that "because an informant is shown to be right about some things, he is probably right about other facts that he has alleged." Alabama v White, 496 US 325, 331, 110 L Ed 2d 301, 110 S Ct 2412 (1990). See also Illinois v Gates, 462 US 213, 244, 245, 76

L Ed 2d 527, 103 S Ct 2317 (1983); Spinelli v United States, 393 US 410, 415, 21 L Ed 2d 637, 89 S Ct 584 (1969); Jones v United States, 362 US 257, 271, 4 L Ed 2d 697, 80 S Ct 725, 78 ALR2d 233 (1960).

The Court does not offer any justification for barring the consideration of corroborating evidence, other than the suggestion that corroborating evidence does not bolster the "inherent trustworthiness" of the statements. Ante, at 822, 111 L Ed 2d, at 657. But for purposes of determining the reliability of the statements, I can discern no difference between the factors that the Court believes indicate "inherent trustworthiness" and those, like corroborating evidence, that apparently do not. Even the factors endorsed by the Court will involve consideration of the very evidence the Court purports to exclude from the reliability analysis. The Court notes that one test of reliability is whether the child "use[d] . . . terminology unexpected of a child of similar age." Ante, at 821, 111 L Ed 2d, at 656. But making this determination requires consideration of the child's vocabulary skills and past opportunity, or lack thereof, to learn the terminology at issue. And, when all of the extrinsic circumstances of a case are considered, it may be shown that use of a particular word or vocabulary in fact supports the inference of prolonged contact with the defendant, who was known to use the vocabulary in question. As a further example, the Court notes that motive to fabricate is an index of reliability. Ibid. But if the suspect charges that a third person concocted a false case against him and coached the child, surely it is relevant to show that the third person had no contact with the child or no opportunity to suggest false testimony. Given the contradictions inherent in the Court's test when

measured against its own examples, I expect its holding will soon prove to be as unworkable as it is illogical.

The short of the matter is that both the circumstances existing at the time the child makes the statements and the existence of corroborating evidence indicate, to a greater or lesser degree, whether the statements are reliable. If the Court means to suggest that the circumstances surrounding the making of a statement are the best indicators of reliability, I doubt this is so in every instance. And, if it were true in a particular case, that does not warrant ignoring other indicators of reliability such as corroborating evidence, absent some other reason for excluding it. If anything, I should think that corroborating evidence in the form of testimony or physical evidence, apart from the narrow circumstances in which the statement was made, would be a preferred means of determining a statement's reliability for purposes of the Confrontation Clause, for the simple reason that, unlike other indicators of trustworthiness, corroborating evidence can be addressed by the defendant and assessed by the trial court in an objective and critical way.

In this case, the younger daughter's statements are corroborated in at least four respects: (1) physical evidence that she was the victim of sexual abuse; (2) evidence that she had been in the custody of the suspect at the time the injuries occurred; (3) testimony of the older daughter that their father abused the younger daughter, thus corroborating the younger daughter's statement; and (4) the testimony of the older daughter that she herself was abused by their father, thus corroborating the younger daughter's statement that her sister had also been abused. These facts, coupled with the circumstances surrounding the making of the statements acknowledged by the Court as suggesting that the statements are reliable, give rise to a legitimate argument that admission of the statements did not violate the Confrontation Clause. Because the Idaho Supreme Court did not consider these factors, I would vacate its judgment reversing respondent's

conviction and remand for it to consider in the first instance whether the child's statements bore "particularized guarantees of trustworthiness" under the analysis set forth in this separate opinion.

For these reasons, I respectfully dissent.

[497 US 836]

MARYLAND, Petitioner

v

SANDRA ANN CRAIG

497 US 836, 111 L Ed 2d 666, 110 S Ct 3157

[No. 89-478]

Argued April 18, 1990. Decided June 27, 1990.

Decision: Sixth Amendment's confrontation clause held not absolutely to prohibit Maryland from using one-way closed-circuit television for receipt of testimony by child witness in child abuse case.

SUMMARY

A Maryland statute permitted a trial judge to receive, by one-way closed-circuit television, the testimony of a child witness who was alleged to be a victim of child abuse, if the judge determined that testimony by the child in the courtroom would result in the child's suffering serious emotional distress such that the child could not reasonably communicate. Under the statute, (1) the witness, prosecutor, and defense counsel withdrew to a separate room, while the judge, jury, and defendant remained in the courtroom; (2) the witness was then examined and cross-examined in the separate room, while a video monitor recorded and displayed the witness' testimony to those in the courtroom; and (3) during this time, the witness could not see the defendant, but the defendant remained in electronic communication with defense counsel, and objections could be made and ruled on as if the witness were testifying in the courtroom. Before the operator of a kindergarten and prekindergarten center was tried by a Maryland court on several charges related to the operator's alleged sexual abuse of a 6-year-old child who had attended the center, the state made a motion invoking the statutory procedure, and the accused objected under the confrontation clause of the Federal Constitution's Sixth Amendment. The trial court, however, in denying the accused's objection, concluded that (1) under the procedure, an accused retained the essence of the right of confrontation; and (2) based upon expert testimony presented by the state, the testimony in a courtroom of the alleged victim and other children who were alleged to have been sexually abused by the accused would result in

Briefs of Counsel, p 1008, infra.

each child's suffering serious emotional distress such that the child could not reasonably communicate. After the trial court found the alleged victim and three other children competent to testify and permitted them to testify using the statutory procedure, the jury convicted the accused on all counts. The Maryland Court of Special Appeals affirmed the convictions (76 Md App 250, 544 A2d 784). The Court of Appeals of Maryland, however, in reversing and ordering a remand for a new trial, expressed the view that the showing made by the state in support of using the statutory procedure was insufficient to reach the high threshold required for the procedure to be invoked (316 Md 551, 560 A2d 1120).

On certiorari, the United States Supreme Court vacated and remanded. In an opinion by O'Connor, J., joined by Rehnquist, Ch. J., and White, Blackmun, and Kennedy, JJ., it was held that the confrontation clause did not absolutely prohibit the child witnesses from testifying through the statutory procedure, because (1) face-to-face confrontation with witnesses appearing at trial is not an indispensable element of the Sixth Amendment's confrontation guarantee, since (a) in certain narrow circumstances, competing interests, if closely examined, may warrant dispensing with confrontation at trial, and (b) the word "confront," as used in the confrontation clause, cannot simply mean face-to-face confrontation; (2) the Supreme Court, in prior cases, had held that other Sixth Amendment rights must be interpreted in the context of the necessities of trial and the adversary process; (3) the statutory procedure insured the reliability of the evidence by subjecting it to rigorous adversarial testing, and thereby preserved the essence of effective confrontation, where, under the procedure, the witnesses testified under oath, were subject to full cross-examination, and were able to be observed as they testified by the judge, jury, and defendant; and (4) a state's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court.

Scalia, J., joined by Brennan, Marshall, and Stevens, JJ., dissented, expressing the view that the confrontation clause of the Sixth Amendment guarantees, in a criminal prosecution, a defendant's right to meet face-to-face all those who appear and give evidence at trial, because "to confront" plainly means to encounter face-to-face, whatever else "to confront" may mean in addition.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Criminal Law § 50 — confrontation of witness — testimony by one-way closed-circuit television — right to face-to-face confrontation

1a-1g. The confrontation clause of the Federal Constitution's Sixth Amendment does not absolutely prohibit a child witness in a child abuse case from testifying against a defendant at a state criminal trial, outside the defendant's physical presence, by one-way closed-circuit television, because (1) face-to-face confrontation with witnesses appearing at trial is not an indispensable element of the Sixth Amendment's confrontation guarantee, since (a) in certain narrow circumstances, competing interests, if closely examined,

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

21A Am Jur 2d, Criminal Law §§ 720-723, 729, 731, 956-958, 960

9 Federal Procedure, L Ed, Criminal Procedure §§ 22:814, 22:814.3

24 Am Jur Proof of Facts 2d 515, Defense to Charges of Sex Offense

USCS, Constitution, Amendment 6

US L Ed Digest, Criminal Law § 50

Index to Annotations, Abuse of Persons; Closed-Circuit Television; Confrontation of Witnesses

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Federal constitutional right to confront witnesses—Supreme Court cases. 98 L Ed 2d 1115.

Comment note.—What provisions of the Federal Constitution's Bill of Rights are applicable to the states. 18 L Ed 2d 1388, 23 L Ed 2d 985.

Closed-circuit television witness examination. 61 ALR4th 1155.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution. 45 ALR4th 310.

Instructions to jury as to credibility of child's testimony in criminal case. 32 ALR4th 1196.

Condition interfering with accused's view of witness as violation of right of confrontation. 19 ALR4th 1286.

may warrant dispensing with confrontation at trial, and (b) the word "confront," as used in the confrontation clause, cannot simply mean face-to-face confrontation, for the clause would then, contrary to the United States Supreme Court's decisions in prior cases, prohibit the admission of any accusatory hearsay statement made by an absent declarant—a declarant who is as much a "witness against" a defendant as one who actually testifies at trial, (2) this interpretation of the confrontation clause is consistent with the Supreme Court's prior cases holding that other Sixth Amendment rights must be interpreted in the context of the necessities of trial and the adversary process, and (3) where it is necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the confrontation clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, insures the reliability of the evidence by subjecting it to rigorous adversarial testing, and thereby preserves the essence of effective confrontation, given that a state's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court; thus, to the extent that a proper finding of the necessity for alleged child abuse victims to testify under a state's statutory one-way closed-circuit television procedure has been made, the admission of such testimony is consonant with the confrontation clause, where, under the statutory procedure, (1) a determination must be made that such a child witness will suffer such serious emotional distress that the child cannot reasonably communicate, and (2) all elements of the confrontation right, other than face-to-face confrontation, have been preserved by the facts that the child witnesses testified under oath, were subject to full cross-examination, and were able to be observed as they testified by the judge, jury, and defendant. (Scalia, Brennan, Marshall, and Stevens, JJ., dissented from this holding.)

Constitutional Law § 37 — right to confront witnesses — states

2. The confrontation clause of the Federal Constitution's Sixth Amendment is made applicable to the states through the Constitution's Fourteenth Amendment.

Appeal § 386 — necessity for adjudication of federal question

3. On certiorari to review a decision of a state's highest court as to whether the confrontation clause of the Federal Constitution's Sixth Amendment prohibits certain child witnesses in a child abuse case from testifying against the defendant at a criminal trial, outside the defendant's physical presence, by one-way closed-circuit television, the United States Supreme Court is required to decide whether any exceptions exist to the irreducible literal meaning of the confrontation clause that there is a right to meet face-to-face all those who appear and give evidence at trial, where (1) the Supreme Court has never held that the confrontation clause guarantees criminal defendants the absolute right to a face-to-face meeting with witnesses against them at trial; (2) the Su-

preme Court, in a prior case, has (a) expressly left for another day the question whether any exceptions to the clause's literal meaning exist, and (b) concluded that, because there had been no individualized findings that the witnesses in question needed special protection from having to testify in the presence of the defendant, the judgment against the defendant could not be sustained by any conceivable exception; and (3) the trial court in the case at hand has made individualized findings that each witness in question needed special protection from testifying in the presence of the defendant.

Criminal Law § 50 — confrontation of witness — purposes

4. The central concern of the confrontation clause of the Federal Constitution's Sixth Amendment is to insure the reliability of the evidence against a criminal defendant by subjecting the evidence to rigorous testing in the context of an adversary proceeding before the trier of fact; the right guaranteed by the confrontation clause not only includes a personal examination of the witness, but also (1) insures that the witness will give his or her statements under oath, (2) forces the witness to submit to cross-examination, and (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his or her statement; the combined effect of physical presence, oath, cross-examination, and observation of demeanor by the trier of fact serves the purposes of the confrontation clause by insuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings.

Criminal Law § 50 — face-to-face confrontation of witness

5a-5c. The confrontation clause of the Federal Constitution's Sixth Amendment—which clause provides that, in all criminal prosecutions, the accused has the right to be confronted with the witnesses against the accused—reflects a preference for face-to-face confrontation at trial, given that face-to-face confrontation forms the core of the values furthered by the confrontation clause; although the face-to-face confrontation requirement of the clause is not absolute, that does not mean that the requirement may easily be dispensed with, given that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where (1) denial of such confrontation is necessary to further an important public policy, and (2) the reliability of the testimony is otherwise assured. (Scalia, Brennan, Marshall, and Stevens, JJ., dissented in part from this holding.)

Criminal Law § 50 — confrontation of witness — specific finding

6a, 6b. In determining whether a state has made an adequate showing of the necessity of using a special procedure which permits a child witness in a child abuse case to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant, without a violation of the confrontation clause of the Federal Constitution's Sixth Amendment—which clause provides that, in all criminal prosecutions, the accused has the right to be confronted with the witnesses against the accused—a trial court's requisite finding of necessity must be a case-specific one; where the special procedure involves testimony by one-way closed-circuit television, the trial court must (1) hear evidence and determine whether use of the closed-circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify, and (2) if the court is to find the procedure necessary, find that (a) the child witness would be traumatized not by the courtroom generally, but by the presence of the defendant, and (b) the emotional distress suffered by the child witness in the presence of the defendant would be more than mere nervousness or excitement or some reluctance to testify.

Criminal Law § 50 — confrontation of witness — state interest

7. For purposes of determining the validity, under the confrontation clause of the Federal Constitution's Sixth Amendment—which clause provides that, in all criminal prosecutions, the accused has the right to be confronted with the witnesses against the accused—of a state's statutory procedure which allows the use of one-way closed-circuit television for the testimony of alleged child abuse victims, the United States Supreme Court will not second-guess the considered judgment of the state legislature regarding the importance of the state's interest in protecting child abuse victims from the emotional trauma of testifying, where (1) the state has had a traditional and transcendent interest in protecting the welfare of children, and (2) there has been a growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court. (Scalia, Brennan, Marshall, and Stevens, JJ., dissented from this holding.)

Appeal § 1662 — effect of decision on other ground

8. On certiorari to review the decision of a state's highest court as to whether the confrontation clause of the Federal Constitution's Sixth Amendment prohibits certain child witnesses in a child abuse case from testifying, under a state statutory procedure, against the defendant at trial, outside the defendant's physical presence, by one-way closed-circuit television—where the United States Supreme Court has held that, in determining whether the state has made an adequate showing of the necessity of using such a special procedure to support a finding that the procedure does not violate the confrontation clause, a trial court must find that the emotional distress suffered by the child witness in the presence of the defendant would be more than mere nervousness or excitement or some reluctance to testify—the Supreme Court need not decide the minimum showing of emotional trauma required for use of the statutory procedure in question, where the statute, which requires a determination that the child witness will suffer serious emotional distress such that the child cannot reasonably communicate, clearly suffices to meet constitutional standards.

Criminal Law § 50 — confrontation of witness — procedural prerequisites

9. Although the grounds for the use of protective measures could be strengthened by some proposed requirements—that a trial court, in determining whether the confrontation clause of the Federal Constitution's Sixth Amendment prohibits certain child witnesses in a child abuse case from testifying against a defendant at a state criminal trial, outside the defendant's physical

presence, by one-way closed-circuit television, must (1) observe the children's behavior in the defendant's presence, and (2) explore less restrictive alternatives to the use of the procedure—the United States Supreme Court will decline to establish, as a matter of a federal constitutional law, any such categorical evidentiary prerequisites for the use of such a television procedure, where the trial court in a particular case could well have found, on the basis of the expert testimony before it, that testimony by the child witnesses in the courtroom in the defendant's presence would result in each child's suffering serious emotional distress such that the child could not reasonably communicate; so long as a trial court makes such a case-specific finding of the necessity of using a one-way closed-circuit television procedure for the receipt of testimony by a child witness in a child abuse case, the confrontation clause does not prohibit such a procedure. (Scalia, Brennan, Marshall, and Stevens, JJ., dissented in part from this holding.)

Appeal § 1692.3 — remand — uncertainty as to law

10. On certiorari to review a decision of a state's highest court as to whether the confrontation clause of the Federal Constitution's Sixth Amendment prohibits certain child witnesses in a child abuse case from testifying, under a state statutory procedure, against the defendant at a criminal trial, outside the defendant's physical presence, by one-way closed-circuit television, the United States Supreme Court will vacate the judgment of the state's highest court and remand the case for further proceedings, where (1) the state's highest court reversed the defendant's convictions and remanded the case for a new trial, and (2) because the state's highest court held that, under its interpretation of the threshold required before the state's statutory procedure may be invoked, the trial court had not made the finding, required by the confrontation clause, that the procedure was necessary to protect the witness from serious emotional distress, the Supreme Court cannot be certain whether the state's highest court would reach the same conclusion in light of the legal standard established by the Supreme Court's decision in the case.

SYLLABUS BY REPORTER OF DECISIONS

Respondent Craig was tried in a Maryland court on several charges related to her alleged sexual abuse of a six-year-old child. Before the trial began, the State sought to invoke a state statutory procedure permitting a judge to receive, by one-way closed circuit television, the testimony of an alleged child abuse victim upon determining that the child's courtroom testimony would result in the child suffering serious emotional distress, such that he or she could not reasonably communicate. If the procedure is invoked, the child, prosecutor, and defense counsel withdraw to another room, where the child is examined and cross-examined; the judge, jury, and defendant remain in the courtroom, where the testimony is displayed. Although the child cannot see the defendant, the defendant remains in electronic communication with counsel, and objections may be made and ruled on as if the witness were in the courtroom. The court rejected Craig's objection that the procedure's use violates the Confrontation Clause of the Sixth Amendment, ruling that Craig retained the essence of the right to confrontation. Based on expert testimony, the court also found that the alleged victim and other allegedly abused children who were witnesses would suffer serious emotional distress if they were required to testify in the courtroom, such that each would be unable to communicate. Finding that the children were competent to testify, the court permitted testimony under the procedure, and Craig was convicted. The State Court of Special Appeals affirmed, but the State Court of Appeals reversed. Although it rejected Craig's argument that the Clause requires in all cases a face-to-face courtroom encounter between the accused and accusers, it found that the State's showing was insufficient to reach the high threshold required by Coy v Iowa, 487 US 1012, 101 L Ed 2d 857, 108 S Ct 2798, before the procedure could be invoked. The court held that the procedure usually cannot be invoked unless the child initially is questioned in the defendant's presence and that, before using the one-way television procedure, the trial court must determine whether a child would suffer severe emotional distress if he or she were to testify by two-way television.

Held:

1. The Confrontation Clause does not guarantee criminal defendants an *absolute* right to a face-to-face meeting with the witnesses against them at trial. The Clause's central purpose, to ensure the reliability of the evidence against a defendant by subjecting it to rigorous testing in an adversary proceeding before the trier of fact, is served by the combined effects of the elements of confrontation: physical presence, oath, cross-examination, and observation of demeanor by the trier of fact. Although face-to-face confrontation forms the core of the Clause's values, it is not an indispensable element of the confrontation right. If it were, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme, Ohio v Roberts, 448 US 56, 63, 65 L Ed 2d 597, 100 S Ct 2531. Accordingly, the Clause must be interpreted in a manner sensitive to its purpose and to the necessities of trial and the adversary process. See, e. g., Kirby v United States, 174 US 47, 43 L Ed 890, 19 S Ct 574. Nonetheless, the right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the testimony's reliability is otherwise assured. Coy, supra, at 1021, 101 L Ed 2d 857, 108 S Ct 2798.

2. Maryland's interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of its special procedure, provided that the State makes an adequate showing of necessity in an individual case.

(a) While Maryland's procedure prevents the child from seeing the defendant, it preserves the other elements of confrontation and, thus, adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony. These assurances are far greater than those required for the admission of hearsay statements. Thus, the use of the one-way closed circuit television procedure, where it is necessary to further an important state interest, does not impinge upon the Confrontation Clause's truth-seeking or symbolic purposes.

(b) A State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court. The fact that most States have enacted similar statutes attests to widespread belief in such a public policy's importance, and this Court has previously recognized that States have a compelling interest in protecting minor victims of sex crimes from further trauma and embarrassment, see, e. g., Globe Newspaper Co. v Superior Court of Norfolk County, 457 US 596, 607, 73 L Ed 2d 248, 102 S Ct 2613. The Maryland Legislature's considered judgment regarding the importance of its interest will not be second-guessed, given the State's traditional and transcendent interest in protecting the welfare of children and the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court.

(c) The requisite necessity finding must be case specific. The trial court must hear evidence and determine whether the procedure's use is necessary to protect the particular child witness' welfare; find that the child would be traumatized, not by the courtroom generally, but by the defendant's presence; and find that the emotional distress suffered by the child in the defendant's presence is more than de minimis. Without determining the minimum showing of emotional trauma required for the use of a special procedure, the Maryland statute, which requires a determination that the child will suffer serious emotional distress such that the child cannot reasonably communicate, clearly suffices to meet constitutional standards.

(d) Since there is no dispute that, here, the children testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, admitting their testimony is consonant with the Confrontation Clause, provided that a proper necessity finding has been made.

3. The Court of Appeals erred to the extent that it may have rested its conclusion that the trial court did not make the requisite necessity finding on the lower court's failure to observe the children's behavior in the defendant's presence and its failure to explore less restrictive alternatives to the one-way television procedure. While such evidentiary requirements could strengthen the grounds for the use of protective measures, only a case-specific necessity finding is required. This Court will not establish, as a matter of federal constitutional law, such categorical evidentiary prerequisites for the use of the one-way procedure.

316 Md 551, 560 A2d 1120, vacated and remanded.

O'Connor, J., delivered the opinion of the Court, in which Rehnquist, C.J., and White, Blackmun, and Kennedy, JJ., joined. Scalia, J., filed a dissenting opinion, in which Brennan, Marshall, and Stevens, JJ., joined.

APPEARANCES OF COUNSEL

J. Joseph Curran, Jr. argued the cause for petitioner.
William H. Murphy, Jr. argued the cause for respondent.
Briefs of Counsel, p 1008, infra.

OPINION OF THE COURT

[497 US 840]

Justice **O'Connor** delivered the opinion of the Court.

[1a] This case requires us to decide whether the Confrontation Clause of the Sixth Amendment categorically prohibits a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by one-way closed circuit television.

I

In October 1986, a Howard County grand jury charged respondent, Sandra Ann Craig, with child abuse, first and second degree sexual offenses, perverted sexual practice, assault, and battery. The named victim in each count was a six-year-old girl who, from August 1984 to June 1986, had attended a kindergarten and prekindergarten center owned and operated by Craig.

In March 1987, before the case went to trial, the State sought to invoke a Maryland statutory procedure that permits a judge to receive, by one-way closed circuit television, the testimony of a child witness who is alleged to be a victim of child abuse.[1] To invoke the procedure, the [497 US 841] trial judge must first "determin[e] that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." Md Cts &

---

[1] Maryland Cts & Jud Proc & Code Ann § 9-102 (1989) provides in full:

"(a)(1) In a case of abuse of a child as defined in § 5-701 of the Family Law Article or Article 27, § 35A of the Code, a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of a closed circuit television if:

"(i) The testimony is taken during the proceeding; and

"(ii) The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.

"(2) Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child.

"(3) The operators of the closed circuit television shall make every effort to be unobtrusive.

"(b)(1) Only the following persons may be in the room with the child when the child testifies by closed circuit television:

"(i) The prosecuting attorney;

"(ii) The attorney for the defendant;

"(iii) The operators of the closed circuit television equipment; and

"(iv) Unless the defendant objects, any person whose presence, in the opinion of the court, contributes to the well-being of the child, including a person who has dealt with the child in a therapeutic setting concerning the abuse.

"(2) During the child's testimony by closed circuit television, the judge and the defendant shall be in the courtroom.

"(3) The judge and the defendant shall be allowed to communicate with the persons in the room where the child is testifying by any appropriate electronic method.

"(c) The provisions of this section do not apply if the defendant is an attorney pro se.

"(d) This section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time." For a detailed description of the § 9-102 procedure, see Wildermuth v State, 310 Md 496, 503-504, 530 A2d 275, 278-279 (1987).

Jud Proc Code Ann § 9-102(a)(1)(ii) (1989). Once the procedure is invoked, the child witness, prosecutor, and defense counsel withdraw to a separate room; the judge, jury, and defendant remain in the courtroom. The child witness is then examined and cross-examined in the separate room, while a video monitor records and displays the witness' testimony to those in the courtroom. During this time the witness cannot see the defendant.

[497 US 842]

The defendant remains in electronic communication with defense counsel, and objections may be made and ruled on as if the witness were testifying in the courtroom.

In support of its motion invoking the one-way closed circuit television procedure, the State presented expert testimony that the named victim as well as a number of other children who were alleged to have been sexually abused by Craig, would suffer "serious emotional distress such that [they could not] reasonably communicate," § 9-102(a)(1)(ii), if required to testify in the courtroom. App 7-59. The Maryland Court of Appeals characterized the evidence as follows:

> "The expert testimony in each case suggested that each child would have some or considerable difficulty in testifying in Craig's presence. For example, as to one child, the expert said that what 'would cause him the most anxiety would be to testify in front of Mrs. Craig. . . .' The child 'wouldn't be able to communicate effectively.' As to another, an expert said she 'would probably stop talking and she would withdraw and curl up.' With respect to two others, the testimony was that one would 'become highly agitated, that he may refuse to talk or if he did talk, that he would choose his subject regardless of the questions' while the other would 'become extremely timid and unwilling to talk.'" 316 Md 551, 568-569, 560 A2d 1120, 1128-1129 (1989).

Craig objected to the use of the procedure on Confrontation Clause grounds, but the trial court rejected that contention, concluding that although the statute "take[s] away the right of the defendant to be face to face with his or her accuser," the defendant retains the "essence of the right of confrontation," including the right to observe, cross-examine, and have the jury view the demeanor of the witness. App 65-66. The trial court further found that, "based upon the evidence presented . . . the testimony of each of these children in a courtroom will result in each child suffering serious emotional distress . . . such that each of these children cannot reasonably

[497 US 843]

communicate." Id., at 66. The trial court then found the named victim and three other children competent to testify and accordingly permitted them to testify against Craig via the one-way closed circuit television procedure. The jury convicted Craig on all counts, and the Maryland Court of Special Appeals affirmed the convictions, 76 Md App 250, 544 A2d 784 (1988).

The Court of Appeals of Maryland reversed and remanded for a new trial. 316 Md 551, 560 A2d 1120 (1989). The Court of Appeals rejected Craig's argument that the Confrontation Clause requires in all cases a face-to-face courtroom encounter between the accused and his accusers, id., at 556-562, 560 A2d, at 1122-1125, but concluded:

> "[U]nder § 9-102(a)(1)(ii), the opera-

> tive 'serious emotional distress' which renders a child victim unable to 'reasonably communicate' must be determined to arise, at least primarily, from face-to-face confrontation with the defendant. Thus, we construe the phrase 'in the courtroom' as meaning, for sixth amendment and [state constitution] confrontation purposes, 'in the courtroom in the presence of the defendant.' Unless prevention of 'eyeball-to-eyeball' confrontation is necessary to obtain the trial testimony of the child, the defendant cannot be denied that right." Id., at 566, 560 A2d, at 1127.

Reviewing the trial court's finding and the evidence presented in support of the § 9-102 procedure, the Court of Appeals held that, "as [it] read Coy [v Iowa, 487 US 1012 [101 L Ed 2d 857, 108 S Ct 2798] (1988)], the showing made by the State was insufficient to reach the high threshold required by that case before § 9-102 may be invoked." Id., at 554-555, 560 A2d, at 1121 (footnote omitted).

We granted certiorari to resolve the important Confrontation Clause issues raised by this case. 493 US 104, 107 L Ed 2d 830, 110 S Ct 834 (1990).

II

[2] The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

We observed in Coy v Iowa that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." 487 US, at 1016, 101 L Ed 2d 857, 108 S Ct 2798 (citing Kentucky v Stincer, 482 US 730, 748, 749-750, 96 L Ed 2d 631, 107 S Ct 2658 (1987) (Marshall, J., dissenting)); see also Pennsylvania v Ritchie, 480 US 39, 51, 94 L Ed 2d 40, 107 S Ct 989 (1987) (plurality opinion); California v Green, 399 US 149, 157, 26 L Ed 2d 489, 90 S Ct 1930 (1970); Snyder v Massachusetts, 291 US 97, 106, 78 L Ed 674, 54 S Ct 330, 90 ALR 575 (1934); Dowdell v United States, 221 US 325, 330, 55 L Ed 753, 31 S Ct 590 (1911); Kirby v United States, 174 US 47, 55, 43 L Ed 890, 19 S Ct 574 (1899); Mattox v United States, 156 US 237, 244, 39 L Ed 409, 15 S Ct 337 (1895). This interpretation derives not only from the literal text of the Clause, but also from our understanding of its historical roots. See Coy, supra, at 1015-1016, 101 L Ed 2d 857, 108 S Ct 2798; Mattox, supra, at 242, 39 L Ed 409, 15 S Ct 337 (Confrontation Clause intended to prevent conviction by affidavit); Green, supra, at 156, 26 L Ed 2d 489, 90 S Ct 1930 (same); cf. 3 J. Story, Commentaries on the Constitution § 1785, p 662 (1833).

[3] We have never held, however, that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial. Indeed, in Coy v Iowa, we expressly "le[ft] for another day . . . the question whether any exceptions exist" to the "irreducible literal meaning of the Clause: 'a right to *meet face to face* all those who appear and give evidence *at trial.*'" 487 US, at 1021, 101 L Ed 2d 857, 108 S Ct 2798 (quoting Green, supra, at 175, 26 L Ed 2d 489, 90 S Ct 1930 (Harlan, J., concurring)). The procedure challenged in Coy involved the placement of a screen that prevented two child witnesses in a child abuse case from seeing the defendant as they testified against him at trial. See 487 US, at 1014-1015, 101 L Ed 2d 857, 108 S Ct 2798. In holding that the use of this procedure violated the defendant's right to confront witnesses against him, we suggested that

[497 US 845]

any exception to the right "would surely be allowed only when necessary to further an important public policy"—i. e., only upon a showing of something more than the generalized, "legislatively imposed presumption of trauma" underlying the statute at issue in that case. Id., at 1021, 101 L Ed 2d 857, 108 S Ct 2798; see also id., at 1025, 101 L Ed 2d 857, 108 S Ct 2798 (O'Connor, J., concurring). We concluded that "[s]ince there ha[d] been no individualized findings that these particular witnesses needed special protection, the judgment [in the case before us] could not be sustained by any conceivable exception." Id., at 1021, 101 L Ed 2d 857, 108 S Ct 2798. Because the trial court in this case made individualized findings that each of the child witnesses needed special protection, this case requires us to decide the question reserved in Coy.

[4] The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. The word "confront," after all, also means a clashing of forces or ideas, thus carrying with it the notion of adversariness. As we noted in our earliest case interpreting the Clause:

> "The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Mattox, supra, at 242-243, 39 L Ed 409, 15 S Ct 337.

As this description indicates, the right guaranteed by the Confrontation Clause includes not only a "personal examination," id., at 242, 39 L Ed 409, 15 S Ct 337, but also "(1) insures that the witness will give his statements under oath—thus impressing him with

[497 US 846]

the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." Green, 399 US, at 158, 26 L Ed 2d 489, 90 S Ct 1930 (footnote omitted).

The combined effect of these elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact—serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings. See Stincer, supra, at 739, 96 L Ed 2d 631, 107 S Ct 2658 ("[T]he right to confrontation is a functional one for the purpose of promoting reliability in a criminal trial"); Dutton v Evans, 400 US 74, 89, 27 L Ed 2d 213, 91 S Ct 210 (1970) (plurality opinion) ("[T]he mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the [testimony]' "); Lee v Illinois, 476 US 530, 540, 90 L Ed 2d 514, 106 S Ct 2056 (1986) (confrontation guarantee serves "symbolic goals" and "promotes reliability"); see also Faretta v California, 422 US 806, 818, 45 L Ed 2d 562, 95 S Ct 2525 (1975) (Sixth Amendment "constitutionalizes the right in an adversary criminal trial to make a defense as we know it"); Strickland v Washington, 466 US 668, 684-685, 80 L Ed 2d 674, 104 S Ct 2052 (1984).

We have recognized, for example, that face-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person. See Coy, supra, at 1019-1020, 101 L Ed 2d 857, 108 S Ct 2798 ("It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' . . . That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or

[497 US 847]

reveal the child coached by a malevolent adult"); Ohio v Roberts, 448 US 56, 63, n 6, 65 L Ed 2d 597, 100 S Ct 2531 (1980); see also 3 W. Blackstone, Commentaries *373-*374. We have also noted the strong symbolic purpose served by requiring adverse witnesses at trial to testify in the accused's presence. See Coy, 487 US, at 1017, 101 L Ed 2d 857, 108 S Ct 2798 ("[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution' ") (quoting Pointer v Texas, 380 US 400, 404, 13 L Ed 2d 923, 85 S Ct 1065 (1965)).

[5a] Although face-to-face confrontation forms "the core of the values furthered by the Confrontation Clause," Green, 399 US, at 157, 26 L Ed 2d 489, 90 S Ct 1930, we have nevertheless recognized that it is not the sine qua non of the confrontation right. See Delaware v Fensterer, 474 US 15, 22, 88 L Ed 2d 15, 106 S Ct 292 (1985) (per curiam) ("[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities [such as forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony"); Roberts, supra, at 69, 65 L Ed 2d 597, 100 S Ct 2531 (oath, cross-examination, and demeanor provide "all that the Sixth Amendment demands: 'substantial compliance with the purposes behind the confrontation requirement' ") (quoting Green, supra, at 166, 26 L Ed 2d 489, 90 S Ct 1930); see also Stincer, 482 US, at 739-744, 96 L Ed 2d 631, 107 S Ct 2658 (confrontation right not violated by exclusion of defendant from competency hearing of child witnesses, where defendant had opportunity for full and effective cross-examination at trial); Davis v

Alaska, 415 US 308, 315-316, 39 L Ed 2d 347, 94 S Ct 1105 (1974); Douglas v Alabama, 380 US 415, 418, 13 L Ed 2d 934, 85 S Ct 1074 (1965); Pointer, supra, at 406-407, 13 L Ed 2d 923, 85 S Ct 1065; 5 J. Wigmore, Evidence § 1395, p 150 (J. Chadbourn rev 1974).

[1b] For this reason, we have never insisted on an actual face-to-face encounter at trial in *every* instance in which testimony is admitted against a defendant. Instead, we have repeatedly held that the Clause permits, where necessary, the admission of certain hearsay statements against a defendant despite

[497 US 848]

the defendant's inability to confront the declarant at trial. See, e. g., Mattox, 156 US, at 243, 39 L Ed 409, 15 S Ct 337 ("[T]here could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations"); Pointer, supra, at 407, 13 L Ed 2d 923, 85 S Ct 1065 (noting exceptions to the confrontation right for dying declarations and "other analogous situations"). In Mattox, for example, we held that the testimony of a Government witness at a former trial against the defendant, where the witness was fully cross-examined but had died after the first trial, was admissible in evidence against the defendant at his second trial. See 156 US, at 240-244, 39 L Ed 409, 15 S Ct 337. We explained:

> "There is doubtless reason for saying that . . . if notes of [the witness'] testimony are permitted to be read, [the defendant] is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." Id., at 243, 39 L Ed 409, 15 S Ct 337.

We have accordingly stated that a literal reading of the Confrontation Clause would "abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme." Roberts, 448 US, at 63, 65 L Ed 2d 597, 100 S Ct 2531. Thus, in certain narrow circumstances, "competing interests, if 'closely examined,' may warrant dispensing with confrontation at trial." Id., at 64, 65 L Ed 2d 597, 100 S Ct 2531 (quoting Chambers v Mississippi, 410 US 284, 295, 35 L Ed 2d 297, 93 S Ct 1038 (1973), and citing Mattox, supra). We have recently held,

[497 US 849]

for example, that hearsay statements of nontestifying co-conspirators may be admitted against a defendant despite the lack of any face-to-face encounter with the accused. See Bourjaily v United States, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775 (1987); United States v Inadi, 475 US 387, 89 L Ed 2d 390, 106 S Ct 1121 (1986). Given our hearsay cases, the word "confront," as used in the Confrontation Clause, cannot simply mean face-to-face confrontation, for the Clause would then, contrary to our cases, prohibit the admission of any accusatory hearsay statement made by an absent declarant—a declarant who is undoubtedly as much a "witness against" a defendant as one who actually testifies at trial.

[1c, 5b] In sum, our precedents establish that "the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial," Roberts, supra, at 63, 65 L Ed 2d 597, 100 S Ct 2531 (emphasis added; footnote omitted), a preference that "must occasionally give way to considerations of public policy and the necessities of the case," Mattox, supra, at 243, 39 L Ed 409, 15 S Ct 337. "[W]e have attempted to harmonize the goal of the Clause—placing limits on the kind of evidence that may be received against a defendant—with a societal interest in accurate factfinding, which may require consideration of out-of-court statements." Bourjaily, supra, at 182, 97 L Ed 2d 144, 107 S Ct 2775. We have accordingly interpreted the Confrontation Clause in a manner sensitive to its purposes and sensitive to the necessities of trial and the adversary process. See, e. g., Kirby, 174 US, at 61, 43 L Ed 890, 19 S Ct 574 ("It is scarcely necessary to say that to the rule that an accused is entitled to be confronted with witnesses against him the admission of dying declarations is an exception which arises from the necessity of the case"); Chambers, supra, at 295, 35 L Ed 2d 297, 93 S Ct 1038 ("Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process"). Thus, though we reaffirm the importance of face-to-face confrontation with witnesses appearing at trial, we cannot say that such confrontation is an indispensable element of the Sixth Amendment's guarantee

of the right to confront one's accusers. Indeed, one commentator has noted that "[i]t is all but universally assumed that there are circumstances that excuse compliance with the right of confrontation." Graham, The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One, 8 Crim L Bull 99, 107-108 (1972).

[1d] This interpretation of the Confrontation Clause is consistent with our cases holding that other Sixth Amendment rights must also be interpreted in the context of the necessities of trial and the adversary process. See, e. g., Illinois v Allen, 397 US 337, 342-343, 25 L Ed 2d 353, 90 S Ct 1057 (1970) (right to be present at trial not violated where trial judge removed defendant for disruptive behavior); Ritchie, 480 US, at 51-54, 94 L Ed 2d 40, 107 S Ct 989 (plurality opinion) (right to cross-examination not violated where State denied defendant access to investigative files); Taylor v Illinois, 484 US 400, 410-416, 98 L Ed 2d 798, 108 S Ct 646 (1988) (right to compulsory process not violated where trial judge precluded testimony of a surprise defense witness); Perry v Leeke, 488 US 272, 280-285, 102 L Ed 2d 624, 109 S Ct 594 (1989) (right to effective assistance of counsel not violated where trial judge prevented testifying defendant from conferring with counsel during a short break in testimony). We see no reason to treat the face-to-face component of the confrontation right any differently, and indeed we think it would be anomalous to do so.

[5c] That the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with. As we suggested in Coy, our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured. See 487 US, at 1021, 101 L Ed 2d 857, 108 S Ct 2798 (citing Roberts, supra, at 64, 65 L Ed 2d 597, 100 S Ct 2531; Chambers, supra, at 295, 35 L Ed 2d 297, 93 S Ct 1038); Coy, supra, at 1025, 101 L Ed 2d 857, 108 S Ct 2798 (O'Connor, J., concurring).

III

[1e] Maryland's statutory procedure, when invoked, prevents a child witness from seeing the defendant as he or she testifies against the defendant at trial. We find it significant, however, that Maryland's procedure preserves all of the other elements of the confrontation right: The child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies. Although we are mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding, the presence of these other elements of confrontation—oath, cross-examination, and observation of the witness' demeanor—adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony. These safeguards of reliability and adversariness render the use of such a procedure a far cry from the undisputed prohibition of the Confrontation Clause: trial by ex parte affidavit or inquisition, see Mattox, 156 US, at 242, 39 L Ed 409, 15 S Ct 337; see also Green, 399 US, at 179, 26 L Ed 2d 489, 90 S Ct 1930 (Harlan, J., concurring) ("[T]he Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses"). Rather, we think these elements of effective confrontation not only permit a defendant to "confound and undo the false accuser, or reveal the child coached by a malevolent adult," Coy, supra, at 1020, 101 L Ed 2d 857, 108 S Ct 2798, but may well aid a defendant in eliciting favorable testimony from the child witness. Indeed, to the extent the child witness' testimony may be said to be technically given out of court (though we do not so hold), these assurances of reliability and adversariness are far greater than those required for admission of hearsay testimony under the Confrontation Clause. See Roberts, 448 US, at 66, 65 L Ed 2d 597, 100 S Ct 2531. We are therefore confident that use of the one-way closed circuit television procedure, where necessary to further an important state interest, does not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause.

The critical inquiry in this case, therefore, is whether use of the procedure is necessary to further an important state interest. The State contends that it has a substantial interest in protecting children who are allegedly victims of child abuse from the trauma of testifying against the alleged perpetrator and that its statutory procedure for receiving testimony from such witnesses is necessary to further that interest.

We have of course recognized that a State's interest in "the protection of minor victims of sex crimes from further trauma and embarrassment" is a "compelling" one. Globe Newspaper Co. v Superior Court of Norfolk County, 457 US 596, 607, 73 L Ed 2d 248, 102 S Ct 2613 (1982); see also New York v Ferber, 458 US 747, 756-757, 73 L Ed 2d 1113, 102 S Ct 3348 (1982); FCC v Pacifica Foundation, 438 US 726, 749-750, 57 L Ed 2d 1073, 98 S Ct 3026 (1978); Ginsberg v New York, 390 US 629, 640, 20 L Ed 2d 195, 88 S Ct 1274 (1968); Prince v Massachusetts, 321 US 158, 168, 88 L Ed 645, 64 S Ct 438 (1944). "[W]e have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." Ferber, supra, at 757, 73 L Ed 2d 1113, 102 S Ct 3348. In Globe Newspaper, for example, we held that a State's interest in the physical and psychological well-being of a minor victim was sufficiently weighty to justify depriving the press and public of their constitutional right to attend criminal trials, where the trial court makes a case-specific finding that closure of the trial is necessary to protect the welfare of the minor. See 457 US, at 608-609, 73 L Ed 2d 248, 102 S Ct 2613. This Term, in Osborne v Ohio, 495 US 103, 109 L Ed 2d 98, 110 S Ct 1691 (1990), we upheld a state statute that proscribed the possession and viewing of child pornography, reaffirming that " '[i]t is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and

psychological well-being of a minor" is "compelling." ' " Id., at 109, 109 L Ed 2d 98, 110 S Ct 1691 (quoting Ferber, supra, at 756-757, 73 L Ed 2d 1113, 102 S Ct 3348).

We likewise conclude today that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court. That a significant majority of States have enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy. See Coy, 487 US, at 1022-1023, 101 L Ed 2d 857, 105 S Ct 2798 (O'Connor, J., concurring) ("Many States have determined that a child victim may suffer trauma from exposure to the harsh atmosphere of the typical courtroom and have undertaken to shield the child through a variety of ameliorative measures"). Thirty-seven States, for example, permit the use of videotaped testimony of sexually abused children;[2] 24 States have authorized the use of one-way [497 US 854] closed circuit television testimony in child abuse cases,[3] and 8 States authorize the use of a two-way system in which the child-witness is permitted to see the courtroom and the defendant on a video monitor and in which the jury and judge are permitted to view the child during the testimony.[4]

---

[2] See Ala Code § 15-25-2 (Supp 1989); Ariz Rev Stat Ann §§ 13-4251 and 4253(B), (C) (1989); Ark Code Ann § 16-44-203 (1987); Cal Penal Code Ann § 1346 (West Supp 1990); Colo Rev Stat §§ 18-3-413 and 18-6-401.3 (1986); Conn Gen Stat § 54-86g (1989); Del Code Ann, Tit 11, § 3511 (1987); Fla Stat § 92.53 (1989); Haw Rev Stat, ch 626, Rule Evid 616 (1985); Ill Rev Stat, ch 38, ¶ 106A-2 (1989); Ind Code §§ 35-37-4-8(c), (d), (f), (g) (1988); Iowa Code § 910A.14 (1987); Kan Stat Ann § 38-1558 (1986); Ky Rev Stat Ann § 421.350(4) (Baldwin Supp 1989); Mass Gen Laws § 278:16D (Supp 1990); Mich Comp Laws Ann § 600.2163a(5) (Supp 1990); Minn Stat § 595.02(4) (1988); Miss Code Ann § 13-1-407

[6a, 7] The statute at issue in this case, for example, was specifically intended "to safeguard the physical and psychological well-being of child victims by avoiding, or at least minimizing, the emotional trauma produced by testifying." Wildermuth v State, 310 Md 496, 518, 530 A2d 275, 286 (1987). The Wildermuth court noted:

> "In Maryland, the Governor's Task Force on Child Abuse in its Interim Report (Nov. 1984) documented the existence of the [child abuse] problem in our State. Interim Report at 1. It brought the picture up to date in its Final Report (Dec. 1985). In the first six months of 1985, investigations of child abuse were 12 percent more numerous than during the same period of 1984. In 1979 4,615 cases of child abuse were investigated; in 1984, [497 US 855] 8,321. Final Report at iii. In its Interim Report at 2, the Commission proposed legislation that, with some changes, became § 9-102. The proposal was 'aimed at alleviating the trauma to a child victim in the courtroom atmosphere by allowing the child's testimony to be obtained outside of the courtroom.' Id., at 2. This would both protect the child and enhance the public interest by encouraging effective prosecution of the alleged abuser." Id., at 517, 530 A2d, at 285.

Given the State's traditional and " 'transcendent interest in protecting the welfare of children,' " Ginsberg, 390 US, at 640, 20 L Ed 2d 195, 88 S Ct 1274 (citation omitted), and buttressed by the growing body of academic literature documenting the

---

(Supp 1989); Mo Rev Stat §§ 491.675-491.690 (1986); Mont Code Ann §§ 46-15-401 to 46-15-403 (1989); Neb Rev Stat § 29-1926 (1989); Nev Rev Stat § 174.227 (1989); NH Rev Stat Ann § 517:13-a (Supp 1989); NM Stat Ann § 30-9-17 (1984); Ohio Rev Code Ann §§ 2907.41(A), (B), (D), (E) (1987); Okla Stat, Tit 22, § 753(c) (Supp 1988); Ore Rev Stat § 40.460(24) (1989); 42 Pa Cons Stat §§ 5982, 5984 (1988); RI Gen Laws § 11-37-13.2 (Supp 1989); SC Code § 16-3-1530(G) (1985); SD Codified Laws § 23A-12-9 (1988); Tenn Code Ann §§ 24-7-116(d), (e), (f) (Supp 1989); Tex Code Crim Proc Ann, Art 38.071, § 4 (Vernon Supp 1990); Utah Rule Crim Proc 15.5 (1990); Vt Rule Evid 807(d) (Supp 1989); Wis Stat §§ 967.04(7) to (10) (1987-1988); Wyo Stat § 7-11-408 (1987).

[3] See Ala Code § 15-25-3 (Supp 1989); Alaska Stat Ann § 12.45.046 (Supp 1989); Ariz Rev Stat Ann § 13-4253 (1989); Conn Gen Stat § 54-86g (1989); Fla Stat § 92.54 (1989); Ga Code Ann § 17-8-55 (Supp 1989); Ill Rev Stat, ch 38, ¶ 106A-3 (1987); Ind Code § 35-37-4-8 (1988); Iowa Code § 910A-14 (Supp 1990); Kan Stat Ann § 38-1558 (1986); Ky Rev Stat Ann §§ 421-350(1), (3) (Baldwin Supp 1989); La Rev Stat Ann § 15:283 (West Supp 1990); Md Cts & Jud Proc Code Ann § 9-102 (1989); Mass Gen Laws § 278:16D (Supp 1990); Minn Stat § 595.02(4) (1988); Miss Code Ann § 13-1-405 (Supp 1989); NJ Stat Ann § 2A:84A-32.4 (West Supp 1989); Okla Stat, Tit 22, § 753(b) (Supp 1988); Ore Rev Stat § 40.460(24) (1989); 42 Pa Cons Stat §§ 5982, 5985 (1988); RI Gen Laws § 11-37-13.2 (Supp 1989); Tex Code Crim Proc Ann, Art 38.071, § 3 (Vernon Supp 1990); Utah Rule Crim Proc 15.5 (1990); Vt Rule Evid 807(d) (Supp 1989).

[4] See Cal Penal Code Ann § 1347 (West Supp 1990); Haw Rev Stat, ch 626, Rule Evid 616 (1985); Idaho Code § 19-3024A (Supp 1989); Minn Stat § 595.02(4)(c)(2) (1988); NY Crim Proc Law §§ 65.00 to 65.30 (McKinney Supp 1990); Ohio Rev Code Ann § 2907.41(C), (E) (1987); Va Code § 18.2-67.9 (1988); Vt Rule Evid 807(e) (Supp 1989).

psychological trauma suffered by child abuse victims who must testify in court, see Brief for American Psychological Association as Amicus Curiae 7-13; G. Goodman et al., Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims, Final Report to the National Institute of Justice (presented as conference paper at annual convention of American Psychological Assn., Aug 1989), we will not second-guess the considered judgment of the Maryland Legislature regarding the importance of its interest in protecting child abuse victims from the emotional trauma of testifying. Accordingly, we hold that, if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.

[1f, 6b, 8] The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. See Globe Newspaper Co., 457 US, at 608-609, 73 L Ed 2d 248, 102 S Ct 2613 (compelling interest in protecting

[497 US 856]

child victims does not justify a *mandatory* trial closure rule); Coy, 487 US, at 1021, 101 L Ed 2d 857, 108 S Ct 2798; id., at 1025, 101 L Ed 2d 857, 108 S Ct 2798 (O'Connor, J., concurring); see also Hochheiser v Superior Court, 161 Cal App 3d 777, 793, 208 Cal Rptr 273, 283 (1984). The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. See, e.g., State v Wilhite, 160 Ariz 228, 772 P2d 582 (1989); State v Bonello, 210 Conn 51, 554 A2d 277 (1989); State v Davidson, 764 SW2d 731 (Mo App 1989); Commonwealth v Ludwig, 366 Pa Super 361, 531 A2d 459 (1987). Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimus, i. e., more than "mere nervousness or excitement or some reluctance to testify," Wildermuth, supra, at 524, 530 A2d, at 289; see also State v Mannion, 19 Utah 505, 511-512, 57 P 542, 543-544 (1899). We need not decide the minimum showing of emotional trauma required for use of the special procedure, however, because the Maryland statute, which requires a determination that the child witness will suffer "serious emotional distress such that the child cannot reasonably communicate," § 9-102(a)(1)(ii), clearly suffices to meet constitutional standards.

[1g] To be sure, face-to-face confrontation may be said to cause trauma for the very purpose of eliciting truth, cf. Coy, supra, at 1019-

1020, 101 L Ed 2d 857, 108 S Ct 2798, but we think that the use of Maryland's special procedure, where necessary to further the important state interest in preventing trauma to child witnesses in child

abuse cases, adequately ensures the accuracy of the testimony and preserves the adversary nature of the trial. See supra, at 851-852, 111 L Ed 2d, at 682-683. Indeed, where face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact *disserve* the Confrontation Clause's truth-seeking goal. See, e. g., Coy, supra, at 1032, 101 L Ed 2d 857, 108 S Ct 2798 (Blackmun, J., dissenting) (face-to-face confrontation "may so overwhelm the child as to prevent the possibility of effective testimony, thereby undermining the truth-finding function of the trial itself"); Brief for American Psychological Association as Amicus Curiae 18-24; State v Sheppard, 197 NJ Super 411, 416, 484 A2d 1330, 1332 (1984); Goodman & Helgeson, Child Sexual Assault: Children's Memory and the Law, 40 U Miami L Rev 181, 203-204 (1985); Note, Videotaping Children's Testimony: An Empirical View, 85 Mich L Rev 809, 813-820 (1987).

In sum, we conclude that where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation. Because there is no dispute that the child witnesses in this case testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, we conclude that, to the extent that a proper finding of necessity has been made, the admission of such testimony would be consonant with the Confrontation Clause.

IV

The Maryland Court of Appeals held, as we do today, that although face-to-face confrontation is not an absolute constitutional requirement, it may be abridged only where there

is a "'case-specific finding of necessity.'" 316 Md, at 564, 560 A2d, at 1126 (quoting Coy, supra, at 1025, 101 L Ed 2d 857, 108 S Ct 2798 (O'Connor, J., concurring)). Given this latter requirement, the Court of Appeals reasoned that "[t]he question of whether a child is unavailable to testify . . . should not be asked in terms of inability to testify in the ordinary courtroom setting, but in the much narrower terms of the witness's inability to testify in the presence of the accused." 316 Md, at 564, 560 A2d, at 1126 (footnote omitted). "[T]he determinative inquiry required to preclude face-to-face confrontation is the effect of the presence of the defendant on the witness or the witness's testimony." Id., at 565, 560 A2d, at 1127. The Court of Appeals accordingly concluded that, as a prerequisite to use of the § 9-102 procedure, the Confrontation Clause requires the trial court to make a specific finding that testimony by the child in the courtroom *in the presence of the defendant* would result in the child suffering serious emotional distress such that the child could not reasonably communicate. Id., at 566, 560 A2d, at 1127. This conclusion, of course, is consistent with our holding today.

In addition, however, the Court of Appeals interpreted our decision in Coy to impose two subsidiary requirements. First, the court held that "§ 9-102 ordinarily cannot be invoked unless the child witness initially is questioned (either in or outside the courtroom) in the defendant's presence." Id., at 566, 560 A2d, at 1127; see also Wildermuth, 310 Md, at 523-524, 530 A2d, at 289 (personal observation by the judge should be the rule rather than the exception). Second, the court asserted that, before using the one-way television procedure, a trial judge must determine whether a child would suffer "severe emotional distress" if he or she were to testify by *two*-way closed circuit television. 316 Md, at 567, 560 A2d, at 1128.

Reviewing the evidence presented to the trial court in support of the finding required under § 9-102(a)(1)(ii), the Court of Appeals determined that "the finding of necessity required

[497 US 859]

to limit the defendant's right of confrontation through invocation of § 9-102 . . . was not made here." Id., at 570-571, 560 A2d, at 1129. The Court of Appeals noted that the trial judge "had the benefit only of expert testimony on the ability of the children to communicate; he did not question any of the children himself, nor did he observe any child's behavior on the witness stand before making his ruling. He did not explore any alternatives to the use of one-way closed-circuit television." Id., at 568, 560 A2d, at 1128 (footnote omitted). The Court of Appeals also observed that "the testimony in this case was not sharply focused on the effect of the defendant's presence on the child witnesses." Id., at 569, 560 A2d, at 1129. Thus, the Court of Appeals concluded:

> "Unable to supplement the expert testimony by responses to questions put by him, or by his own observations of the children's behavior in Craig's presence, the judge made his § 9-102 finding in terms of what the experts had said. He ruled that 'the testimony of each of these children *in a courtroom* will [result] in each child suffering serious emotional distress . . . such that each of these children cannot reasonably communicate.' He failed to find—indeed, on the evidence before him, *could not have found*—that this result would be the product of testimony in a courtroom in the defendant's presence or outside the courtroom but in the defendant's televised presence. That, however, is the finding of necessity required to limit the defendant's right of confrontation through invocation of § 9-102. Since that finding was not made here, and since the procedures we deem requisite to the valid use of § 9-102 were not followed, the judgment of the Court of Special Appeals must be reversed and the case remanded for a new trial." Id., at 570-571, 560 A2d, at 1129 (emphasis added).

[9, 10] The Court of Appeals appears to have rested its conclusion at least in part on the trial court's failure to observe the children's behavior in the defendant's presence and its failure to

[497 US 860]

explore less restrictive alternatives to the use of the one-way closed circuit television procedure. See id., at 568-571, 560 A2d, at 1128-1129. Although we think such evidentiary requirements could strengthen the grounds for use of protective measures, we decline to establish, as a matter of federal constitutional law, any such categorical evidentiary prerequisites for the use of the one-way television procedure. The trial court in this case, for example, could well have found, on the basis of the expert testimony before it, that testimony by the child witnesses in the courtroom in the defendant's presence "will result in [each] child suffering serious emotional distress such that the child cannot reasonably communicate," § 9-102(a)(1)(ii). See id., at 568-569, 560 A2d, at 1128-1129; see also App 22-25, 39, 41, 43, 44-45, 54-57. So long as a trial court makes such a case-specific finding of necessity, the Confrontation Clause does not prohibit a State from using a one-way closed circuit television procedure for the receipt of testimony by a child witness in a child abuse case. Because the Court of Appeals held that the trial court had not made the requisite finding of necessity under its interpretation of "the high threshold required by [coy] before § 9-102 may be invoked," 316 Md, at 554-555, 560 A2d, at 1121 (footnote omitted), we cannot be certain whether the Court of Appeals would reach the same conclusion in light of the legal standard we establish today. We therefore vacate the judgment of the Court of Appeals of Maryland and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

SEPARATE OPINION

Justice **Scalia,** with whom Justice **Brennan,** Justice **Marshall,** and Justice **Stevens** join, dissenting.

Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion. The Sixth Amendment provides, with unmistakable clarity, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted

[497 US 861]

with the witnesses against him." The purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court. The Court, however, says:

> "We . . . conclude today that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court. That a significant majority of States have enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy." Ante, at 853, 111 L Ed 2d, at 683.

Because of this subordination of explicit constitutional text to currently favored public policy, the following scene can be played out in an American courtroom for the first time in two centuries: A father whose young daughter has been given over to the exclusive custody of his estranged wife, or a mother whose young son has been taken into custody by the State's child welfare department, is sentenced to prison for sexual abuse on the basis of testimony by a child the parent has not seen or spoken to for many months; and the guilty verdict is rendered without giving the parent so much as the opportunity to sit in the presence of the child, and to ask, personally or through counsel, "it is really not true, is it, that I—your father (or mother) whom you see before you—did these terrible things?" Perhaps that is a procedure today's society desires; perhaps (though I doubt it) it is even a fair procedure; but it is assuredly not a procedure permitted by the Constitution.

Because the text of the Sixth Amendment is clear, and because the Constitution is meant to protect against, rather than conform to, current "widespread belief," I respectfully dissent.

[497 US 862]

I

According to the Court, "we cannot say that [face-to-face] confrontation [with witnesses appearing at trial] is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers." Ante, at 849-850, 111 L Ed 2d, at 681. That is rather like saying "we cannot say that being tried before a jury is an indispensable element of the Sixth Amendment's guarantee of the right to jury trial." The Court makes the impossible plausible by recharacterizing the Confrontation Clause, so that confrontation (redesignated "face-to-face confrontation") becomes only one of many "elements of confrontation." Ante, at 846, 111 L Ed 2d, at 678. The reasoning is as follows: The Confrontation Clause guarantees not only what it explicitly provides for—"face-to-face" confrontation—but also implied and collateral rights such as cross-examination, oath, and observation of demeanor (TRUE); the purpose of this entire cluster of rights is to ensure the reliability of evidence (TRUE); the Maryland procedure preserves the implied and collateral rights (TRUE), which adequately ensure the reliability of evidence (perhaps TRUE); therefore the Confrontation Clause is not violated by denying what it explicitly provides for—"face-to-face" confrontation (unquestionably FALSE). This reasoning abstracts from the right to its purposes, and then eliminates the right. It is wrong because the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was "face-to-face" confrontation. Whatever else it may mean in addition, the defendant's constitutional right "to be confronted with the witnesses against him" means, always and everywhere, at least what it explicitly says: the " 'right to meet face to face all those who appear and give evidence at trial.' " Coy v Iowa, 487 US 1012, 1016, 101 L Ed 2d 857, 108 S Ct 2798 (1988), quoting California v Green, 399 US 149, 175, 26 L Ed 2d 489, 90 S Ct 1930 (1970) (Harlan, J. concurring).

[497 US 863]

The Court supports its antitextual conclusion by cobbling together scraps of dicta from various cases that have no bearing here. It will suffice to discuss one of them, since they are all of a kind: Quoting Ohio v Roberts, 448 US 56, 63, 65 L Ed 2d 597, 100 S Ct 2531 (1980), the Court says that "[i]n sum, our precedents establish that 'the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial,' " ante, at 849, 111 L Ed 2d, at 681 (emphasis added by the Court). But Roberts, and all the other "precedents" the Court enlists to prove the implausible, dealt with the *implications* of the Confrontation Clause, and not its literal, unavoidable text. When Roberts said that the Clause merely "reflects a preference for face-to-face confrontation at trial," what it had in mind as the nonpreferred alternative was not (as the Court implies) the appearance of a witness at trial without confronting the defendant. That has been, until today, not merely "nonpreferred" but utterly unheard-of. What Roberts had in mind was the receipt of *other-than-first-hand testimony* from witnesses at trial—that is, witnesses' recounting of hearsay statements by absent parties who, *since they did not appear at trial,* did not have to endure face-to-face confrontation. Rejecting that, I agree, was merely giving effect to an evident constitutional preference; there are, after all, many exceptions to the Confrontation Clause's hearsay rule. But that the defendant should be confronted by the witnesses who appear at trial is not a preference "reflected" by the Confrontation Clause; it is a constitutional right unqualifiedly guaranteed.

The Court claims that its interpretation of the Confrontation Clause "is consistent with our cases holding that other Sixth Amendment rights must also be interpreted in the context of the necessities of trial and the adversary process." Ante, at 850, 111 L Ed 2d, at 681. I disagree. It is true enough that the "necessities of trial and the adversary process" limit the *manner* in which Sixth Amendment rights may be exercised, and limit the *scope* of Sixth Amendment guarantees to the extent that scope is textually indeterminate. Thus (to

describe the cases the Court cites): The right to confront is not the right to confront in a manner that disrupts the trial. Illinois v Allen, 397 US 337, 25 L Ed 2d 353, 90 S Ct 1057 (1970). The right "to have compulsory process for obtaining witnesses" is not the right to call witnesses in a manner that violates fair and orderly procedures. Taylor v Illinois, 484 US 400, 98 L Ed 2d 798, 108 S Ct 646 (1988). The scope of the right "to have the assistance of counsel" does not include consultation with counsel at all times during the trial. Perry v Leeke, 488 US 272, 102 L Ed 2d 624, 109 S Ct 594 (1989). The scope of the right to cross-examine does not include access to the State's investigative files. Pennsylvania v Ritchie, 480 US 39, 94 L Ed 2d 40, 107 S Ct 989 (1987). But we are not talking here about denying expansive scope to a Sixth Amendment provision whose scope for the purpose at issue is textually unclear; "to confront" plainly means to encounter face to face, whatever else it may mean in addition. And we are not talking about the manner of arranging that face-to-face encounter, but about whether it shall occur at all. The "necessities of trial and the adversary process" are irrelevant here, since they cannot alter the constitutional text.

II

Much of the Court's opinion consists of applying to this case the mode of analysis we have used in the admission of hearsay evidence. The Sixth Amendment does not literally contain a prohibition upon such evidence, since it guarantees the defendant only the right to confront "the witnesses against him."

As applied in the Sixth Amendment's context of a prosecution, the noun "witness"—in 1791 as today—could mean either (a) one "who knows or sees any thing; one personally present" or (b) "one who gives testimony" or who "testifies," i.e., "[i]n *judicial proceedings,* [one who] make[s] a solemn declaration under oath, for the purpose of establishing or making proof of some fact to a court." 2 N. Webster, An American Dictionary of the English Language (1828) (emphasis added). See also J. Buchanan, Linguae Britannicae Vera Pronunciatio (1757). The former meaning (one "who

[497 US 865]

knows or sees") would cover hearsay evidence, but is excluded in the Sixth Amendment by the words following the noun: "witnesses *against him.*" The phrase obviously refers to those who give testimony against the defendant at trial. We have nonetheless found implicit in the Confrontation Clause some limitation upon hearsay evidence, since otherwise the government could subvert the confrontation right by putting on witnesses who know nothing except what an absent declarant said. And in determining the scope of that implicit limitation, we have focused upon whether the reliability of the hearsay statements (which are not *expressly* excluded by the Confrontation Clause) "is otherwise assured." Ante, at 850, 111 L Ed 2d, at 682. The same test cannot be applied, however, to permit what is explicitly forbidden by the constitutional text; there is simply no room for interpretation with regard to "the irreducible literal meaning of the Clause." Coy, supra, at 1020-1021, 101 L Ed 2d 857, 108 S Ct 2798.

Some of the Court's analysis seems to suggest that the children's testimony here was itself hearsay of the sort permissible under our Confrontation Clause cases. See ante, at 851, 111 L Ed 2d, at 682. That cannot be. Our Confrontation Clause conditions for the admission of hearsay have long included a "general requirement of unavailability" of the declarant. Idaho v Wright, ante, at 815, 111 L Ed 2d 638, 110 S Ct 3139. "In the usual case . . . , the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." Ohio v Roberts, 448 US, at 65, 65 L Ed 2d 597, 100 S Ct 2531. We have permitted a few exceptions to this general rule—e.g., for co-conspirators' statements, whose effect cannot be replicated by live testimony because they "derive [their] significance from the circumstances in which [they were] made," United States v Inadi, 475 US 387, 395, 89 L Ed 2d 390, 106 S Ct 1121 (1986). "Live" closed-circuit television testimony, however—if it can be called hearsay at all—is surely an example of hearsay as "a weaker substitute for live testimony," id., at 394, 89 L Ed 2d 390, 106 S Ct 1121, which can be employed only when the genuine article is unavailable. "When

[497 US 866]

two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence." Ibid. See also Roberts, supra (requiring unavailability as precondition for admission of prior testimony); Barber v Page, 390 US 719, 20 L Ed 2d 255, 88 S Ct 1318 (1968) (same).

The Court's test today requires unavailability only in the sense that the child is unable to testify in the presence of the defendant.[1] That cannot possibly be the relevant sense. If unconfronted testimony is admissible hearsay when the witness is unable to confront the defendant, then presumably there are other categories of admissible hearsay consisting of unsworn testimony when the witness is unable to risk perjury, uncross-examined testimony when the witness is unable to undergo hostile questioning, etc. California v Green, 399 US 149, 26 L Ed 2d 489, 90 S Ct 1930 (1970), is not precedent for such a silly system. That case held that the Confrontation Clause does not bar admission of prior testimony when the declarant is sworn as a witness but refuses to answer. But in Green, as in most cases of refusal, we could not know *why* the declarant refused to testify. Here, by contrast, we know that it is precisely because the child is unwilling to testify in the presence of the defendant. That unwillingness cannot be a valid excuse under the Confrontation Clause, whose very object is to place the witness under the sometimes hostile glare of the defendant. "That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult." Coy, 487 **[497 US 867]** US, at 1020, 101 L Ed 2d 857, 108 S Ct 2798. To say that a defendant loses his right to confront a witness when that would cause the witness not to testify is rather like saying that the defendant loses his right to counsel when counsel would save him, or his right to subpoena witnesses when they would exculpate him, or his right not to give testimony against himself when that would prove him guilty.

III

The Court characterizes the State's interest which "outweigh[s]" the explicit text of the Constitution as an "interest in the physical and psychological well-being of child abuse victims," ante, at 853, 111 L Ed 2d, at 683, an "interest in protecting" such victims "from the emotional trauma of testifying," ante, at 855, 111 L Ed 2d, at 685. That is not so. A child who meets the Maryland statute's requirement of suffering such "serious emotional distress" from confrontation that he "cannot reasonably communicate" would seem entirely safe. Why would a prosecutor want to call a witness who cannot reasonably communicate? And if he did, it would be the State's own fault. Protection of the child's interest—as far as the Confrontation Clause is concerned[2]—is entirely within Maryland's control. The State's interest here is in fact no more and no less than what the State's interest always is when it seeks to get a class of evidence admitted in criminal proceedings: more convictions of guilty defendants. That is not an unworthy interest, but it should not be dressed up as a humanitarian one.

---

[1] I presume that when the Court says "trauma would impair the child's ability to communicate," ante, at 857, 111 L Ed 2d, at 686, it means that trauma would make it impossible for the child to communicate. That is the requirement of the Maryland law at issue here: "serious emotional distress such that the child cannot reasonably communicate." Md Cts & Jud Proc Code Ann § 9-102(a)(1)(ii)(1989). Any implication beyond that would in any event be dictum.

[2] A different situation would be presented if the defendant sought to call the child. In that event, the State's refusal to compel the child to appear, or its insistence upon a procedure such as that set forth in the Maryland statute as a condition of its compelling him to do so, would call into question—initially, at least, and perhaps exclusively—the scope of the defendant's Sixth Amendment right "to have compulsory process for obtaining witnesses in his favor."

And the interest on the other side is also what it usually is when the State seeks to get a new class of evidence admitted: fewer convictions of innocent defendants—specifically, in the

[497 US 868]

present context, innocent defendants accused of particularly heinous crimes. The "special" reasons that exist for suspending one of the usual guarantees of reliability in the case of children's testimony are perhaps matched by "special" reasons for being particularly insistent upon it in the case of children's testimony. Some studies show that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality. See Lindsay & Johnson, Reality Monitoring and Suggestibility: Children's Ability to Discriminate Among Memories From Different Sources, in Children's Eyewitness Memory 92 (S. Ceci, M. Toglia, & D. Ross eds 1987); Feher, The Alleged Molestation Victim, The Rules of Evidence, and the Constitution: Should Children Really Be Seen and Not Heard?, 14 Am J Crim L 227, 230-233 (1987); Christiansen, The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews, 62 Wash L Rev 705, 708-711 (1987). The injustice their erroneous testimony can produce is evidenced by the tragic Scott County investigations of 1983-1984, which disrupted the lives of many (as far as we know) innocent people in the small town of Jordan, Minnesota. At one stage those investigations were pursuing allegations by at least eight children of multiple murders, but the prosecutions actually initiated charged only sexual abuse. Specifically, 24 adults were charged with molesting 37 children. In the course of the investigations, 25 children were placed in foster homes. Of the 24 indicted defendants, one pleaded guilty, two were acquitted at trial, and the charges against the remaining 21 were voluntarily dismissed. See Feher, supra, at 239-240. There is no doubt that some sexual abuse took place in Jordan; but there is no reason to believe it was as widespread as charged. A report by the Minnesota attorney general's office, based on inquiries conducted by the Minnesota Bureau of Criminal Apprehension and the Federal Bureau of Investigation, concluded that there was an "absence of credible testimony and [a] lack of

[497 US 869]

significant corroboration" to support reinstitution of sex-abuse charges, and "no credible evidence of murders." H. Humphrey, Report on Scott County Investigation 8, 7 (1985). The report describes an investigation full of well-intentioned techniques employed by the prosecution team, police, child protection workers, and foster parents, that distorted and in some cases even coerced the children's recollection. Children were interrogated repeatedly, in some cases as many as 50 times, id., at 9; answers were suggested by telling the children what other witnesses had said, id., at 11; and children (even some who did not at first complain of abuse) were separated from their parents for months, id., at 9. The report describes the consequences as follows:

> "As children continued to be interviewed the list of accused citizens grew. In a number of cases, it was only after weeks or months of

> questioning that children would 'admit' their parents abused them.
>
> . . . . .
>
> "In some instances, over a period of time, the allegations of sexual abuse turned to stories of mutilations, and eventually homicide." Id., at 10-11.

The value of the confrontation right in guarding against a child's distorted or coerced recollections is dramatically evident with respect to one of the misguided investigative techniques the report cited: some children were told by their foster parents that reunion with their real parents would be hastened by "admission" of their parents' abuse. Id., at 9. Is it difficult to imagine how unconvincing such a testimonial admission might be to a jury that witnesses the child's delight at seeing his parents in the courtroom? Or how devastating it might be if, pursuant to a psychiatric evaluation that "trauma would impair the child's ability to communicate" in front of his parents, the child were permitted to tell his story to the jury on closed-circuit television?

In the last analysis, however, this debate is not an appropriate one. I have no need to defend the value of confrontation,

[497 US 870]

because the Court has no authority to question it. It is not within our charge to speculate that, "where face-to-face confrontation causes significant emotional distress in a child witness," confrontation might "in fact *disserve* the Confrontation Clause's truth-seeking goal." Ante, at 857, 111 L Ed 2d, at 686. If so, that is a defect in the Constitution—which should be amended by the procedures provided for such an eventuality, but cannot be corrected by judicial pronouncement that it is archaic, contrary to "widespread belief," and thus null and void. For good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it. To quote the document one last time (for it plainly says all that need be said): "In *all* criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" (emphasis added).

* * *

The Court today has applied "interest-balancing" analysis where the text of the Constitution simply does not permit it. We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings. The Court has convincingly proved that the Maryland procedure serves a valid interest, and gives the defendant virtually everything the Confrontation Clause guarantees (everything, that is, except confrontation). I am persuaded, therefore, that the Maryland procedure is virtually constitutional. Since it is not, however, actually constitutional I would affirm the judgment of the Maryland Court of Appeals reversing the judgment of conviction.

[497 US 871]

MANUEL LUJAN, Jr., Secretary of the Interior, et al., Petitioners

v

NATIONAL WILDLIFE FEDERATION et al.

497 US 871, 111 L Ed 2d 695, 110 S Ct 3177

[No. 89-640]

Argued April 16, 1990. Decided June 27, 1990.

Decision: Conservation-advocacy organization held not to have established right to judicial review, under 5 USCS § 702, of Federal Government's land classification determinations which allegedly violated federal environmental and other statutes.

SUMMARY

In 1985, a national wildlife-protection, conservation-advocacy organization filed an action in the United States District Court for the District of Columbia against the United States Department of the Interior, the Secretary of the Interior, and the Director of the Bureau of Land Management (BLM), an agency within the Department of the Interior. The organization alleged that (1) pursuant to a "land withdrawal review program," the named entities of the Federal Government had violated various federal land and environmental policy statutes by reclassifying the status of approximately 180 million acres of public lands in 17 states through 1,250 or so individual classification determinations, which classifications the organization claimed would open up the lands to mining activities and thereby destroy the natural beauty of such lands; and (2) the government's actions with respect to the lands should be set aside as being arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, pursuant to § 10(e) of the Administrative Procedure Act (APA) (5 USCS § 706). After granting the organization's motion for a preliminary injunction prohibiting the government from reclassifying the lands or taking any action inconsistent with the preservation of their status, the District Court denied the government's motion for a dismissal on the pleadings, under Rule 12(b) of the Federal Rules of Civil Procedure, for failure to demonstrate standing to challenge the government's actions under § 10(a) of the APA, 5 USCS § 702. The United States Court of Appeals for the District of Columbia Circuit,

Briefs of Counsel, p 1010, infra.

affirming both orders on appeal, held that, with respect to the Rule 12(b) motion, two affidavits filed in District Court by members of the organization (the "original member affidavits"), in which affidavits the members claimed use of land "in the vicinity" of land covered by two of the challenged reclassification determinations, rendered the organization's complaint sufficiently specific to survive the motion (266 App DC 241, 835 F2d 305). Thereafter, the government filed a motion in the District Court for summary judgment, under Rule 56 of the Federal Rules of Civil Procedure, again on the ground that the organization lacked standing. After argument on the motion, the organization responded to the District Court's request for additional briefing by submitting four additional affidavits from its members (the "additional member affidavits") which asserted the organization's standing to challenge the government's land withdrawal review program. Noting that neither its earlier decision on the Rule 12(b) motion nor the Court of Appeals' affirmance controlled the disposition of the government's Rule 56 motion, the District Court (1) rejected the four additional member affidavits as untimely filed; (2) vacated the preliminary injunction; and (3) granted the motion, on the grounds that (a) the two original member affidavits were insufficient to withstand the motion and could not support the organization's attempted challenge to each of the approximately 1,250 individual classification decisions, and (b) an affidavit filed by one of the organization's vice presidents—in which it was stated that the organization's interest in providing adequate information and opportunity for public participation with respect to the "land withdrawal review program" had been injured by the government—was also insufficient to establish the organization's right to seek judicial review under § 702 (699 F Supp 327). On appeal, the Court of Appeals, reversing, ruled that (1) the two original member affidavits were sufficient in themselves to withstand the Rule 56 motion; (2) the District Court had abused its discretion by not considering the four additional member affidavits; and (3) the organization's standing to challenge individual classification decisions conferred standing to challenge all such decisions under the government's program (278 App DC 320, 878 F2d 422).

On certiorari, the United States Supreme Court reversed. In an opinion by SCALIA, J., joined by REHNQUIST, Ch. J., and WHITE, O'CONNOR, and KENNEDY, JJ., the Supreme Court held that none of the affidavits were sufficient, for purposes of withstanding the government's motion for summary judgment under Rule 56, to establish the organization's right to judicial review of the government's actions under § 702 as a person adversely affected or aggrieved by agency action, because (1) the original member affidavits did not set forth specific facts raising a genuine issue of fact as Rule 56(e) required, but instead averred only that one of the organization's members used unspecified portions of an immense tract of territory, on some portions of which mining activity had occurred or probably would occur by virtue of the government's actions; (2) with respect to the additional member affidavits, (a) no "agency action" within the meaning of § 702 was identified by the term "land withdrawal review program," which was simply the name by which the government occasionally referred to the continuing operations of the BLM in reviewing the classification of public lands, and such term did not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations, and (b) flaws in the entirety of such "program" could not be laid before the courts for wholesale correction under § 702 simply because one of the actions that was ripe for review adversely affected one of the organization's members; (3) the District Court did not abuse its discretion in declining to admit the additional member affidavits, given that (a) their submission was untimely pursuant to the filing deadlines of both Rule 56(c) and Rule 6(d) of the Federal Rules of Civil Procedure, and (b) there appeared to be no motion, showing of cause, or excusable neglect which would allow the District Court, pursuant to Rule 6(b) of the Federal Rules of Civil Procedure, to extend the filing period; and (4) the affidavit of the organization's vice president also failed to identify any particular "agency action" within the meaning of § 702 that was the source of the organization's injuries.

Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting, expressed the view that (1) the original member affidavits at least created a genuine issue of fact as to the organization's injury, and thus provided sufficient evidence of the organization's standing to withstand a motion for summary judgment under Rule 56; (2) the District Court abused its discretion by refusing to consider the additional member affidavits, since (a) the organization showed adequate cause for its failure to file the additional affidavits prior to the hearing on the summary judgment motion, insofar as the District Court had not indicated that the issue of standing would be open to reconsideration, and (b) such untimely filing neither disserved the purposes of Rule 56 nor prejudiced the government; and (3) the adequacy of the affidavit submitted by the organization's vice president should not have been addressed, since the Court of Appeals did not pass on that issue.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

2 Am Jur 2d, Administrative Law §§ 576, 584; 61A Am Jur 2d, Pollution Control §§ 35, 500, 502; 73 Am Jur 2d, Summary Judgment §§ 27, 35

2 Federal Procedure, L Ed, Administrative Procedure §§ 2:200, 2:203, 2:209; 11 Federal Procedure, L Ed, Environmental Protection §§ 32:22, 32:23; 28 Federal Procedure, L Ed, Pleadings and Motions §§ 62:538, 62:539, 62:593, 62:628; 33 Federal Procedure, L Ed, Trial §§ 77:8, 77:9

1 Federal Procedural Forms, L Ed, Actions in District Court §§ 1:1731-1:1812, Administrative Procedure § 2:194; 9 Federal Procedural Forms, L Ed, Environmental Protection §§ 29:31, 29:43

5 Am Jur Trials 105, Summary Judgment Practice

5 USCS § 702; USCS Court Rules, Federal Rules of Civil Procedure, Rules 6, 56

US L Ed Digest, Administrative Law §§ 214, 219, 223; Courts § 538.12; Summary Judgment and Judgment on Pleadings § 5

Index to Annotations, Administrative Law; Affidavits; Civil Procedure Rules; Environmental Law; Public Lands and Property; Summary Judgment

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

What constitutes agency "action," "order," "decision," "final order," "final decision," or the like, within meaning of federal statutes authorizing judicial review of administrative action—Supreme Court cases. 47 L Ed 2d 843.

Standing of private citizen, association, or organization to maintain action in federal court for injunctive relief against commercial development or activities, or construction of highways, or other governmental projects, alleged to be harmful to environment in public parks, other similar recreational areas, or wildlife refuges. 11 ALR Fed 556.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Administrative Law § 223; Summary Judgment and Judgment on Pleadings § 5 — right to judicial review of federal agency action — organization as person aggrieved — summary judgment

1a-1f. With respect to an action brought in Federal District Court by a conservation-advocacy organization against the United States Department of the Interior, the Secretary of the Interior, and the Director of the Bureau of Land Management, in which action the organization alleged that the Federal Government had violated various federal land and environmental policy statutes by reclassifying the status of certain public lands through approximately 1,250 individual classification determinations that opened up the lands to mining activities which would destroy their natural beauty, the organization does not set forth specific facts raising a genuine issue of fact as to its right to judicial review of the government's actions under § 10(a) of the Administrative Procedure Act (5 USCS § 702) as a person adversely affected or aggrieved by agency action—and thus the organization cannot withstand the government's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure—through solely affidavits filed by two of the organization's members which claimed use of land "in the vicinity" of the land covered by two of the classification determinations; Rule 56(e), which requires the party against whom summary judgment is sought to set forth specific facts showing that there is a genuine issue for trial, is not satisfied by averments which state only that one of the organization's members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action. (Blackmun, Brennan, Marshall, and Stevens, JJ., dissented from this holding.)

Administrative Law §§ 214, 219 — right to judicial review — federal land reclassification as "agency action"

2a-2d. A conservation-advocacy organization does not establish its right to judicial review, under § 10(a) of the Administrative Procedure Act, 5 USCS § 702, of a so-called "land withdrawal review program" of the Bureau of Land Management (BLM) by proffering four affidavits of the organization's members which assert the organization's standing to challenge the entirety of such a program, because the term "land withdrawal review program," being simply the name by which the government occasionally refers to the continuing operations of the BLM in reviewing the classification of public lands, does not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations, and thus such term does not identify an "agency action" within the meaning of § 702, much less a "final agency action" within the meaning of 5 USCS § 704; flaws in the entire "program"—consisting principally of the many individual actions referenced in the organization's complaint, and presumably actions yet to be taken as well—cannot be laid before the courts for wholesale correction under § 702 simply because one of the actions that is ripe for review adversely affects one of the organization's members. (Blackmun, Brennan, Marshall, and Stevens, JJ., dissented from this holding.)

Courts § 538.12 — late-filed affidavits — admissibility under federal procedural rules

3a-3d. In an action brought by a conservation-advocacy organization against the United States Department of the Interior, the Secretary of the Interior, and the Director of the Bureau of Land Management under 5 USCS § 702, a Federal District Court does not abuse its discretion in declining to admit affidavits submitted by the organization after argument on the government's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, where (1) their submission was untimely pursuant to the filing deadlines of both Rule 56(c) and Rule 6(d) of the Federal Rules of Civil Procedure, and (2) there appeared to be no motion, showing of cause, or excusable neglect which would allow the District Court, pursuant to Rule 6(b) of the Federal Rules of Civil Procedure, to extend the filing period; upon the District Court's issuance of the order which announced that the hearing on the government's Rule 56 motion would be held 1 month later, the organization was on notice that its right to sue was at issue, and that—absent proper motion—the time for filing any additional evidentiary materials was, at the latest, the day before the hearing. (Blackmun, Brennan, Marshall, and Stevens, JJ., dissented from this holding.)

Administrative Law §§ 219, 223; Summary Judgment and Judgment on Pleadings § 5 — judicial review — organization suing in its own right — federal land reclassification as "agency action" — summary judgment

4a-4c. With respect to an action brought in Federal District Court by a conservation-advocacy organization against the United States Department of the Interior, the Secretary of the Interior, and the Director of the Bureau of Land Management (BLM), in which action the organization alleged that, pursuant to a "land withdrawal review program," the Federal Government had violated various federal land and environmental policy statutes by reclassifying the status of certain public lands through approximately 1,250 individual classification determinations that opened up the lands to mining activities which would destroy their natural beauty, the organization does not set forth specific facts raising a genuine issue of fact as to its right to seek judicial review of the government's actions under 5 USCS § 702 in the organization's own right as a person adversely affected or aggrieved by agency action —and thus the organization cannot withstand the government's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure—through solely the affidavit filed by one of the organization's vice presidents, which affidavit states that the organization's interest in providing adequate information and opportunity for public participation with respect to the "land withdrawal review program" have been injured by the Federal Government; even assuming that providing information to such an organization was one of the objectives of the statutes allegedly violated, so that the organization is aggrieved within the meaning of those statutes, the vice president's affidavit cannot survive a

Rule 56 motion, because the term "land withdrawal review program," being simply the name by which the government occasionally refers to the continuing operations of the BLM in reviewing the classification of public lands, does not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations, and thus the affidavit fails to identify any particular "agency action" within the meaning of § 702 that was the source of the organization's injuries.

Appeal §§ 1769, 1770 — "law of the case" — earlier appeal to lower court

5a, 5b. A ruling by an earlier panel of a Federal Court of Appeals does not bind the United States Supreme Court as the "law of the case" in the Supreme Court's review of a subsequent decision by the Court of Appeals in the same case.

Administrative Law §§ 214, 219, 220, 223 — right to judicial review of agency action — final action — aggrievement — zone of interests

6a, 6b. In order to obtain judicial review under § 10(a) of the Administrative Procedure Act (APA) (5 USCS § 702), a person (1) must identify some "agency action," as such term is defined in 5 USCS § 551(13) —which action also must be "final agency action" within the meaning of 5 USCS § 704 where review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA—and (2) must show that either (a) he has suffered legal wrong because of the challenged agency action, or (b) he is adversely affected or aggrieved within the meaning of a relevant statute, in which case he must establish that the injury he complains of —his aggrievement, or the adverse effect upon him—falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for his complaint; thus, where an agency fails to comply with a statutory provision requiring "on the record" hearings, the company that has the contract to record and transcribe the agency's proceedings would not be "adversely affected within the meaning" of the statute, since the provision was obviously enacted to protect the interests of the parties to the proceedings, and not those of the reporters.

Summary Judgment and Judgment on Pleadings § 5 — summary judgment — nonmoving party's burden — obligations of moving party

7a, 7b. The plain language of Rule 56(c) of the Federal Rules of Civil Procedure mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial; where no such showing is made, the moving party is entitled to a judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of the case with respect to which that party has the burden of proof; Rule 56 does not require the moving party to negate the elements of the nonmoving party's case; to the contrary, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may and should be granted so long as whatever is before the Federal District Court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied.

Summary Judgment and Judgment on Pleadings § 4 — summary judgment — opposition by party seeking judicial review of agency action

8. In order to withstand a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, a party seeking judicial review of federal agency action pursuant to 5 USCS § 702 has the burden of setting forth specific facts—even though they may be controverted by the Federal Government—showing that the party is adversely affected or aggrieved by agency action within the meaning of a relevant statute.

Administrative Law § 219; Pleading § 179 — right to judicial review — existence of "agency action"

9. For purposes of determining whether a conservation-advocacy organization has established its right to judicial review, under 5 USCS § 702, of actions taken by the United States Department of the Interior, the Secretary of the Interior, and the Director of the Bureau of Land Management (BLM) in reclassifying the status of certain public lands through approximately 1,250 individual classification determinations which, the organization alleged, had the effect of opening up the lands to mining activities which would destroy their natural beauty, each of 2 affidavits that are filed by members of the organization can be read to complain of a particular "agency action," as such term is defined—for purposes of § 702—in 5 USCS § 551, where the parties agree, or appear to agree, that each affidavit refers to one particular BLM order.

Administrative Law §§ 219, 223; Environmental Law § 3; Public Lands § 13 — right to judicial review of agency action — "aggrievement" under "relevant statute" — National Environmental Policy Act — Federal Land Policy and Management Act

10. For purposes of determining whether a conservation-advocacy organization has established its right to judicial review, under 5 USCS § 702, of actions taken by the United States Department of the Interior, the Secretary of the Interior, and the Director of the Bureau of Land Management, which the organization alleged to be in violation of the Federal Land Policy and Management Act of 1976 (FLPMA) (43 USCS §§ 1701 et seq.) and the National Environmental Policy Act of 1969 (NEPA) (42 USCS §§ 4321 et seq.), in reclassifying the status of certain public lands through approximately 1,250 individual classification determinations which, the organization alleged, had the effect of opening up the lands to mining activities which would destroy their natural beauty, the organization meets § 702's "zone of interests" test —which requires that the organization be "adversely affected or aggrieved" by the Federal Government's action "within the meaning of a relevant statute"—by submitting affidavits filed by members of the organization, which affidavits allege that the members' "recreational use and aesthetic enjoyment" have been and will continue to be adversely affected by the government's

actions in violation of the FLPMA and the NEPA; recreational use and aesthetic enjoyment are among the sorts of interests that those statutes are specifically designed to protect.

Summary Judgment and Judgment on Pleadings § 5 — summary judgment — determination — specificity of nonmoving party's averments

11. In ruling upon a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, a Federal District Court must resolve any factual issues of controversy in favor of the nonmoving party only in the sense that, where the facts specifically averred by that party contradict facts specifically averred by the movant, the motion must be denied; thus, the District Court cannot assume that general averments embrace the specific facts needed to sustain the complaint under Rule 56(e); the object of the provision of Rule 56(e) that judgment shall be entered against the nonmoving party unless affidavits or other evidence sets forth specific facts showing that there is a genuine issue for trial is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit, but rather is to enable a party who believes there is no genuine dispute as to a specific fact essential to the other side's case to demand at least one sworn averment of that fact before the lengthy process of litigation continues.

Summary Judgment and Judgment on Pleadings §§ 5, 8 — summary judgment — judgment on pleadings — determination — presumption of specific facts

12. A motion to dismiss on the pleadings under Rule 12(b) of the Federal Rules of Civil Procedure presumes that general allegations embrace those specific facts that are necessary to support the claim; however, a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure does not make such a presumption.

Administrative Law §§ 214, 219 — right to judicial review — federal "programs" as "agency actions"

13. The continuing operations of the Bureau of Land Management in reviewing withdrawal revocation applications and the classification of public lands and developing land use plans as required by the Federal Land Policy and Management Act of 1976 (43 USCS §§ 1701 et seq.), pursuant to a "land withdrawal review program," is no more an identifiable "agency action" subject to judicial review under 5 USCS § 702—much less a "final agency action" within the meaning of 5 USCS § 704—than is a "weapons procurement program" of the United States Department of Defense or a "drug interdiction program" of the Drug Enforcement Administration.

Administrative Law §§ 214, 216 — finality of agency action — ripeness for review — regulation

14a, 14b. Absent a statutory provision which enables an administrative regulation to serve as an "agency action" within the meaning of 5 USCS § 702—which action, as such, can be the object of direct judicial review even before the concrete effects normally required for review under the Administrative Procedure Act (APA) (5 USCS §§ 551 et seq., 701 et seq.) are felt—a regulation is not ordinarily considered the type of agency action that is ripe for judicial review under the APA until the scope of a controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm the claimant; except where Congress explicitly provides for judicial correction of the administrative process at a higher level of generality, the federal courts may intervene in the administration of the laws only when, and to the extent that, a specific "final agency action" within the meaning of 5 USCS § 704 has an actual or immediately threatened effect; however, a substantive rule which, as a practical matter, requires the claimant to adjust his conduct immediately is ripe for review at once, regardless of whether explicit statutory review apart from the APA is provided.

Administrative Law §§ 214, 219 — grant of mine permit by agency — ripeness — right to review

15a, 15b. The grant of a mine permit application filed with the Bureau of Land Management—which permit covers a portion of federal land as to which a member of a conservation-advocacy organization alleges interests in recreational use and aesthetic enjoyment—constitutes agency action that is ripe for judicial review under the Administrative Procedure Act (5 USCS §§ 551 et seq., 701 et seq.); in the course of an otherwise proper court challenge to such permit grant, the member—and, through that member, the organization—may properly call into question the validity of the federal land classification order which authorized the permit.

Courts §§ 538.11, 538.12 — federal rules — construction of time provisions — operation

16a, 16b. Rule 6(b) of the Federal Rules of Civil Procedure—which provides that predeadline extensions of procedural time limitations may be given "if request therefor is made," while postdeadline extensions must be "upon motion made"—establishes a clear distinction between "requests" and "motions," and generally the one cannot be converted into the other without violating the Rule's provisions; at the least, a postdeadline request for an extension of time, in order to be even permissibly treated as a "motion" for purposes of Rule 6(b), must contain a high degree of formality and precision, putting the opposing party on notice that a motion is at issue and that he therefore ought to respond; such requirement is not met where a party's request for an extension of time (1) is contained in a single sentence at the end of the first paragraph of one of the 18 single-spaced footnotes in a 20-page memorandum of law, and (2) does not specifically ask for an extension of time, but merely says that the party "should be given adequate opportunity to supplement the record."

Evidence § 866 — assumption of sufficiency by litigant

17. Since a litigant is never justified in assuming that the court has made up its mind until the court expresses itself to that effect, the litigant's failure to buttress its position with additional evidentiary materials because of confidence in the strength of that position is always indulged at the litigant's own risk.

SYLLABUS BY REPORTER OF DECISIONS

The National Wildlife Federation (hereinafter respondent) filed this action in the District Court against petitioners, the Director of the Bureau of Land Management (BLM) and other federal parties, alleging that, in various respects, they had violated the Federal Land Policy and Management Act of 1976 (FLPMA) and the National Environmental Policy Act of 1969 (NEPA) in the course of administering the BLM's "land withdrawal review program," and that the complained-of actions should be set aside because they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" within the meaning of § 10(e) of the Administrative Procedure Act (APA), 5 USC § 706 [5 USCS § 706]. Under the program, petitioners make various types of decisions affecting the status of public lands and their availability for private uses such as mining, a number of which decisions were listed in an appendix to the complaint. The court granted petitioners' motion for summary judgment under Federal Rule of Civil Procedure 56, holding that respondent lacked standing to seek judicial review of petitioners' actions under the APA, § 702. The court ruled that affidavits by two of respondent's members, Peterson and Erman, claiming use of public lands "in the vicinity" of lands covered by two of the listed decisions, were insufficient to confer standing as to those particular decisions, and that, even if they had been adequate for that limited purpose, they could not support respondent's attempted APA challenge to each of the 1,250 or so individual actions effected under the program. The court rejected as untimely four more member affidavits pertaining to standing, which were submitted after argument on the summary judgment motion and in purported response to the District Court's postargument request for additional briefing. The Court of Appeals reversed, holding that the Peterson and Erman affidavits were sufficient in themselves, that it was an abuse of discretion not to consider the four additional affidavits, and that standing to challenge the individual decisions conferred standing to challenge all such decisions.

Held:

1. The Peterson and Erman affidavits are insufficient to establish respondent's § 702 entitlement to judicial review as "[a] person . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute."

(a) To establish a right to relief under § 702, respondent must satisfy two requirements. First, it must show that it has been affected by some "agency action," as defined in § 551(13). See § 701(b)(2). Since neither the FLPMA nor NEPA provides a private right of action, the "agency action" in question must also be "final agency action" under § 704. Second, respondent must prove that it is "adversely affected or aggrieved" by that action "within the meaning of a relevant statute," which requires a showing that the injury complained of falls within the "zone of interests" sought to be protected by the FLPMA and NEPA. Cf. Clarke v Securities Industry Assn. 479 US 388, 396-397, 93 L Ed 2d 757, 107 S Ct 750.

(b) When a defendant moves for summary judgment on the ground that the plaintiff has failed to establish a right to relief under § 702, the burden is on the plaintiff, under Rule 56(e), to set forth specific facts (even though they may be controverted by the defendant) showing that there is a genuine issue for trial. Cf. Celotex Corp. v Catrett, 477 US 317, 322, 91 L Ed 2d 265, 106 S Ct 2548. Where no such showing is made, the defendant is entitled to judgment as a matter of law. Id., at 323, 91 L Ed 2d 265, 106 S Ct 2548.

(c) The specific facts alleged in the two affidavits do not raise a genuine issue of fact as to whether respondent has a right to relief under § 702. It may be assumed that the allegedly affected interests set forth in the affidavits—"recreational use and aesthetic enjoyment"—are sufficiently related to respondent's purposes that respondent meets § 702's requirements if any of its members do. Moreover, each affidavit can be read to complain of a particular "agency action" within § 551's meaning; and whatever "adverse effect" or "aggrievement" is established by the affidavits meets the "zone of interests" test, since "recreational use and aesthetic enjoyment" are among the *sorts* of interests that the FLPMA and NEPA are designed to protect. However, there has been no showing that those interests of Peterson and Erman were actually "affected" by petitioners' actions, since the affidavits alleged only that the affiants used unspecified lands "in the vicinity of" immense tracts of territory, only on some portions of which, the record shows, mining activity has occurred or probably will occur by virtue of the complained-of actions. The Court of Appeals erred in ruling that the District Court had to presume specific facts sufficient to support the general allegations of injury to the affiants, since such facts are essential to sustaining the complaint and, under Rule 56(e), had to be set forth by respondent. United States v Students Challenging Regulatory Agency Procedures (SCRAP), 412 US 669, 37 L Ed 2d 254, 93 S Ct 2405, distinguished.

2. Respondent's four additional member affidavits did not establish its right to § 702 review.

(a) The affidavits are insufficient to enable respondent to challenge the entirety of petitioners' "land withdrawal review program." That term does not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations, but is simply the name by which petitioners have occasionally referred to certain continuing (and thus constantly changing) BLM operations regarding public lands, which currently extend to about 1,250 individual decisions and presumably will include more actions in the future. Thus, the program is not an identifiable "agency action" within § 702's meaning, much less a "final agency action" under § 704. Absent an explicit congressional authorization to correct the administrative process on a systemic level, agency action is not ordinarily considered "ripe" for judicial review under the APA until the scope of the controversy has been reduced to manageable proportions, and its factual components fleshed out, by concrete action that harms or threatens to harm the complainant. It may well be, due to the scope of the "program," that the individual BLM actions identified in the affidavits will not be "ripe" for challenge until some further agency action or inaction more immediately harming respondent occurs. But it is entirely certain that the flaws in the entire "program" cannot be laid before the courts for wholesale correction under the APA simply because one of them that is ripe for review adversely affects one of respondent's members. Respondent must seek such programmatic improvements from the BLM or Congress.

(b) The District Court did not abuse its discretion in declining to admit the supplemental affidavits. Since the affidavits were filed in response to the court's briefing order following the summary judgment hearing, they were untimely under, inter alia, Rule 6(d), which provides that "opposing affidavits may be served not later than 1 day before the hearing." Although Rule 6(b) allows a court, "in its discretion," to extend any filing deadline "for cause shown," a *post*-deadline extension must be "upon motion made," and is permissible only where the failure to meet the deadline "was the result of excusable neglect." Here, respondent made no motion for extension nor any showing of "cause." Moreover, the failure to timely file did not result from "excusable neglect," since the court's order setting the hearing on the summary judgment motion put respondent on notice that its right to sue was at issue, and that (absent proper motion) the time for filing additional evidentiary materials was, at the latest, the day before the hearing. Even if the court could have overcome these obstacles to admit the affidavits, it was not *compelled,* in exercising its discretion, to do so.

3. Respondent is not entitled to seek § 702 review of petitioners' actions in its own right. The brief affidavit submitted to the District Court to show that respondent's ability to fulfill its informational and advocacy functions was "adversely affected" by petitioners' alleged failure to provide adequate information and opportunities for public participation with respect to the land withdrawal review program fails to identify any particular "agency action" that was the source of respondent's alleged injuries, since that program is not an identifiable action or event. Thus, the affidavit does not set forth the specific facts necessary to survive a Rule 56 motion.

278 US App DC 320, 878 F2d 422, reversed.

Scalia, J., delivered the opinion of the Court, in which Rehnquist, C. J., and White, O'Connor, and Kennedy, JJ., joined. Blackmun, J., filed a dissenting opinion, in which Brennan, Marshall, and Stevens, JJ., joined.

APPEARANCES OF COUNSEL

Acting Solicitor General **John G. Roberts, Jr.** argued the cause for petitioners.

E. Barrett Prettyman argued the cause for respondents.

Briefs of Counsel, p 1010, infra.

OPINION OF THE COURT

[497 US 875]

Justice **Scalia** delivered the opinion of the Court.

[1a, 2a, 3a, 4a] In this case we must decide whether respondent, the National Wildlife Federation (hereinafter respondent), is a proper party to challenge actions of the Federal Government relating to certain public lands.

I

Respondent filed this action in 1985 in the United States District Court for the District of Columbia against petitioners the United States Department of the Interior, the Secretary of the Interior, and the Director of the Bureau of Land Management (BLM), an agency within the Department. In its amended complaint, respondent alleged that petitioners had violated the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat 2744, 43 USC § 1701 et seq. (1982 ed) [43 USCS §§ 1701 et seq.], the National Environmental Policy Act of 1969 (NEPA), 83 Stat 852, 42 USC § 4321 et seq. [42 USCS §§ 4321 et seq.], and § 10(e) of the Administrative Procedure Act (APA), 5 USC § 706 [5 USCS § 706], in the course of administering what the complaint called the "land withdrawal review program" of the BLM. Some background information concerning that program is necessary to an understanding of this dispute.

In various enactments, Congress empowered United States citizens to acquire title to, and rights in, vast portions of federally owned land. See, e.g., Rev Stat § 2319, 30 USC § 22 et seq. [30 USCS §§ 22 et seq.] (Mining Law of 1872); 41 Stat 437, as amended, 30 USC § 181 et seq. [30 USCS §§ 181 et seq.] (Mineral Leasing Act of 1920). Congress also provided means, however, for the Executive to remove public lands from the operation of these statutes. The Pickett Act, 36 Stat 847, 43 USC § 141 (1970 ed) [43 USCS § 141], repealed, 90 Stat 2792 (1976), authorized the President "at any time in his discretion, temporarily [to] withdraw from settlement, location, sale, or entry any of the

[497 US 876]

public lands of the United States . . . and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes . . . ." Acting under this and under the Taylor Grazing Act of 1934, ch 865, 48 Stat 1269, as amended, 43 USC § 315f [43 USCS § 315f], which gave the Secretary of the Interior authority to "classify" public lands as suitable for either disposal or federal retention and management, President Franklin Roosevelt withdrew all unreserved public land from disposal until such time as they were classified. Exec Order No. 6910, Nov. 26, 1934; Exec Order No. 6964, Feb. 5, 1935. In 1936, Congress amended § 7 of the Taylor Grazing Act to authorize the Secretary of the Interior "to examine and classify any lands" withdrawn by these orders and by other authority as "more valuable or suitable" for other uses "and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws." 49 Stat 1976, 43 USC § 315f (1982 ed) [43 USCS § 315f]. The amendment also directed that "[s]uch lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry." Ibid. The 1964 classification and multiple use Act, 78 Stat 986, 43 USC §§ 1411-1418 (1970 ed) [43 USCS §§ 1411-1418] (expired 1970), gave the Secretary further authority to classify lands for the purpose of either disposal or retention by the Federal Government.

Management of the public lands under these various laws became chaotic. The Public Land Law Review Commission, established by Congress in 1964 to study the matter, 78 Stat 982, determined in 1970 that "virtually all" of the country's public domain, see Public Land Law Review Commission, One Third of the Nation's Land 52 (1970)—about one-third of the land within the United States, see id., at 19—had been withdrawn or classified for retention; that it was difficult to determine "the extent of existing Executive withdrawals and the degree to which withdrawals overlap each other," id., at 52; and that there were inadequate records to show the purposes

[497 US 877]

of withdrawals and the permissible public uses. Ibid. Accordingly, it recommended that "Congress should provide for a careful review of (1) all Executive withdrawals and reservations, and (2) BLM retention and disposal classifications under the Classification and Multiple Use Act of 1964." Ibid.

In 1976, Congress passed the FLPMA, which repealed many of the miscellaneous laws governing disposal of public land, 43 USC § 1701 et seq. (1982 ed) [43 USCS §§ 1701 et seq.], and established a policy in favor of retaining public lands for multiple use management. It directed the Secretary to "prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values," § 1711(a), required land use planning for public lands, and established criteria to be used for that purpose, § 1712. It provided that existing classifications of public lands were subject to review in the land use planning process, and that the Secretary could "modify or terminate any such classification consistent with such land use plans." § 1712(d). It also authorized the Secretary to "make, modify, extend or revoke" withdrawals. § 1714(a). Finally it directed the Secretary, within 15 years, to review withdrawals in existence in 1976 in 11 western States, § 1714*(l)*(1), and to "determine whether, and for how long, the continuation of the existing withdrawal of the lands would be, in his judgment, consistent with the statutory objectives of the programs for which the lands were dedicated and of the other relevant programs," § 1714*(l)*(2). The activities undertaken by the BLM to comply with these various provisions constitute what respondent's amended complaint styles the BLM's "land withdrawal review program," which is the subject of the current litigation.

Pursuant to the directives of the FLPMA, the petitioners engage in a number of different types of administrative action with respect to the various tracts of public land within the United States. First, the BLM conducts the review and recommends the determinations required by § 1714*(l)* with

[497 US 878]

respect to withdrawals in 11 western States. The law requires the Secretary to "report his recommendations to the President, together with statements of concurrence or nonconcurrence submitted by the heads of the departments or agencies which administer the lands"; the President must in turn submit this report to the Congress, together with his recommendation "for action by the Secretary, or for legislation." § 1714*(l)*(2). The Secretary has submitted a number of reports to the President in accordance with this provision.

Second, the Secretary revokes some withdrawals under § 204(a) of the Act, which the Office of the Solicitor has interpreted to give the

Secretary the power to process proposals for revocation of withdrawals made during the "ordinary course of business." U.S. Dept. of the Interior, Memorandum from the Office of the Solicitor, Oct. 30, 1980. These revocations are initiated in one of three manners: An agency or department holding a portion of withdrawn land that it no longer needs may file a notice of intention to relinquish the lands with the BLM. Any member of the public may file a petition requesting revocation. And in the case of lands held by the BLM, the BLM itself may initiate the revocation proposal. App 56-57. Withdrawal revocations may be made for several reasons. Some are effected in order to permit sale of the land; some for record-clearing purposes, where the withdrawal designation has been superseded by congressional action or overlaps with another withdrawal designation; some in order to restore the land to multiple use management pursuant to § 102(a)(7) of the FLPMA, 43 USC § 1701(a)(7) (1982 ed) [43 USCS § 1701(a)(7)]. App 142-145.

Third, the Secretary engages in the ongoing process of classifying public lands, either for multiple-use management, 43 CFR pt 2420 (1988), for disposal, pt 2430, or for other uses. Classification decisions may be initiated by petition, pt 2450, or by the BLM itself, pt 2460. Regulations promulgated

[497 US 879]

by the Secretary prescribe the procedures to be followed in the case of each type of classification determination.

II

In its complaint, respondent averred generally that the reclassification of some withdrawn lands and the return of others to the public domain would open the lands up to mining activities, thereby destroying their natural beauty. Respondent alleged that petitioners, in the course of administering the Nation's public lands, had violated the FLPMA by failing to "develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands," 43 USC § 1712(a) (1982 ed) [43 USCS § 1712(a)]; failing to submit recommendations as to withdrawals in the 11 western States to the President, § 1714*(l)*; failing to consider multiple uses for the disputed lands, § 1732(a), focusing inordinately on such uses as mineral exploitation and development; and failing to provide public notice of decisions, §§ 1701(a)(5), 1712(c)(9), 1712(f), and 1739(e). Respondent also claimed that petitioners had violated NEPA, which requires federal agencies to "include in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action." 42 USC § 4332(2)(C) (1982 ed) [42 USCS § 4332(2)(C)]. Finally, respondent alleged that all of the above actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and should therefore be set aside pursuant to § 10(e) of the APA, 5 USC § 706 [5 USCS § 706]. Appended to the amended complaint was a schedule of specific land status determinations, which the complaint stated had been "taken by defendants since January 1, 1981"; each was identified by a listing in the Federal Register.

In December 1985, the District Court granted respondent's motion for a preliminary injunction prohibiting petitioners from "[m]odifying, terminating or altering any withdrawal, classification, or other designation governing the protection

of lands in the public domain that was in effect on January 1, 1981," and from "[t]aking any action inconsistent" with any such withdrawal, classification, or designation. App to Pet for Cert 185a. In a subsequent order, the court denied petitioners' motion under Rule 12(b) of the Federal Rules of Civil Procedure to dismiss the complaint for failure to demonstrate standing to challenge petitioners' actions under the APA, 5 USC § 702 [5 USCS § 702]. App to Pet for Cert 183a. The Court of Appeals affirmed both orders. National Wildlife Federation v Burford, 266 US App DC 241, 835 F2d 305 (1987). As to the motion to dismiss, the Court of Appeals found sufficient to survive the motion the general allegation in the amended complaint that respondent's members used environmental resources that would be damaged by petitioners' actions. See id., at 248, 835 F2d, at 312. It held that this allegation, fairly read along with the balance of the complaint, both identified particular land-status actions that respondent sought to challenge—since at least some of the actions complained of were listed in the complaint's appendix of Federal Register references—and asserted harm to respondent's members attributable to those particular actions. Id., at 249, 835 F2d, at 313. To support the latter point, the Court of Appeals pointed to the affidavits of two of respondent's members, Peggy Kay Peterson and Richard Erman, which claimed use of land "in the vicinity" of the land covered by two of the listed actions. Thus, the Court of Appeals concluded, there was "concrete indication that [respondent's] members use specific lands covered by the agency's Program and will be adversely affected by the agency's actions," and the complaint was "sufficiently specific for purposes of a motion to dismiss." Ibid. On petitions for rehearing, the Court of Appeals stood by its denial of the motion to dismiss and directed the parties and the District Court "to proceed with this litigation with dispatch." National Wildlife Federation v Burford, 269 US App DC 271, 272, 844 F2d 889, 890 (1988).

Back before the District Court, petitioners again claimed, this time by means of a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (which motion had been outstanding during the proceedings before the Court of Appeals), that respondent had no standing to seek judicial review of petitioners' actions under the APA. After argument on this motion, and in purported response to the court's postargument request for additional briefing, respondent submitted four additional member affidavits pertaining to the issue of standing. The District Court rejected them as untimely, vacated the injunction, and granted the Rule 56 motion to dismiss. It noted that neither its earlier decision nor the Court of Appeals' affirmance controlled the question, since both pertained to a motion under Rule 12(b). It found the Peterson and Erman affidavits insufficient to withstand the Rule 56 motion, even as to judicial review of the particular classification decisions to which they pertained. And even if they had been adequate for that limited purpose, the court said, they could not support respondent's attempted APA challenge to "each of the 1250 or so individual classification terminations and withdrawal revocations" effected under the land withdrawal review program. National Wildlife Federation v Burford, 699 F Supp 327, 332 (DC 1988).

[5a] This time the Court of Appeals reversed. National Wildlife Federation v Burford, 278 US App DC 320, 878 F2d 422 (1989). It both found the Peterson and Erman affidavits sufficient in themselves and held that it was an abuse of discretion not to consider the four additional affidavits as well.[1] The Court of Appeals also concluded that

[497 US 882]

standing to challenge individual classification and withdrawal decisions conferred standing to challenge all such decisions under the land withdrawal review program. We granted certiorari. 493 US 1042, 107 L Ed 2d 830, 110 S Ct 834 (1990).

III

A

[1b, 6a] We first address respondent's claim that the Peterson and Erman affidavits alone suffice to establish respondent's right to judicial review of petitioners' actions. Respondent does not contend that either the FLPMA or NEPA provides a private right of action for violations of its provisions. Rather, respondent claims a right to judicial review under § 10(a) of the APA, which provides:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 USC § 702 [5 USCS § 702].

This provision contains two separate requirements. First, the person claiming a right to sue must identify some "agency action" that affects him in the specified fashion; it is judicial review "thereof" to which he is entitled. The meaning of "agency action" for purposes of § 702 is set forth in 5 USC § 551(13) [5 USCS § 551(13)], see 5 USC § 701(b)(2) [5 USCS § 701(b)(2)] ("For the purpose of this chapter . . . 'agency action' ha[s] the meanin[g] given . . . by section 551 of this title"), which defines the term as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act," 5 USC § 551(13) [5 USCS § 551(13)]. When, as here, review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the "agency action" in question must be "final agency action." See 5 USC § 704 [5 USCS § 704] ("Agency action made reviewable by statute and *final* agency action for which there is no other adequate remedy in a court are subject to judicial review" (emphasis added).

[497 US 883]

[6b] Second, the party seeking review under § 702 must show that he has "suffer[ed] legal wrong" because of the challenged agency action, or is

---

[1] **[5b]** As an additional basis for its conclusion, the Court of Appeals held that the earlier panel's finding that the Peterson and Erman affidavits were sufficient to establish respondent's right to sue was the "law of the case." We do not address this conclusion, as the earlier panel's ruling does not, of course, bind this Court. Messenger v Anderson, 225 US 436, 444, 56 L Ed 1152, 32 S Ct 739 (1912).

"adversely affected or aggrieved" by that action "within the meaning of a relevant statute." Respondent does not assert that it has suffered "legal wrong," so we need only discuss the meaning of "adversely affected or aggrieved . . . within the meaning of a relevant statute." As an original matter, it might be thought that one cannot be "adversely affected or aggrieved *within the meaning*" of a statute unless the statute in question uses those terms (or terms like them)—as some pre-APA statutes in fact did when conferring rights of judicial review. See, e. g. Federal Communications Act of 1934, § 402(b)(2), 48 Stat 1093, as amended, 47 USC § 402(b)(6) (1982 ed) [47 USCS § 402(b)(6)]. We have long since rejected that interpretation, however, which would have made the judicial review provision of the APA no more than a restatement of pre-existing law. Rather, we have said that to be "adversely affected or aggrieved . . . within the meaning" of a statute, the plaintiff must establish that the injury he complains of *(his* aggrievement, or the adverse effect *upon him)* falls within the "zone of interests" sought to be protected by the statutory provision whose violation forms the legal basis for his complaint. See Clarke v Securities Industry Assn. 479 US 388, 396-397, 93 L Ed 2d 757, 107 S Ct 750 (1987). Thus, for example, the failure of an agency to comply with a statutory provision requiring "on the record" hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be "adversely affected within the meaning" of the statute.

B

[1c, 7a] Because this case comes to us on petitioners' motion for summary judgment, we must assess the record under the

[497 US 884]

standard set forth in Rule 56 of the Federal Rules of Civil Procedure. Rule 56(c) states that a party is entitled to summary judgment in his favor "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(e) further provides:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."

As we stated in Celotex Corp. v Catrett, 477 US 317, 91 L Ed 2d 265, 106 S Ct 2548 (1986), "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id., at 322, 91 L Ed 2d 265, 106 S Ct 2548. Where no such showing is made, "[t]he moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." Id., at 323, 91 L Ed 2d 265, 106 S Ct 2548.

[7b, 8] These standards are fully applicable when a defendant moves for summary judgment, in a suit brought under § 702, on the ground that the plaintiff has failed to show that he is "adversely affected or aggrieved by agency action within the meaning of a relevant statute." The burden is on the party seeking review under § 702 to set forth specific facts (even though they may be controverted by the Government) showing that he has satisfied its terms. Sierra Club v Morton,

405 US 727, 740, 31 L Ed 2d 636, 92 S Ct 1361 (1972). Celotex made clear that Rule 56 does not require the moving party to *negate* the elements of the nonmoving party's case; to the contrary, "regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied." 477 US, at 323, 91 L Ed 2d 265, 106 S Ct 2548.

C

[1d] We turn, then, to whether the specific facts alleged in the two affidavits considered by the District Court raised a genuine issue of fact as to whether an "agency action" taken by petitioners caused respondent to be "adversely affected or aggrieved . . . within the meaning of a relevant statute." We assume, since it has been uncontested, that the allegedly affected interests set forth in the affidavits—"recreational use and aesthetic enjoyment"—are sufficiently related to the purposes of respondent association that respondent meets the requirements of § 702 if any of its members do. Hunt v Washington State Apple Advertising Comm'n, 432 US 333, 53 L Ed 2d 383, 97 S Ct 2434 (1977).

[9] As for the "agency action" requirement, we think that each of the affidavits can be read, as the Court of Appeals believed, to complain of a particular "agency action" as that term is defined in § 551. The parties agree that the Peterson affidavit, judging from the geographic area it describes, must refer to that one of the BLM orders listed in the appendix to the complaint that appears at 49 Fed Reg 19904-19905 (1984), an order captioned W-6228 and dated April 30, 1984, terminating the withdrawal classification of some 4,500 acres of land in that area. See, e.g., Brief for Petitioners 8-10. The parties also appear to agree, on the basis of similar deduction, that the Erman affidavit refers to the BLM order listed in the appendix that appears at 47 Fed Reg 7232-7233

(1982), an order captioned Public Land Order 6156 and dated February 18, 1982.

[1e, 10] We also think that whatever "adverse effect" or "aggrievement" is established by the affidavits was "within the meaning of the relevant statute"—i.e., met the "zone of interests" test. The relevant statute, of course, is the statute whose violation is the gravamen of the complaint—both the FLPMA and NEPA. We have no doubt that "recreational use and aesthetic enjoyment" are among the *sorts* of interests those statutes were specifically designed to protect. The only issue, then, is whether the facts alleged in the affidavits showed that those interests *of Peterson and Erman* were actually affected.

The Peterson affidavit averred:

> "My recreational use and aesthetic enjoyment of federal lands, particularly those in the vicinity of South Pass-Green Mountain, Wyoming have been and continue to be adversely affected in fact by the unlawful actions of the Bureau and the Department. In particular, the South Pass-Green Mountain area of Wyoming has been opened to the staking of mining claims and oil and gas leasing, an action which threatens the aesthetic beauty and wildlife habitat potential of these lands." App to Pet for Cert 191a.

Erman's affidavit was substantially the same as Peterson's, with respect to all except the area involved; he claimed use of land "in the vicinity of Grand Canyon National Park, the Arizona Strip (Kanab Plateau), and the Kaibab National Forest." Id., at 187a.

The District Court found the Peterson affidavit inadequate for the following reasons:

> "Peterson . . . claims that she uses federal lands *in the vicinity* of the South Pass-Green Mountain area of Wyoming for recreational purposes and for aesthetic enjoyment and that her recreational and aesthetic enjoyment
>
> [497 US 887]
>
> has been and continues to be adversely affected as the result of the decision of BLM to open it to the staking of mining claims and oil and gas leasing. . . . This decision [W-6228] opened up to mining approximately 4500 acres within a two million acre area, the balance of which, with the exception of 2000 acres, has always been open to mineral leasing and mining. . . . There is no showing that Peterson's recreational use and enjoyment extends to the particular 4500 acres covered by the decision to terminate classification to the remainder of the two million acres affected by the termination. All she claims is that she uses lands 'in the vicinity.' The affidavit on its face contains only a bare allegation of injury, and fails to show specific facts supporting the affiant's allegation." 699 F Supp, at 331 (emphasis in original).

The District Court found the Erman affidavit "similarly flawed."

> "The magnitude of Erman's claimed injury stretches the imagination. . . . [T]he Arizona Strip consists of all lands in Arizona north and west of the Colorado River on approximately 5.5 million acres, an area one-eighth the size of the State of Arizona. Furthermore, virtually the entire Strip is and for many years has been open to uranium and other metalliferous mining. The revocation of withdrawal [in Public Land Order 6156] concerned only non-metalliferous mining in the western one-third of the Arizona Strip, an area possessing no potential for non-metalliferous mining." Id., at 332.

The Court of Appeals disagreed with the District Court's assessment as to the Peterson affidavit (and thus found it unnecessary to consider the Erman affidavit) for the following reason:

> "If Peterson was not referring to lands in this 4500-acre affected area, her allegation of impairment to her use and enjoyment would be meaningless, or perjurious. . . .
>
>
>
> [T]he trial court overlooks the fact that unless Peterson's language is read to refer to the lands affected by the Program, the affidavit is, at best, a meaningless document.
>
> "At a minimum, Peterson's affidavit is ambiguous regarding whether the adversely affected lands are the ones she uses. When presented with ambiguity on a motion for summary judgment, a District Court must resolve any factual issues of controversy in favor of the non-moving party . . . . This means that the District Court was obliged to resolve any factual ambiguity in favor of NWF, and would have had to assume, for the purposes of summary judgment, that Peterson used the 4500 affected acres." 278 US App DC, at 329, 878 F2d, at 431.

[11] That is not the law. In ruling upon a Rule 56 motion, "a District Court must resolve any factual issues of controversy in favor of the non-moving party" only in the sense that, where the facts specifically averred by that party contradict facts specifically averred by the movant, the motion must be denied. That is a world apart from "assuming" that general averments embrace the "specific facts" needed to sustain the complaint. As set forth above, Rule 56(e) provides that judgment "shall be entered" against the nonmoving party unless affidavits or other evidence "set forth specific facts showing that there is a genuine issue for trial." The object of this provision is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit. Cf. Anderson v Liberty Lobby, Inc., 477 US 242, 249, 91 L Ed 2d 202, 106 S Ct 2505 (1986) ("[T]he plaintiff could not rest on his allegations of a conspiracy to get to a jury without 'any significant probative evidence tending to support the complaint' "), quoting First National Bank of Ariz. v Cities Service Co. 391 US 253, 290, 20 L Ed 2d 569, 88 S Ct 1575 (1968). Rather, the purpose of Rule 56 is to enable a party who believes there is no genuine dispute as to a specific fact essential to the other side's case to demand at least one

sworn averment of that fact before the lengthy process of litigation continues.

[1f] At the margins there is some room for debate as to how "specific" must be the "specific facts" that Rule 56(e) requires in a particular case. But where the fact in question is the one put in issue by the § 702 challenge here—whether one of respondent's members has been, or is threatened to be, "adversely affected or aggrieved" by Government action—Rule 56(e) is assuredly not satisfied by averments which state only that one of respondent's members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action. It will not do to "presume" the missing facts because without them the affidavits would not establish the injury that they generally allege. That converts the operation of Rule 56 to a circular promenade: plaintiff's complaint makes general allegation of injury; defendant contests through Rule 56 existence of specific facts to support injury; plaintiff responds with affidavit containing general allegation of injury, which must be deemed to constitute averment of requisite specific facts since otherwise allegation of injury would be unsupported (which is precisely what defendant claims it is).

[12] Respondent places great reliance, as did the Court of Appeals, upon our decision in United States v Students Challenging Regulatory Agency Procedures (SCRAP), 412 US 669, 37 L Ed 2d 254, 93 S Ct 2405 (1973). The SCRAP opinion, whose expansive expression of what would suffice for § 702 review under its particular facts has never since been emulated by this Court, is of no relevance here, since it involved not a Rule 56 motion for summary judgment but a Rule 12(b) motion to dismiss on the pleadings. The latter, unlike the former, presumes that general allegations embrace those specific facts that are necessary to support the claim. Conley v Gibson, 355 US 41, 45-46, 2 L Ed 2d 80, 78 S Ct 99 (1957).

[497 US 890]

IV

[2b] We turn next to the Court of Appeals' alternative holding that the four additional member affidavits proffered by respondent in response to the District Court's briefing order established its right to § 702 review of agency action.

A

[2c, 4b, 13] It is impossible that the affidavits would suffice, as the Court of Appeals held, to enable respondent to challenge the entirety of petitioners' so-called "land withdrawal review program." That is not an "agency action" within the meaning of § 702, much less a "final agency action" within the meaning of § 704. The term "land withdrawal review program" (which as far as we know is not derived from any authoritative text) does not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations. It is simply the name by which petitioners have occasionally referred to the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans as required by the FLPMA. It is no more an identifiable "agency action"—much less a "final agency action"—than a "weapons procurement program" of the Department of Defense or a "drug interdiction program" of the Drug Enforcement Administration. As the District Court explained, the "land withdrawal review program" extends to, currently at least, "1250 or so individual classification terminations and withdrawal revocations." 699 F Supp, at 332.[2]

---

[2] Contrary to the apparent understanding of the dissent, we do not contend that no "land withdrawal review program" exists, any more than we would contend that no weapons procurement program exists. We merely assert that it is not an identifiable "final agency action" for purposes of the APA. If there is in fact some specific order or regulation, applying some particular measure across the board to all individual classification terminations and withdrawal revocations, and if that order or regulation is final, and has become ripe for review in the manner we discuss subsequently in text, it can of course be challenged under the APA by a person adversely affected—and the entire "land withdrawal review program,"

[14a] Respondent alleges that violation of the law is rampant within this program—failure to revise land use plans in proper fashion, failure to submit certain recommendations to Congress, failure to consider multiple use, inordinate focus upon mineral exploitation, failure to provide required public notice, failure to provide adequate environmental impact statements. Perhaps so. But respondent cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made. Under the terms of the APA, respondent must direct its attack against some particular "agency action" that causes it harm. Some statutes permit broad regulations to serve as the "agency action," and thus to be the object of judicial review directly, even before the concrete effects normally required for APA review are felt. Absent such a provision, however, a regulation is not ordinarily considered the type of agency action "ripe" for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him. (The major exception, of course, is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately. Such agency action is "ripe" for review at once, whether or not explicit statutory review apart from the APA is provided. See Abbott Laboratories v Gardner, 387 US 136, 152-154, 18 L Ed 2d 681, 87 S Ct 1507 (1967); Gardner v Toilet Goods Assn., Inc. 387 US 167, 171-173, 18 L Ed 2d 704, 87 S Ct 1526 (1967). Cf. Toilet

Goods Assn., Inc. v Gardner, 387 US 158, 164-166, 18 L Ed 2d 697, 87 S Ct 1520 (1967).)

[2d, 15a] In the present case, the individual actions of the BLM identified in the six affidavits can be regarded as rules of general applicability (a "rule" is defined in the APA as agency action of "general or particular applicability *and future effect,"* 5 USC § 551(4) [5 USCS § 551(4)] (emphasis added)) announcing, with respect to vast expanses of territory that they cover, the agency's intent to grant requisite permission for certain activities, to decline to interfere with other activities, and to take other particular action if requested. It may well be, then, that even those individual actions will not be ripe for challenge until some further agency action or inaction more immediately harming the plaintiff occurs.[3] But it is at least

---

insofar as the content of that particular action is concerned, would thereby be affected. But that is quite different from permitting a generic challenge to all aspects of the "land withdrawal review program," as though that itself constituted a final agency action.

[3] Under the Secretary's regulations, any person seeking to conduct mining operations that will "cause a cumulative surface disturbance" of five acres or more must first obtain approval of a plan of operations. 43 CFR § 3809.1-4 (1988). Mining operations that cause surface disturbance of less than 5 acres do not require prior approval, but prior notice must be given to the district office of the BLM. § 3809.1-3. Neither approval nor notification is required only with respect to "casual use operations," § 3809.1-2, defined as "activities ordinarily resulting in only negligible disturbance of the Federal lands and resources," § 3809.0-5. (Activities are considered "casual" if "they do not involve the use of mechanized earth moving equipment or explosives or do not involve the use of motorized

entirely [497 US 893] certain that the flaws in the entire "program"—consisting principally of the many individual actions referenced in the complaint, and presumably actions yet to be taken as well—cannot be laid before the courts for wholesale correction under the APA, simply because one of them that is ripe for review adversely affects one of respondent's members.[4]

[497 US 894]

[14b] The case-by-case approach that this requires is understandably frustrating to an organization such as respondent, which has as its objective across-the-board protection of our Nation's wildlife and the streams and forests that support it. But this is the traditional, and remains the normal, mode of operation of the courts. Except where Congress explicitly provides for our correction

---

vehicles in areas designated as closed to off-road vehicles . . . ." Ibid.) Thus, before any mining use ordinarily involving more than "negligible disturbance" can take place, there must occur either agency action in response to a submitted plan or agency inaction in response to a submitted notice.

[15b] In one of the four new affidavits, Peggy Peterson, one of the original affiants, states that a corporation has filed a mine permit application with the BLM covering a portion of the land to which her original affidavit pertained. App to Brief in Opposition for Respondent National Wildlife Federation 16. If that permit is granted, there is no doubt that agency action ripe for review will have occurred; nor any doubt that, in the course of an otherwise proper court challenge, affiant Peterson, and through her respondent, would be able to call into question the validity of the classification order authorizing the permit. However, before the grant of such a permit, or (when it will suffice) the filing of a notice to engage in mining activities, or (when only "negligible disturbance" will occur) actual mining of the land, it is impossible to tell where or whether mining activities will occur. Indeed, it is often impossible to tell from a classification order alone whether mining activities will even be permissible. As explained in the uncontested affidavit of the BLM's Assistant Director of Land Resources:

"The lands may be subject to another withdrawal of comparable scope or they may be subject to classification segregations tantamount to such a withdrawal. In that case, the lands would not be opened to the operation of the public land laws so that the removal of one of the withdrawals has no practical effect. Another reason why there may not be any change is that before the revocation occurred, the lands may have been transferred into private ownership. Consequently, the withdrawal revocation amounts to nothing more than a paper transaction . . . In the alternative, a revoked withdrawal may open the lands to the operation of the public land and mineral laws. . . . Some withdrawal revocations are made without prior knowledge as to what subsequent disposition may be made of the lands. After the lands are opened, they might be transferred out of federal ownership by sale, exchange, or some other discretionary mode of disposal, not anticipated when the withdrawal was revoked. These subsequent discretionary actions require separate and independent decisionmaking that, obviously, are divorced from the prior revocation decision. Environmental and other management concerns and public participation are taken into account in relation to the post-revocation decisionmaking." Affidavit of Frank Edwards, Aug. 18, 1985, App 61-62.

[4] Nothing in this is contrary to our opinion in Automobile Workers v Brock, 477 US 274, 91 L Ed 2d 228, 106 S Ct 2523 (1986), cited by the Court of Appeals. That opinion did not discuss, and the respondent Secretary of Labor did not rely upon, the requirements of 5 USC § 702 [5 USCS § 702] and our ripeness jurisprudence in cases such as Abbott Laboratories v Gardner, 387 US 136, 18 L Ed 2d 681, 87 S Ct 1507 (1967); Gardner v Toilet Goods Assn. Inc. 387 US 167, 18 L Ed 2d 704, 87 S Ct 1526 (1967); and Toilet Goods Assn., Inc. v Gardner, 387 US 158, 18 L Ed 2d 697, 87 S Ct 1520 (1967). The only challenge made and decided, with respect to the individuals' right to sue, relied upon 19 USC § 2311(d) (1982 ed) [19 USCS § 2311(d)], which according to the Secretary of Labor made entertainment of that suit " 'contrary to Congress's incorporation of the state system into the administration of the Trade Act, and an affront to the integrity and authority of the state courts.' " 477 US, at 283, 91 L Ed 2d 228, 106 S Ct 2523, quoting Brief for Respondent in Automobile Workers, No. 84-1777, p 16.

of the administrative process at a higher level of generality, we intervene in the administration of the laws only when, and to the extent that, a specific "final agency action" has an actual or immediately threatened effect. Toilet Goods Assn. 387 US, at 164-166, 18 L Ed 2d 697, 87 S Ct 1520. Such an intervention may ultimately have the effect of requiring a regulation, a series of regulations, or even a whole "program" to be revised by the agency in order to avoid the unlawful result that the court discerns. But it is assuredly not as swift or as immediately far-reaching a corrective process as those interested in systemic improvement would desire. Until confided to us, however, more sweeping actions are for the other branches.

B

[3b] The Court of Appeals' reliance upon the supplemental affidavits was wrong for a second reason: The District Court did not abuse its discretion in declining to admit them. Petitioners filed their motion for summary judgment in September 1986; respondent filed an opposition but did not submit any new evidentiary materials at that time. On June 27, 1988, after the case had made its way for the first time through the Court of Appeals, the District Court announced that it would hold a hearing on July 22 on "the outstanding motions for summary judgment," which included petitioners' motion challenging respondent's § 702 standing. The hearing was held and, as noted earlier, the District Court issued an order directing respondent to file "a supplemental memorandum regarding

the issue of its standing to proceed." Record, Doc. No. 274. Although that plainly did not call for the submission of new evidentiary materials, it was in purported response to this order, on August 22, 1988, that respondent submitted (along with the requested legal memorandum) the additional affidavits. The only explanation for the submission (if it can be called an explanation) was contained in a footnote to the memorandum, which simply stated that "NWF now has submitted declarations on behalf of other members of NWF who have been injured by the challenged actions of federal defendants." Record, Doc No. 278, p 18, n 21. In its November 4, 1988, ruling granting petitioners' motion, the District Court rejected the additional affidavits as "untimely and in violation of [the court's briefing] Order." 699 F Supp, at 328, n 3.

[3c, 16a] Respondent's evidentiary submission was indeed untimely, both under Rule 56, which requires affidavits in opposition to a summary judgment motion to be served "prior to the day of the hearing," Fed R Civ P 56(c), and under Rule 6(d), which states more generally that "[w]hen a motion is supported by affidavit, . . . opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time." Rule 6(b) sets out the proper approach in the case of late filings:

> "When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is

> made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect. . . ."

This provision not only specifically confers the "discretion" relevant to the present issue, but also provides the mechanism [497 US 896] by which that discretion is to be invoked and exercised. First, any extension of a time limitation must be "for cause shown." Second, although extensions before expiration of the time period may be "with or without motion or notice," any *post*deadline extension must be "upon motion made," and is permissible only where the failure to meet the deadline "was the result of excusable neglect." Thus, in order to receive the affidavits here, the District Court would have had to regard the very filing of the late document as the "motion made" to file it,[5] it would have had to interpret "cause [497 US 897] shown" to mean merely "cause," since respondent made no "showing" of cause at all; and finally, it would have had to find as a substantive matter that there was indeed "cause" for the late filing, and that the failure to file on time "was the result of excusable neglect."

[3d, 17] This last substantive obstacle is the greatest of all. The Court of Appeals presumably thought it was overcome because "the papers on which the trial court relied were two years old by the time it requested supplemental memoranda" and because "there was no indication prior to the trial court's request that [respondent] should have doubted the adequacy of

---

5. **[16b]** The dissent asserts that a footnote in respondent's reply memorandum to the District Court was a "motion" within the meaning of Rule 6(b)(2), and was so obviously so that the District Court committed reversible error in failing to construe it that way. Post, at 909-910, 111 L Ed 2d, at 729-730, and n 10. We cannot agree. Rule 6(b) establishes a clear distinction between "requests" and "motions," and the one cannot be converted into the other without violating its provisions—or at least cannot be converted on the basis of such lax criteria that conversion would be not only marginally permissible but positively mandatory in the present case. Rule 6(b)(1) allows a court ("for cause shown" and "in its discretion") to grant a "request" for an extension of time, whether the request is made "with or without motion or notice," *provided* the request is made before the time for filing expires. *After* the time for filing has expired, however, the court (again "for cause shown" and "in its discretion") may extend the time only "upon motion." To treat all postdeadline "requests" as "motions" (if indeed any of them can be treated that way) would eliminate the distinction between predeadline and postdeadline filings that the Rule painstakingly draws. Surely the postdeadline "request," to be even *permissibly* treated as a "motion," must contain a high degree of formality and precision, putting the opposing party on notice that a motion is at issue and that he therefore ought to respond. The request here had not much of either characteristic. As for formality, it was not even made in a separate filing or in a separate appearance before the court, but was contained in a single sentence at the end of the first paragraph of one of the 18 single-spaced footnotes in a 20-page memorandum of law. Our district judges must read footnotes with new care if they are to be reversed for failing to recognize motions buried in this fashion. And as for precision, the request not only did not ask for any *particular* extension of time (7 days, 30 days), it did not specifically ask for an extension of time *at all,* but merely said that respondent "should be given adequate opportunity to supplement the record." Even this, moreover, was not requested (much less moved for) unconditionally, but only "[i]f the court intends to reverse its prior ruling [regarding NWF standing]." Record, Doc. No. 294, p 17, n 16. We think it quite impossible to agree with the dissent that the District Judge not only *might* treat this request as a motion, but that he was compelled to do so.

the affidavits it had already submitted." 278 US App DC, at 331, 878 F2d, at 433. We do not understand the relevance of the first point; the passage of so long a time as two years suggests, if anything, that respondent had more than the usual amount of time to prepare its response to the motion, and was more than moderately remiss in waiting until after the last moment. As to the suggestion of unfair surprise: A litigant is never justified in assuming that the court has made up its mind until the court expresses itself to that effect, and a litigant's failure to buttress its position because of confidence in the strength of that position is always indulged in at the litigant's own risk. In any case, whatever erroneous expectations respondent may have had were surely dispelled by the District Court's order in June 1988 announcing that the hearing on petitioners' motion would be held one month later. At least when that order issued, respondent was on notice that its right to sue was at issue, and that (absent proper motion) the time for filing any additional evidentiary materials was, at the latest, the day before the hearing.

[497 US 898]

Perhaps it is true that the District Court could have overcome all the obstacles we have described—apparent lack of a motion, of a showing, and of excusable neglect—to admit the affidavits at issue here. But the proposition that it was *compelled* to receive them—that it was an abuse of discretion to *reject* them—cannot be accepted.

V

[4c] Respondent's final argument is that we should remand this case for the Court of Appeals to decide whether respondent may seek § 702 review of petitioners' actions in its own right, rather than derivatively through its members. Specifically, it points to allegations in the amended complaint that petitioners unlawfully failed to publish regulations, to invite public participation, and to prepare an environmental impact statement with respect to the "land withdrawal review program" as a whole. In order to show that it is a "person . . . adversely affected or aggrieved" by these failures, it submitted to the District Court a brief affidavit (two pages in the record) by one of its vice presidents, Lynn A. Greenwalt, who stated that respondent's mission is to "inform its members and the general public about conservation issues" and to advocate improvements in laws and administrative practices "pertaining to the protection and enhancement of federal lands," App to Pet for Cert 193a-194a; and that its ability to perform this mission has been impaired by petitioners' failure "to provide adequate information and opportunities for public participation with respect to the Land Withdrawal Review Program." Id., at 194a. The District Court found this affidavit insufficient to establish respondent's right to seek judicial review, since it was "conclusory and completely devoid of specific facts." 699 F Supp, at 330. The Court of Appeals, having reversed the District Court on the grounds discussed above, did not address the issue.

We agree with the District Court's disposition. Even assuming that the affidavit set forth "specific facts," Fed R

[497 US 899]

Civ P 56(e), adequate to show injury to respondent through the deprivation of information; and even assuming that providing information to organizations such as respondent was one of the objectives of the statutes allegedly violated, so that respondent is "aggrieved within the meaning" of those statutes; nonetheless, the Greenwalt affidavit fails to identify any particular "agency action" that was the source of these injuries. The only sentences addressed to that point are as follows:

> "NWF's ability to meet these obligations to its members has been significantly impaired by the failure of the Bureau of Land Management and the Department of the Interior to provide adequate information and opportunities for public participation with respect to the Land Withdrawal Review Program. These interests of NWF have been injured by the actions of the Bureau and the Department and would be irreparably harmed by the continued failure to provide meaningful opportunities for public input and access to information regarding the Land Withdrawal Review Program." App to Pet for Cert 194a.

As is evident, this is even more deficient than the Peterson and Erman affidavits, which contained geographical descriptions whereby at least an action as general as a particular classification decision could be identified as the source of the grievance. As we discussed earlier, the "land withdrawal review program" is not an identifiable action or event. With regard to alleged deficiencies in providing information and permitting public participation, as with regard to the other illegalities alleged in the complaint, respondent cannot demand a general judicial review of the BLM's day-to-day operations. The Greenwalt affidavit, like the others, does not set forth the specific facts necessary to survive a Rule 56 motion.

[497 US 900]

* * *

For the foregoing reasons, the judgment of the Court of Appeals is reversed.

It is so ordered.

SEPARATE OPINION

Justice **Blackmun,** with whom Justice **Brennan,** Justice **Marshall,** and Justice **Stevens** join, dissenting.

In my view, the affidavits of Peggy Kay Peterson and Richard Loren Erman, in conjunction with other record evidence before the District Court on the motions for summary judgment, were sufficient to establish the standing of the National Wildlife Federation (Federation or NWF) to bring this suit. I also conclude that the District Court abused its discretion by refusing to consider supplemental affidavits filed after the hearing on the parties' cross-motions for summary judgment. I therefore would affirm the judgment of the Court of Appeals.

I

The Federation's asserted injury in this case rested upon its claim that the Government actions challenged here would lead to increased mining on public lands; that the mining would result in damage to the environment; and that the recreational opportunities of NWF's members would consequently be diminished. Abundant record evidence supported the Federation's assertion that on lands newly opened for mining, mining in fact would occur.[1] Similarly, the record furnishes ample support for NWF's contention that mining activities can be expected to cause severe environmental

damage to the affected lands.[2] The District Court held, however, that the Federation had not adequately identified particular members who were harmed by the consequences of the Government's actions. Although two of NWF's members expressly averred that their recreational activities had been impaired, the District Court concluded that these affiants had not identified with sufficient precision the particular sites on which their injuries occurred. The majority, like the District Court, holds that the averments of Peterson and Erman were insufficiently specific to withstand a motion for summary judgment. Although these affidavits were not models of precision, I believe that they were adequate at least to create a genuine issue of fact as to the organization's injury.

As the Court points out, the showing (whether as to standing or the merits) required to overcome a motion for summary judgment is more extensive than that required in the context of a motion to dismiss. The principal difference is that in the former context *evidence* is required, while in the latter setting the litigant may rest upon the allegations of his complaint. See Celotex Corp. v Catrett, 477 US 317, 324, 91 L Ed 2d 265, 106 S Ct 2548 (1986) (Federal Rule of Civil Procedure 56(e) "requires the nonmoving party to go beyond the pleadings"). In addition, Rule 56(e) requires that the party opposing summary judgment "must set forth *specific* facts showing that there is a genuine issue for trial" (emphasis added). Thus, Courts of Appeals have reiterated that "conclusory" allegations unsupported by "specific" evidence will be insufficient to establish a genuine issue of fact.[3]

---

[1] Prior to the District Court's entry of the preliminary injunction, 406 mining claims had been staked in the South Pass-Green Mountain area alone. App 119. An exhibit filed by the federal parties indicated that over 7,200 claims had been filed in 12 Western States. Exh. 1 to Affidavit of Joseph Martyak (Apr. 11, 1986) Exh. 1.

[2] A Bureau of Land Management (BLM) draft of a Resource Management Plan/Environmental Impact Statement for the Lander, Wyo, Resource Area stated: "In the Green Mountain Management Unit . . . significant long-term impacts to elk and mule deer herds could occur from habitat losses caused by oil and gas activities over the next 60 years. . . . In the South Pass Management Unit, significant acreages of lodgepole pine forest and aspen conifer woodland habitat types could be disturbed, which would cause significant long-term impacts to moose and elk. . . . If gold mining activities continued to erode these high-value habitats, trout fisheries, the Lander moose herd, the beaver pond ecosystems, and the populations of many other wildlife species would suffer significant cumulative negative effects." Draft RMP/EIS, pp 226-228 (Exh. 3 to Defendant-Intervenors' Reply to Plaintiff's Opposition to Defendants' Motions for Stay Pending Appeal (May 14, 1986)).

A BLM Mineral Report issued June 17, 1982, concluded that mining and associated activities "could have an adverse impact on crucial moose habitat, deer habitat, some elk habitat, and a variety of small game and bird species. Improvements at campgrounds, as well as land in the immediate vicinity, could either be damaged or destroyed. These activities could make it difficult for the BLM to manage the forest production and harvesting in the South Pass area. Historical and cultural resources which have and have not been identified could be either damaged or destroyed." Defendant-Intervenors' Exh 7 (attached as Appendix 1 to Plaintiff National Wildlife Federation's Statement of Points and Authorities in Support of Its Standing To Proceed (Aug 22, 1988)).

[3] See, e.g., May v Department of Air Force, 777 F2d 1012, 1016 (CA5 1985); First Com-

The requirement that evidence be submitted is satisfied here: The Federation has offered the sworn statements of two of its members. There remains the question whether the allegations in these affidavits were sufficiently precise to satisfy the requirements of Rule 56(e). The line of demarcation between "specific" and "conclusory" allegations is hardly a bright one. But, to my mind, the allegations contained in the Peterson and Erman affidavits, in the context of the record as a whole, were adequate to defeat a motion for summary judgment. These affidavits, as the majority acknowledges, were at least sufficiently precise to enable Bureau of Land Management (BLM) officials to identify the particular termination orders to which the affiants referred. See ante, at 885-886, 111 L Ed 2d, at 714. And the affiants averred that their "recreational use and aesthetic enjoyment of federal lands . . . have been and continue to be adversely affected in fact by the unlawful

[497 US 903]

actions of the Bureau and the Department." App to Pet for Cert 188a (Erman affidavit), 191a (Peterson affidavit). The question, it should be emphasized, is not whether the NWF has *proved* that it has standing to bring this action, but simply whether the materials before the District Court established "that there is a genuine issue for trial," see Rule 56(e), concerning the Federation's standing. In light of the principle that "[o]n summary judgment the inferences to be drawn from the underlying facts contained in [evidentiary] materials must be viewed in the light most favorable to the party opposing the motion," United States v Diebold, Inc. 369 US 654, 655, 8 L Ed 2d 176, 82 S Ct 993 (1962), I believe that the evidence before the District Court raised a genuine factual issue as to NWF's standing to sue.

No contrary conclusion is compelled by the fact that Peterson alleged that she uses federal lands "in the vicinity of South Pass-Green Mountain, Wyoming," App to Pet for Cert 191a, rather than averring that she uses the precise tract that was recently opened to mining. The agency itself has repeatedly referred to the "South Pass-Green Mountain area" in describing the region newly opened to mining.[4] Peterson's assertion that her use and enjoyment of federal lands *have been* adversely affected by the agency's decision to permit more extensive mining is, as the Court of Appeals stated, National Wildlife Federation v Burford, 278 US App DC 320, 329, 878 F2d 422, 431 (1989), "meaningless, or perjurious" if the lands she uses do not include those harmed by mining undertaken pursuant to termination order W-6228.[5] To read particular assertions within the affidavit in light of the document as a whole is, as the majority might put it, "a world apart" from "presuming" facts that are neither stated nor implied simply because without them the

[497 US 904]

plaintiff would lack standing. The Peterson and Erman affidavits doubtless could have been more art-

---

modity Traders, Inc. v Heinold Commodities, Inc. 766 F2d 1007, 1011 (CA7 1985); Maldonado v Ramirez, 757 F2d 48, 51 (CA3 1985); Galindo v Precision American Corp. 754 F2d 1212, 1216 (CA5 1985).

[4] See, e.g., App 123-139 (Declaration of Jack Kelly).

[5] The areas harmed or threatened by mining and associated activities may extend well beyond the precise location where mining occurs. See n 2, supra.

fully drafted, but they definitely were sufficient to withstand the federal parties' summary judgment motion.

II

I also conclude that the District Court abused its discretion in refusing to consider the supplemental affidavits filed by NWF after the hearing on the summary judgment motion.[6] The court's decision abruptly derailed the Federation's lawsuit after three years of proceedings involving massive time and expense. The District Court and Court of Appeals both had concluded that NWF's claims were sufficiently substantial to warrant the entry of a nationwide injunction. Whatever the ultimate merits of the Federation's claims, litigation of this magnitude should not be aborted on technical grounds if that result legitimately can be avoided. The majority's approach reflects an insufficient appreciation both of the realities of complex litigation and of the admonition that the Federal Rules of Civil Procedure "shall be construed to secure

the just, speedy, and inexpensive determination of every action." Rule 1.

That a requirement is "technical" does not, of course, mean that it need not be obeyed. And an appeal to the "spirit" of the Federal Rules is an insufficient basis for ignoring the import of their text. If the Rules imposed an absolute deadline for the submission of evidentiary materials, the District Court could not be faulted for strictly enforcing that deadline, even though the result in a particular case might be unfortunate. But, as the Court acknowledges, the Rules expressly permit the District Court to exercise discretion in deciding whether affidavits in opposition to a summary judgment motion may be submitted after the hearing.[7] Once the District Court's

---

[6] Five supplemental affidavits were filed. The first was submitted by Peggy Kay Peterson, in clarification of her earlier affidavit: "A substantial portion of the lands which I use . . . are identical to those lands" newly opened to mining in the South Pass-Green Mountain area. Peterson Supplemental Affidavit, App in No. 88-5397 (CADC), p 356. Ms. Peterson also asserted that "US Energy Corporation has filed a mine permit application with the Bureau and Department, (US Energy Application, TFN 2 4/86), which includes a proposal to mine a significant portion of the federal lands which I use for recreational purposes and aesthetic enjoyment." Id., at 355-356. The other affiants were NWF members David Doran, Merlin McColm, Stephen Blomeke, and Will Ouellette. These individuals identified termination orders that had opened to mining particular tracts of land used by the affiants for recreation and aesthetic enjoyment.

The federal parties do not concede that the supplemental affidavits established with certainty the Federation's standing; they contend that further discovery might show the affiants' allegations to be untrue. The federal parties do concede, however, that the supplemental affidavits were not facially deficient. Tr of Oral Arg 19.

[7] Rule 56(c) provides that when a motion for summary judgment is filed, the "adverse party prior to the day of hearing may serve opposing affidavits." Under Rule 56(e), the district court "may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." Rule 6(d) states: "When a motion is supported by affidavit, . . . opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time." The district court's authority to permit service "at some other time" is governed in turn by Rule 6(b), which provides that when an act is required to be performed by a specified time, the district court may "upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect." See 4A C. Wright & A. Miller, Federal Practice and Procedure § 1165, p 475 (2d ed 1987) (Rule 6(b) "gives the court extensive flexibility to

power to accept untimely affidavits is recognized, the question whether that power should be exercised in a particular instance must be answered by reference to the explanation for the litigant's omission and the purposes the Rules are designed to serve. In my view, NWF showed adequate cause for its failure to file the supplemental affidavits prior to the hearing. Moreover, the organization's untimely filing in no way disserved the purposes of Rule 56(c), and the federal parties suffered no prejudice as a consequence of the

delay. Under these circumstances, I believe that the District Court's refusal to consider these submissions constituted an abuse of discretion.

The Federal Rules require that affidavits in opposition to a motion ordinarily must be served at least one day prior to the hearing; the Rules provide, however, that the affidavits may be filed at a later time "where the failure to act was the result of excusable neglect." Rule 6(b); see n 7, supra. Prior to the July 22, 1988, hearing on the parties' cross-motions for summary judgment, NWF had been assured repeatedly that its prior submissions were sufficient to establish its standing to sue. In its memorandum opinion granting the Federation's motion for a preliminary injunction, the District Court stated: "We continue to find irreparable injury to plaintiff and reaffirm plaintiff's standing to bring this action." National Wildlife Federation v Burford, 676 F Supp 280, 281 (DC 1986).

Later that year the federal parties sought additional discovery on the question of standing. NWF sought to quash discovery, arguing that "[t]he Court should bar any additional discovery on this issue because (1) it has already found that plaintiff has standing; (2) plaintiff has already produced affidavits which demonstrate standing and therefore any additional discovery would be unreasonably cumulative, duplicative, burdensome and expensive within the meaning of Rule 26(c)(1); and (3) contrary to the government defendants' apparent theory, plaintiff need not demonstrate injury as to each and every action that is part of the program." Memorandum of Points and Authorities in Support of Plaintiff's Motion To Quash and for a Protective Order 5-6 (July 1, 1986). In the alternative, NWF argued that if additional discovery on standing was to be ordered, it should be confined to the requirement that a limited number of additional affidavits be submitted. Id., at 22. The District Court, on July 14, 1986, granted in full the Federation's motion to quash and ordered "that no further discovery of plaintiff or

its members, officers, employees, agents, servants, or attorneys shall be permitted until subsequent order of this court, if any." App to Pet for Cert 170a-171a. When the District Court's grant of a preliminary injunction was subjected to appellate review, the Court of Appeals concluded that the Peterson and Erman affidavits "provide a concrete indication that the Federation's members use specific lands covered by the agency's Program and will be adversely affected by the agency's actions." National Wildlife Federation v Burford, 266 US App DC 241, 249, 835 F2d 305, 313

---

modify the fixed time periods found throughout the rules, whether the enlargement is sought before or after the actual termination of the allotted time").

(1987).[8] The majority's statement that "a litigant is never justified in assuming that the court has made up its mind until the court expresses itself to that effect," ante, at 897, 111 L Ed 2d, at 722, is therefore simply irrelevant to the present case: The District Court and the Court of Appeals repeatedly had indicated that the Federation had offered sufficient evidence of its standing.

Nor did the District Court's order of June 27, 1988, scheduling a motion hearing for the following July 22, place NWF on notice that its claim of standing might be reconsidered. That order made clear that the hearing would consider the summary judgment motions of both the federal parties and

the Federation. The principal submission of the federal parties relevant to the hearing was the Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendants' Motion for Summary Judgment and/or for Dissolution of the Preliminary Injunction Issued on February 10, 1986; that memorandum was filed on September 12, 1986. This 86-page memorandum included only 9½ pages devoted to standing, and half of that discussion set forth the federal parties claim that no broad programmatic challenge could succeed even if the Peterson and Erman affidavits adequately alleged injury from Government decisions as to particular tracts of land. Moreover, even the attack on the Peterson and Erman affidavits did not purport to show that summary judgment for the federal parties should be entered on the ground that the Federation lacked standing. Rather, the federal parties argued principally that summary judgment *for* NWF would be inappropriate because a genuine factual dispute existed as to the Federation's standing to sue. See Defendants' Memorandum, at 45-47. In fact, the 86-page memorandum included only *two sentences* arguing that the federal parties should be awarded summary judgment on standing grounds. Id., at 11-12, 85. The District Court's decision to schedule a hearing on the parties' cross-motions for summary judgment provided no hint that previous assurances concerning standing were open to reconsideration.[9]

Certainly the Federation *could*

---

[8] The Court of Appeals' discussion of standing occurred in the context of a motion to dismiss and therefore, by itself, might not assure NWF that it had made a sufficient showing to withstand a motion for summary judgment. But the Court of Appeals, like the District Court before it, also held that the Federation's showing of injury, as reflected in the Peterson and Erman affidavits, provided an adequate basis for a *preliminary injunction.* As the second Court of Appeals panel concluded, "the burden of establishing irreparable harm to support a request for a preliminary injunction is, if anything, at least as great as the burden of resisting a summary judgment motion on the ground that the plaintiff cannot demonstrate 'injury-in-fact.'" National Wildlife Federation v Burford, 278 US App DC 320, 330, 878 F2d 422, 432 (1989) (emphasis omitted). When the first panel affirmed the District Court's entry of a preliminary injunction, Judge Williams' separate opinion, concurring and dissenting, stated that "the specificity required for standing allegations to secure a preliminary injunction will normally be no less than that required on a motion for summary judgment." 266 US App DC, at 264, 835 F2d, at 328.

[9] At the hearing itself Fred R. Disheroon, the federal parties' attorney, argued at length on other points before turning to the issue of standing. He began that portion of his argument by observing that "perhaps the court doesn't want to hear me argue standing, but I think it is imperative that I address that in the context of this case." Tr of Motions Hearing 43 (July 22, 1988).

have submitted additional evidentiary materials in support of its claim of standing, even though it had no reason to believe that further submissions were necessary. But it would hardly enhance the efficiency

of the adjudicative process to encourage litigants to reargue questions previously settled in their favor. In my view, NWF established sufficient cause for its failure to submit the supplemental affidavits prior to the hearing.[10]

---

[10] The supplemental affidavits were submitted as an attachment to the supplemental legal memorandum on standing requested by the District Court. At the time of their submission, NWF stated only that "NWF now has submitted declarations on behalf of other members of NWF who have been injured by the challenged actions of federal defendants." Plaintiff National Wildlife Federation's Statement of Points and Authorities in Support of Its Standing To Proceed 18, n 21 (Aug. 22, 1988). However, in its reply memorandum on the issue, NWF addressed the contention of the federal parties and the defendant-intervenor that the affidavits should be ignored as untimely filed. NWF stated that "plaintiff heretofore, has relied on the court's previous rulings on NWF's standing. In its motion for a protective order against additional discovery, NWF argued that its standing had already been proven on the basis of the affidavits of Mr. Greenwalt, Ms. Peterson, and Mr. Erman. The court agreed and entered the requested protective order. If the court intends to reverse its prior ruling, then NWF respectfully requests that it should be given adequate opportunity to supplement the record." Plaintiff National Wildlife Federation's Reply Memorandum in Support of Its Standing To Proceed 17, n 16 (Sept. 14, 1988). The Federation also noted that Circuit precedent permitted the filing of supplemental affidavits on standing issues, even on appeal. Ibid., citing National Wildlife Federation v Hodel, 268 US App DC 15, 24, 839 F2d 694, 703 (1988). NWF offered the further explanation that "Ms. Peterson has supplemented her affidavit to include new information regarding a mine application which has been filed by U.S. Energy Corporation that includes a proposal to mine lands within the area of South Pass/Green Mountain previously closed to mining. For the record, NWF initially was told by officials of the Bureau of Land Management that the U. S. Energy mine application did not include any lands covered by the court's preliminary injunction. Otherwise, NWF would have supplemented Ms. Peterson's affidavit earlier." Reply Memorandum, at 12-13, n 13.

Along with its Reply Memorandum, NWF submitted an additional filing entitled Plaintiff National Wildlife Federation's Memorandum in Opposition to Defendant-Intervenors' Motion To Strike Plaintiff's Supplementation of the Record (Sept. 14, 1988). That filing stated: "For the reasons stated in [the reply memorandum] at page 17, n 16, plaintiff requests that defendant-intervenors' motion to strike be denied." (In light of this separate submission, addressed solely to the question whether the supplemental affidavits should be considered, and expressly referring to n 16 of the reply memorandum, it is difficult to fathom the Court's assertion that NWF's request was "buried" in the Federation's filings. See ante, at 896-897, n 5, 111 L Ed 2d, at 721.) This separate filing, in conjunction with the reply memorandum, satisfied Rule 6(b)'s requirement that the request for enlargement of time be made "upon motion." Though neither of these filings was expressly denominated a "motion," they met the requirements of Rule 7(b): They were submitted in writing, were signed by counsel, "state[d] with particularity the grounds therefor," and unambiguously "set forth the relief . . . sought." See Campos v LeFevre, 825 F2d 671, 676 (CA2 1987) ("[N]o particular form of words is necessary to render a filing a 'motion.' Any submission signed by a party that may fairly be read as a request to the district court to exercise its discretionary powers . . . should suffice"), cert denied, 484 US 1014, 98 L Ed 2d 667, 108 S Ct 718 (1988); Smith v Danyo, 585 F2d 83, 86 (CA3 1978) ("Rule 7(b) requires no more than that . . . a motion 'state with particularity the grounds' upon which it is based. Plainly, an affidavit which is filed to obtain an order disqualifying a judge satisfies the requirements of Rule 7(b). . . . The . . . failure to type in the word 'motion' above the word 'affidavit' in no way detracts from the notice which the affidavit gave of the nature of the application"). Cf. Snyder v Smith, 736 F2d 409, 419 (CA7) ("The Federal Rules are to be construed liberally so that erroneous nomenclature in a motion does not bind a party at his peril"), cert denied, 469 US 1037, 83 L Ed 2d 403, 105 S Ct 513 (1984); Miller v Transamerican Press, Inc. 709 F2d 524, 527

[497 US 910]

Moreover, the District Court's refusal to consider the additional submissions in this case did not significantly advance the interests that Rule 56(c) is designed to serve. The Rule requires that affidavits in opposition to a motion for summary judgment must be served "prior to the day of hearing." The Courts of Appeals consistently have recognized, however, that "Rule 56 does not necessarily contemplate an oral hearing. Rather, 10-day advance notice to the adverse party that the motion and all materials in support of or in opposition to the motion will be taken under advisement by the trial court as of a certain day satisfies the notice and hearing

[497 US 911]

dictates of Rule 56." Moore v Florida, 703 F2d 516, 519 (CA11 1983).[11] Rule 56(c)'s requirement that a summary judgment motion be filed 10 days in advance of a scheduled hearing serves to ensure that the nonmoving party is afforded adequate notice of the motion. Similarly, the requirement that opposing affidavits be submitted prior to the day of the hearing reflects the fact that the district court may rule on the summary judgment motion at the hearing or at any time thereafter; submission of affidavits prior to that day is thus essential if the moving party is to be assured the opportunity to respond at a time when a response is meaningful. The requirement also allows the district court to establish a deadline by which time all evidence and arguments must be submitted; thereafter, the court may deliberate with the assurance that no subsequent filings will alter the terms of the dispute.

These are pressing concerns when the hearing on a summary judgment motion represents the parties' last opportunity to set forth their legal arguments. In the present case, however, the District Court concluded the July 22, 1988, hearing by requesting supplemental briefing on the issue of standing.[12] NWF's supplemental affidavits, filed on August 22 as an attachment to its legal memorandum, were submitted at a time when the federal parties had ample opportunity to respond. (Indeed, the opportunity to respond here—10 days—was far greater than would have been the case if NWF had filed (timely) affidavits the day before the hearing and no

[497 US 912]

supplemental briefing had been allowed.) The affidavits, moreover, were filed well before the time when the case was to be taken under advisement. The record in this case is voluminous, currently filling six large boxes; consideration of five more affidavits would not have added significantly to the complexity of the issues before the District Court. Under these circumstances, submission of the supple-

---

(CA9 1983) ("The court will construe [a motion], however styled, to be the type proper for the relief requested"); 2A J. Moore & J. Lucas, Moore's Federal Practice ¶ 7.05, pp 7-16 to 7-17 (1989) ("[I]t is the motion's substance, and not merely its linguistic form, that determines its nature and legal effect").

[11] Accord, Allied Chemical Corp. v Mackay, 695 F2d 854, 856 (CA5 1983) ("Rule 56(c) does not require an oral hearing in open court. Rather, it contemplates notice to the party opposing the motion and an adequate opportunity to respond to the movant's arguments"); Bratt v International Business Machines Corp. 785 F2d 352, 363 (CA1 1986).

[12] The District Court subsequently established a schedule for the supplemental briefing. NWF was requested to file its opening memorandum by August 22, 1988; the Government and intervenors were to file memoranda in opposition by September 1; and NWF's reply was due by September 14. Order of July 27, 1988.

mental affidavits neither disserved the purposes of the Rule nor prejudiced the federal parties in any respect.

The District Court discussed none of these factors in explaining its refusal to consider the supplemental affidavits. Indeed, the District Court offered no justification at all for its action beyond the assertion that the affidavits were untimely.[13] Similarly, the Court today fails to assess the District Court's action by reference to the excuse for NWF's untimely filing or the absence of prejudice to the federal parties. The District Court and today's majority fail to recognize the guiding principle of the Federal Rules of Civil Procedure, the principle that procedural rules should be construed pragmatically, so as to ensure the just and efficient resolution of legal disputes. Some provisions of the Rules strip the District Courts of discretion, and the courts have no choice but to enforce these requirements with scrupulous precision.[14] But where the Rules expressly confer a range of

discretion, a district court may abuse its authority by refusing to take account of equitable concerns, even where its action violates no express command. In my view, such an abuse of discretion occurred here.

III

In Part IV-A, ante, at 890-894, 111 L Ed 2d, at 717-720, the majority sets forth a long and abstract discussion of the scope of relief that might have been awarded had the Federation made a sufficient showing of injury from environmental damage to a particular tract of land. Since the majority concludes in other portions of its opinion that the Federation lacks standing to challenge *any* of the land-use decisions at issue here, it is not clear to me why the Court engages in the hypothetical inquiry contained in Part IV-A. In any event, I agree with much of the Court's discussion, at least in its general outline. The Administrative Procedure Act permits suit to be brought by any person "adversely affected or aggrieved by agency action." 5 USC § 702 [5 USCS § 702]. In some cases the "agency action" will consist of a rule of broad applicability; and if the plaintiff prevails, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual. Under these circumstances a single plaintiff, so long as he is injured by the rule, may obtain "programmatic" relief that affects the rights of parties not before the court. On the other hand, if a generally lawful policy is applied in an illegal manner on a particular occasion, one who is injured is not thereby entitled to challenge other applications of the rule.

Application of these principles to the instant case does not turn on whether, or how often, the Bureau's land-management policies have been described as a "program."[15] In one sense,

---

[13] The District Court mentioned these affidavits in a single footnote: "Plaintiff, in addition to its memorandum filed August 22, 1988 has submitted additional evidentiary material, including declarations from four of its members. These submissions are untimely and in violation of our Order. We decline to consider them. See Federal Defendants' Reply to Plaintiff's Statement of Points and Authorities in Support of Its Standing to Proceed, at 1 n 1." National Wildlife Federation v Burford, 699 F Supp 327, 328-329, n 3 (DC 1988).

[14] Rule 6(b), for example, which generally gives the district court broad authority to grant enlargements of time, establishes the limitation that the court "may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), 60(b), and 74(a), except to the extent and under the conditions stated in them."

of course, there is no question that a "program" exists. Everyone associated with this lawsuit recognizes that the BLM, over the past decade, has attempted to develop and implement a comprehensive scheme for the termination of classifications and withdrawals. The real issue is whether the actions and omissions that NWF contends are illegal are themselves part of a plan or policy. For example: If the agency had published a regulation stating that an environmental impact statement (EIS) should never be developed prior to the termination of a classification or withdrawal, NWF could challenge the regulation (which would constitute an "agency action"). If the reviewing court then held that the statute required a pretermination EIS, the relief (invalidation of the rule) would directly affect tracts other than the ones used by individual affiants. At the other extreme, if the applicable BLM regulation stated that an EIS *must* be developed, and NWF alleged that the administrator in charge of South Pass/Green Mountain had inexplicably failed to develop one, NWF should not be allowed (on the basis of the Peterson affidavit) to challenge a termination in Florida on the ground that an administrator there made the same mistake.

The majority, quoting the District Court, characterizes the Bureau's land management program as "'1250 or so individual classification terminations and withdrawal revocations.'" Ante, at 890, 111 L Ed 2d, at 717; see National Wildlife Federation v Burford, 699 F Supp 327, 332 (DC 1988). The majority offers no argument in support of this conclusory assertion, and I am far from certain that the characterization is an accurate one. Since this issue bears on the scope of the relief ultimately to be awarded should the plaintiff prevail, rather than on the jurisdiction

of the District Court to entertain the suit, I would allow the District Court to address the question on remand.[16]

IV

Since I conclude that the Peterson and Erman affidavits provided sufficient evidence of NWF's standing to withstand a motion for summary judgment, and that the District Court abused its discretion by refusing to consider the Federation's supplemental affidavits, I would affirm the judgment of the Court of Appeals. I respectfully dissent.

---

[15] The term "withdrawal review program" repeatedly has been used in BLM documents. See, e.g., Plaintiff's Exhs 1, 3, 10, 11, 15, 18, 19 (filed July 15, 1985). At oral argument on the cross-motions for summary judgment, counsel for the federal parties acknowledged: "It is true, BLM referred to this review process as a land withdrawal review program." Tr of Motion Hearing 40 (July 22, 1988). Counsel went on to say, "but I suggest that using a word, calling it a program, doesn't make a program in the sense that it is being challenged here." Ibid. That assertion, though inelegant, seems essentially correct: An agency's terminology is not decisive in determining whether an alleged illegality is systemic or site-specific.

[16] The majority also suggests that the agency actions challenged in this suit may not be ripe for review. See ante, at 891-893, 111 L Ed 2d, at 718-719. Since the issue of ripeness has not been briefed or argued in this Court, nor passed on by the courts below, I need not address it. I do note, however, that at the outset of this case the federal parties made precisely the opposite argument, asserting that a preliminary injunction should be denied on the ground that NWF's claims were barred by laches. The federal parties contended: "The Federation offers no explanation why, despite its detailed knowledge of BLM's revocation and termination activities, it has waited so long to institute litigation." Defendants' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction 26 (Aug. 22, 1985).

I also decline to address the adequacy of the affidavit submitted by Lynn Greenwalt, since the Court of Appeals did not pass on that issue.

[497 US 916]

ASHLAND OIL, INC., Appellant

v

MICHAEL E. CARYL, Tax Commissioner of the State of West Virginia

497 US 916, 111 L Ed 2d 734, 110 S Ct 3202

[No. 88-421]

Decided June 28, 1990.

Decision: Rule of Armco, Inc. v Hardesty—that state's imposition of gross receipts tax on wholesalers other than local manufacturers violated commerce clause—held retroactively applicable.

SUMMARY

Pursuant to a West Virginia statute which imposed a gross receipts tax on persons, other than local manufacturers, selling tangible property at wholesale, the West Virginia Tax Department assessed a tax deficiency against a Kentucky corporation for the corporation's wholesale sales with West Virginia destinations during a 2-year period. After the corporation's petition for reassessment was rejected by the state tax commissioner, the corporation appealed to the Circuit Court of Kanawha County, West Virginia. While the appeal was pending, the United States Supreme Court decided Armco, Inc. v Hardesty (1984) 467 US 638, 81 L Ed 2d 540, 104 S Ct 2620, in which the Supreme Court held that the imposition of the West Virginia tax discriminated against interstate commerce, in violation of the Federal Constitution's commerce clause (Art I, § 8, cl 3). Thereafter, on the basis of the Armco decision, the Circuit Court granted the corporation summary judgment. The West Virginia Supreme Court of Appeals, reversing and remanding, ruled that the Armco decision did not apply retroactively (350 SE2d 531). The corporation's appeal of the decision by the West Virginia Supreme Court of Appeals was dismissed by the United States Supreme Court for want of a final judgment (481 US 1025, 95 L Ed 2d 522, 107 S Ct 1949). On remand, the Circuit Court rejected a remaining claim which the corporation had against the state tax commissioner, and the West Virginia Supreme Court of Appeals denied review.

On appeal, the United States Supreme Court reversed and remanded. In a per curiam opinion expressing the unanimous view of the court, it was held

that the Armco decision applied retroactively, either under the theory that constitutional decisions applied retroactively to all cases on direct review, or under the theory that the Armco decision neither overruled clear past precedent of the Supreme Court nor decided a wholly new issue of first impression.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Commerce § 329; Courts § 777.5 — state tax on gross receipts — discrimination against interstate commerce — retroactive effect of Supreme Court decision

1a, 1b. The United States Supreme Court's decision in Armco, Inc. v Hardesty (1984) 467 US 638, 81 L Ed 2d 540, 104 S Ct 2620—in which decision the Supreme Court held that a state gross receipts tax which was imposed on persons, other than local manufacturers, selling tangible property at wholesale discriminated against interstate commerce, in violation of the Federal Constitution's commerce clause (Art I, § 8, cl 3)—applies retroactively, either under the theory that constitutional decisions apply retroactively to all cases on direct review, or under the theory that the Armco decision neither overruled clear past precedent of the Supreme Court nor decided a wholly new issue of first impression.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

20 Am Jur 2d, Courts § 233

USCS, Constitution, Art I, § 8, cl 3

US L Ed Digest, Commerce § 329; Courts § 777.5

Index to Annotations, Commerce Clause; Retrospective Operation and Laws; Taxes

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

United States Supreme Court's views as to retroactive effect of its own decisions announcing new rules. 65 L Ed 2d 1219.

Validity, under commerce clause of Federal Constitution, of state gross receipts or income taxes involving interstate transactions—Supreme Court cases. 34 L Ed 2d 749.

Comment Note.—Retroactive or merely prospective operation of new rule adopted by court in overruling precedent—federal cases. 14 L Ed 2d 992.

Courts §§ 766, 777.5 — precedential effect of summary disposition — retroactivity of subsequent decision

2a, 2b. The United States Supreme Court's dismissal, for want of a substantial federal question, of a case which raised a challenge to a state's gross receipts tax on persons, other than local manufacturers, selling tangible property at wholesale does not amount to established precedent which would preclude the retroactive applicability of the Supreme Court's decision in the following year that such tax discriminated against interstate commerce, in violation of the Federal Constitution's commerce clause (Art I, § 8, cl 3), because (1) the Supreme Court gives less deference to summary dispositions, and (2) it is unlikely that the state relied on such dismissal, given that the tax had been in effect for more than 50 years.

OPINION OF THE COURT

Per Curiam.

Appellant Ashland Oil, Inc., a Kentucky corporation, is an integrated oil company that maintains business locations worldwide, including in West Virginia. During the years at issue here, West Virginia imposed a gross receipts tax on persons selling tangible property at wholesale. W Va Code § 11-13-2c (1983). Local manufacturers were exempt from the tax. § 11-13-2. The West Virginia Tax Department conducted a detailed audit of Ashland's tax returns for fiscal years ending September 1975 and 1976 and assessed a

deficiency in tax payments of $181,313.22 for wholesale sales with West Virginia destinations. Ashland filed a timely petition for reassessment, primarily contending that the tax was unconstitutional as applied because there was an insufficient connection between its in-state activities and the transactions sought to be taxed. Juris Statement 38a. After the State Tax Commissioner rejected Ashland's petition, Ashland appealed to the Circuit Court of Kanawha County. While the appeal was pending, this Court decided Armco, Inc. v Hardesty, 467 US 638, 81 L Ed 2d 540, 104 S Ct 2620 (1984), which invalidated the West Virginia tax scheme that had also been applied against Ashland as discriminatory against interstate commerce. The State Circuit Court granted Ashland summary judgment on the basis of our decision in Armco.

The West Virginia Supreme Court of Appeals reversed, holding that Armco did not apply retroactively, and remanded for further proceedings. Relying on its state-law criteria for retroactivity, see Bradley v Appalachian Power Co, 163 W Va 332, 256 SE 879 (1979), which it considered to "follow closely the analysis employed by the United States Supreme Court in Chevron Oil Co v Huson, 404 US 97, 106-[1]07 . . . [30 L Ed 2d 296, 92 S Ct 349] (1971)," Ashland Oil, Inc v Rose, 177 W Va 20, 23, n 6, 350 SE2d 531, 534, n 6 (1986), the court determined that Armco "represented a reversal of prior precedent, and that retroactive application of the Armco rule would cause severe hardship." Id., at 25, 350 SE2d, at 536. Accordingly, the court held that the State was not precluded from collecting the gross receipts taxes due for the fiscal years preceding the date of decision in Armco. Id., at 25-26, 350 SE2d, at

536-537. We dismissed Ashland's appeal of this decision for want of a final judgment. Ashland Oil, Inc. v Rose, 481 US 1025, 95 L Ed 2d 522, 107 S Ct 1949 (1987). On remand, the Circuit Court rejected Ashland's remaining claim, and the State Supreme Court of Appeals denied Ashland's request for review.

[497 US 918]

In its appeal to this Court, Ashland contends, among other claims, that the State Supreme Court of Appeals erred in determining that Armco applied prospectively only. Because "[t]he determination whether a constitutional decision of this Court is retroactive . . . is a matter of federal law," American Trucking Assns., Inc. v Smith, 496 US 167, 177, 110 L Ed 2d 148, 110 S Ct 2323 (1990), we must examine the state court's determination that Armco is not retroactive in light of our nonretroactivity doctrine.

[1a] Applying the view of retroactivity delineated by either the dissent or the plurality in American Trucking Assns., we must reverse the state court's decision. Under the reasoning of the dissent in American Trucking Assns., Armco applies retroactively to the taxes assessed against Ashland because constitutional decisions apply retroactively to all cases on direct review. American Trucking Assns., Inc. v Smith, supra, at 212, 110 L Ed 2d 148, 110 S Ct 2323 (Stevens, J, dissenting). Under the approach of the plurality in American Trucking Assns., the same result obtains, because Armco fails to satisfy the first prong of the plurality's test for determining nonretroactivity. See Chevron Oil Co v Huson, 404 US 97, 106-107, 30 L Ed 2d 296, 92 S Ct 349 (1971), quoted in American Trucking Assns., Inc v Smith, supra, at 179, 110 L Ed 2d 148, 110 S Ct 2323 (plurality opinion).

The first prong of the Chevron Oil test requires that "the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." 404 US, at 106-107, 30 L Ed 2d 296, 92 S Ct 349 (citation omitted). In Armco, an Ohio corporation contested the applicability of West Virginia's wholesale tax on its in-state sales of steel and wire rope. In ruling that the tax violated the Commerce Clause, the Court relied on Boston Stock Exchange v State Tax Comm'n, 429 US 318, 332, n 12, 50 L Ed 2d 514, 97 S Ct 599 (1977), which held that a State "may not discriminate between transactions on the basis of some interstate element." On its face, West Virginia's statutory scheme had just such a discriminatory effect, as it "provides that two companies selling tangible property at wholesale in West Virginia will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it." Armco, supra, at 642, 81 L Ed 2d 540, 104 S Ct 2620.

[497 US 919]

The Court next considered the argument that the State's wholesale tax exemption did not discriminate against out-of-state taxpayers because it served as compensation for the imposition of a heavy manufacturing tax on in-state taxpayers. In Maryland v Louisiana, 451 US 725, 68 L Ed 2d 576, 101 S Ct 2114 (1981), we held that a tax on an out-of-state event may be considered a nondiscriminatory compensation for a tax on an in-state event when the State "is attempting to impose a tax on a substantially equivalent event to assure uniform treatment of goods and materials to be consumed in the State." Id., at 759, 68 L Ed 2d 576, 101 S Ct 2114. Applying this test to the West Virginia tax scheme, the Court determined that "manufacturing and wholesaling are not 'substantially equivalent events' such that the heavy tax on in-state manufacturers can be said to compensate for the admittedly lighter burden placed on wholesalers from out of State." Armco, 467 US, at 643, 81 L Ed 2d 540, 104 S Ct 2620. The Court distinguished Alaska v Arctic Maid, 366 US 199, 6 L Ed 2d 227, 81 S Ct 929 (1961), and Caskey Baking Co. v Virginia, 313 US 117, 85 L Ed 1223, 61 S Ct 881 (1941), two cases that predated the compensatory tax doctrine enunciated in Boston Stock Exchange and Maryland v Louisiana. Armco, supra, at 643, n 7, 81 L Ed 2d 540, 104 S Ct 2620.

Finally, the Court rejected the argument that Armco should be required to prove the tax had actual discriminatory impact. Instead, the Court asserted that the "internal consistency" test, enunciated in Container Corp. of America v Franchise Tax Board, 463 US 159, 169, 77 L Ed 2d 545, 103 S Ct 2993 (1983), was applicable "where the allegation is that a tax on its face discriminates against interstate commerce." Armco, supra, at 644, 81 L Ed 2d 540, 104 S Ct 2620.

[2a] Armco unquestionably contributed to the development of our dormant Commerce Clause jurisprudence. See, e.g., Judson & Duffy, An Opportunity Missed: Armco, Inc. v **[497 US 920]** Hardesty, A Retreat from Economic Reality in Analysis of State Taxes, 87 W Va L Rev 723, 740-743 (1985) (suggesting that Armco's invalidation of a facially discriminatory tax statute signaled a retreat from the economically realistic approach adopted by Complete Auto Transit, Inc. v Brady, 430 US 274, 51 L Ed 2d 326, 97 S Ct 1076 (1977), and a return to a more formalistic analysis); Lathrop, Armco—A Narrow and Puzzling Test for Discriminatory State Taxes Under the Commerce Clause, 63 Taxes 551, 558-559 (1985). In adopting the internal consistency test, Armco extended that doctrine beyond the context in which it had originated. See 467 US, at 648, 81 L Ed 2d 540, 104 S Ct 2620 (Rehnquist, J., dissenting). Nevertheless, Armco neither overturned established precedent* nor decided "an issue of first impression whose resolution was not clearly foreshadowed." Chevron Oil, supra, at 106, 30 L Ed 2d 296, 92 S Ct 349. To be sure, Armco paved the way for Tyler Pipe Industries, Inc. v Washington State Dept. of Revenue, 483 US 232, 97 L Ed 2d 199, 107 S Ct 2810 (1987), which arguably "overturn[ed] a lengthy list of settled decisions" and "revolutionize[d] the law of state taxation," id., at 257, 97 L Ed 2d 199, 107 S Ct 2810

---

* **[2b]** The Court's dismissal for want of a substantial federal question of Columbia Gas Transmission Corp. v Rose, 459 US 807, 74 L Ed 2d 46, 103 S Ct 32 (1982), a case raising a nearly identical challenge to the state tax, see 467 US, at 644, n 7, 81 L Ed 2d 540, 104 S Ct 2620, a year prior to deciding Armco, does not amount to the "overruling [of] clear past precedent on which litigants may have relied." Chevron Oil Co. v Huson, 404 US 97, 106, 30 L Ed 2d 296, 92 S Ct 349 (1971). The Court gives less deference to summary dispositions, see, e.g., Caban v Mohammed, 441 US 380, 390, n 9, 60 L Ed 2d 297, 99 S Ct 1760 (1979), and it is unlikely that West Virginia relied upon the 1982 dismissal of Columbia Gas, given that the statute struck down in Armco had been in effect for more than 50 years.

(Scalia, J., concurring in part and dissenting in part), by extending the internal consistency test. Armco itself, however, was not revolutionary. See American Trucking Assns., Inc. v Scheiner, 483 US 266, 303, 97 L Ed 2d 226, 107 S Ct 2829 (1987) (O'Connor, J., dissenting) ("At most, Armco may be read for the proposition that a tax that is facially discriminatory is unconstitutional if it is not 'internally consistent' ").

[1b] Because Armco did not overrule clear past precedent nor decide a wholly new issue of first impression, it does not meet the first prong of the Chevron Oil test. Armco thus applies retroactively under either the rule advocated by the plurality or the rule advocated by the dissent in American Trucking Assns., Inc. v Smith. Accordingly, the State Supreme Court of Appeals erred in declining to apply Armco retroactively to determine the constitutionality of the State's imposition of taxes on Ashland for the years at issue. The motion of Committee on State Taxation of the Council of State Chambers of Commerce for leave to file a brief as amicus curiae is granted. We reverse the judgment of the State Circuit Court, and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

[497 US 922]

NATIONAL MINES CORPORATION, Petitioner

v

MICHAEL E. CARYL, Tax Commissioner of the State of West Virginia

497 US 922, 111 L Ed 2d 740, 110 S Ct 3205

[No. 89-337]

Decided June 28, 1990.

Decision: Rule of Armco, Inc. v Hardesty—that state's imposition of gross receipts tax on wholesalers other than local manufacturers violated commerce clause—held retroactively applicable.

SUMMARY

Pursuant to a West Virginia statute which imposed a gross receipts tax on persons, other than local manufacturers, selling tangible property at wholesale, the West Virginia Tax Department assessed a tax deficiency against a corporation for the corporation's wholesale sales of coal in West Virginia during a 5-year period. The state tax commissioner upheld the assessment. A few days before the corporation appealed to the Circuit Court of Kanawha County, West Virginia, the United States Supreme Court decided Armco, Inc. v Hardesty (1984) 467 US 638, 81 L Ed 2d 540, 104 S Ct 2620, in which the Supreme Court held that the imposition of the West Virginia tax discriminated against interstate commerce, in violation of the Federal Constitution's commerce clause (Art I, § 8, cl 3). The Circuit Court then held the corporation's action in abeyance while the West Virginia Supreme Court of Appeals considered a similar challenge to the state tax in light of the Armco decision. After the Supreme Court of Appeals ruled in that case that the Armco decision did not apply retroactively, the Circuit Court upheld the assessment against the corporation, and the Supreme Court of Appeals denied review.

Granting certiorari, the United States Supreme Court reversed and remanded. In a per curiam opinion expressing the unanimous view of the court, it was held that the Armco decision applied retroactively, either under the theory that constitutional decisions applied retroactively to all

cases on direct review, or under the theory that the Armco decision neither overruled clear past precedent of the Supreme Court nor decided a wholly new issue of first impression.

HEADNOTE

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Appeal §§ 910.6, 1677, 1692.3; Commerce § 329; Courts § 777.5 — state tax on gross receipts — discrimination against interstate commerce — retroactive effect of Supreme Court decision — grant of certiorari — reversal — remand

The United States Supreme Court's decision in Armco, Inc. v Hardesty (1984) 467 US 638, 81 L Ed 2d 540, 104 S Ct 2620—in which decision the Supreme Court held that a state gross receipts tax which was imposed on persons, other than local manufacturers, selling tangible property at wholesale discriminated against interstate commerce, in violation of the Federal Constitution's commerce clause (Art I, § 8, cl 3)—applies retroactively, either under the theory that constitutional decisions apply retroactively to all cases on direct review, or under the theory that the Armco decision neither overruled clear past precedent of the Supreme Court nor decided a wholly new issue of first impression; under circumstances in which a state court concluded that the Armco decision applied prospectively only, the Su-

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

20 Am Jur 2d, Courts § 233

USCS, Constitution, Art I, § 8, cl 3

US L Ed Digest, Commerce § 329; Courts § 777.5

Index to Annotations, Commerce Clause; Retrospective Operation and Laws; Taxes

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

United States Supreme Court's views as to retroactive effect of its own decisions announcing new rules. 65 L Ed 2d 1219.

Validity, under commerce clause of Federal Constitution, of state gross receipts or income taxes involving interstate transactions—Supreme Court cases. 34 L Ed 2d 749.

Comment Note.—Retroactive or merely prospective operation of new rule adopted by court in overruling precedent—federal cases. 14 L Ed 2d 992.

preme Court will grant a petition for a writ of certiorari to the state court, reverse the state court's judgment, and remand the case for further proceedings.

OPINION OF THE COURT

Per Curiam.

Petitioner National Mines Corp. (National) is principally engaged in the business of producing and selling coal. Among its other activities, National mines coal in Kentucky and Pennsylvania and sells it wholesale in West Virginia. During the period relevant here, West Virginia imposed a gross receipts tax on wholesale sales of tangible property. W Va Code § 11-13-2c (1983). Local producers were subject to taxes on their production activities, but exempt from the tax on wholesale activities. § 11-13-2.

On December 22, 1980, the State Tax Department of West Virginia assessed $475,345.02 in business and occupation tax (plus interest and penalties) for the period January 1, 1975, through December 31, 1979, on National's wholesale sales of coal in West Virginia. National filed a petition for reassessment, asserting that the tax violated the Due Process Clause

of the Fourteenth Amendment and the Commerce Clause of the Federal Constitution. The State Tax Commissioner upheld the assessment, concluding that the tax was fairly apportioned, that the measure of the tax was reasonably related to the benefits conferred by the State, and that the tax did not discriminate against interstate commerce.

A few days before National appealed to the State Circuit Court, this Court issued its opinion in Armco Inc. v Hardesty, 467 US 638, 81 L Ed 2d 540, 104 S Ct 2620 (1984), which held that the West Virginia business and occupation tax sought to be collected from petitioner was unconstitutional. National's action was held in abeyance while the West Virginia Supreme Court of Appeals considered a similar challenge to the state tax in light of Armco. See Ashland Oil, Inc. v Rose, 177 W Va 20, 350 SE2d 531 (1986). After analyzing the retroactivity of Armco under a state-law test that it considered to "follow closely the analysis employed by the United States Supreme Court in Chevron Oil Co. v Huson, 404 US 97, 106-107, 30 L Ed 2d 296, 92 S Ct 349 (1971)," 177 W Va, at 23, n 6, 350 SE2d, at 534, n 6, the court concluded that Armco applied prospectively only. The State Supreme Court thus permitted the State to collect the gross receipts taxes due for fiscal years prior to the date of decision in Armco. Id., at 25-26, 350 SE2d, at 536-537.

The State Circuit Court in this case followed Ashland Oil to uphold the State's collection of the assessed taxes. The West Virginia Supreme Court of Appeals refused to consider National's petition for appeal.

In its petition for certiorari to this Court, National contends, among other claims, that the state court erred in following Ashland Oil's nonretroactivity decision and allowing the State to enforce an unconstitutional tax statute. We agree. For the reasons stated today in Ashland Oil, Inc. v Caryl, ante, p 916, 111 L Ed 2d 734, 110 S Ct 3202, we hold that Armco applies retroactively under the reasoning of either the plurality or the dissent in American Trucking

Assns., Inc., v Smith, 496 US 167, 110 L Ed 2d 148, 110 S Ct 2323 (1990).

[497 US 924]

Because the State Circuit Court failed to consider the constitutionality of the taxes assessed against National in light of our decision in Armco, we grant the petition for certiorari, reverse the judgment of the State Circuit Court, and remand for further proceedings not inconsistent with this opinion.

It is so ordered.

MEMORANDUM CASES

No. 89-761. Edward E. Rice, Petitioner v Ohio Department of Transportation, et al.

497 US 1001, 111 L Ed 2d 744, 110 S Ct 3232.

June 25, 1990. On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of Rutan v Republican Party of Illinois, 497 US 62, 111 L Ed 2d 52, 110 S Ct 2729 (1990).

Same case below, 887 F2d 716.

No. 89-936. INF, Ltd., Petitioner v Spectro Alloys Corp.

497 US 1001, 111 L Ed 2d 744, 110 S Ct 3232.

June 25, 1990. On petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of Maislin Industries, U.S., Inc. v Primary Steel, Inc. 497 US 116, 111 L Ed 2d 94, 110 S Ct 2759 (1990).

Same case below, 881 F2d 546.

No. 89-944. Georgia, Petitioner v Thomas D. Stewart, et ux.

497 US 1001, 111 L Ed 2d 744, 110 S Ct 3232.

June 25, 1990. On petition for writ of certiorari to the Court of Appeals of Georgia. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeals of Georgia for further consideration in light of Illinois v Rodriguez, 497 US 177, 111 L Ed 2d 148, 110 S Ct 2793 (1990). Justice Stevens dissents.

Same case below, 191 Ga App 750, 382 SE2d 677.

No. 89-1575. Gaetano Vastola, et al., Petitioners v United States

497 US 1001, 111 L Ed 2d 744, 110 S Ct 3233.

June 25, 1990. On petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of United States v Ojeda Rios, 495 US 257, 109 L Ed 2d 224, 110 S Ct 1845 (1990).

Same case below, 899 F2d 211.

No. 89-5849. Bruce Messer and Timothy P'Simer, Petitioners v Fran Curci, et al.

497 US 1001, 111 L Ed 2d 745, 110 S Ct 3233.

June 25, 1990. On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. The motion of petitioner for leave to proceed in forma pauperis and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of Rutan v Republican Party of Illinois, 497 US 62, 111 L Ed 2d 52, 110 S Ct 2729 (1990).

Same case below, 881 F2d 219.

No. A-850 (89-1947). John Remington Graham, Petitioner v William J. Wernz

497 US 1001, 111 L Ed 2d 745, 110 S Ct 3235.

June 25, 1990. The application for stay, addressed to Justice Brennan and referred to the Court, is denied.

No. D-868. In the Matter of Disbarment of Gerard E. Molony

497 US 1001, 111 L Ed 2d 745, 110 S Ct 3233.

June 25, 1990. Disbarment order entered.

No. D-871. In the Matter of Disbarment of William Herbert Price

497 US 1002, 111 L Ed 2d 745, 110 S Ct 3233.

June 25, 1990. Disbarment order entered.

No. D-885. In the Matter of Disbarment of Sheldon Joel Sanders

497 US 1002, 111 L Ed 2d 745, 110 S Ct 3233.

June 25, 1990. The order entered May 29, 1990, is amended to read as follows:

It having been reported to the Court that Sheldon Joel Sanders, of Lido Beach, New York, has been disbarred from the practice of law by the Appellate Division, Supreme Court of New York, Second Judicial Department, and this Court by order of March 26, 1990, having suspended the said Sheldon Joel Sanders from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred; And it appearing that the said rule was duly issued and served upon the respondent and that a response has been filed; It is ordered that the said Sheldon Joel Sanders be disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. D-895. In the Matter of Disbarment of Louis Carl Dineff

497 US 1002, 111 L Ed 2d 746, 110 S Ct 3234.

June 25, 1990. Disbarment order entered.

No. D-913. In the Matter of Disbarment of Isaiah White Williams

497 US 1002, 111 L Ed 2d 746, 110 S Ct 3234.

June 25, 1990. It is ordered that Isaiah White Williams, of St. Petersburg, Florida, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-914. In the Matter of Disbarment of William W. Watkins, Sr.

497 US 1002, 111 L Ed 2d 746, 110 S Ct 3234.

June 25, 1990. It is ordered that William W. Watkins, Sr., of Columbia, South Carolina, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 89-1391. Irving Rust, et al., Petitioners v Louis W. Sullivan, Secretary of Health and Human Services

No. 89-1392. New York, et al., Petitioners v Louis W. Sullivan, Secretary of Health and Human Services

497 US 1002, 111 L Ed 2d 746, 110 S Ct 3234.

June 25, 1990. The motion of Alan Ernest for leave to represent children unborn and born alive is denied. The motion of Legal Defense for Unborn Children for leave to file a brief as amicus curiae is denied.

No. 89-5900. John E. Rust, Petitioner v Frank O. Gunter, et al.

497 US 1002, 111 L Ed 2d 746, 110 S Ct 3235.

June 25, 1990. The motion of Alvin J. Bronstein for reimbursement of travel expenses is granted.

No. 89-1500. Business Guides, Inc., Petitioner v Chromatic Communications Enterprises, Inc. and Michael Shipp

497 US 1002, 111 L Ed 2d 746, 110 S Ct 3235.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted.

Same case below, 892 F2d 802.

No. 89-1541. Elizabeth Dole, Secretary of Labor, Petitioner v Occupational Safety and Health Review Commission, et al.

497 US 1002, 111 L Ed 2d 747, 110 S Ct 3235.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit granted.

Same case below, 891 F2d 1495.

No. 89-56. Nancy Allevato, Personal Representative of the Estate of Michael J. Ferrantino, Sr., Deceased, et al., Petitioners v County of Oakland and County of Macomb, Michigan

No. 89-79. City of Detroit, Petitioner v County of Oakland and County of Macomb

No. 89-101. Coleman A. Young, Mayor of the City of Detroit, Petitioner v County of Oakland and County of Macomb

497 US 1003, 111 L Ed 2d 747, 110 S Ct 3235, 110 S Ct 3236.

June 25, 1990. Petitions for writs of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same cases below, 866 F2d 839.

No. 89-933. John Carpenter, et al., Petitioners v James D. Thomas

497 US 1003, 111 L Ed 2d 747, 110 S Ct 3236.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 881 F2d 828.

No. 89-1287. Richard K. Jacquin, Petitioner v Walter Stenzil, Warden

497 US 1003, 111 L Ed 2d 747, 110 S Ct 3236.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 886 F2d 506.

No. 89-1296. Oklahoma Natural Gas Company, Petitioner v Williams Natural Gas Company, et al.

497 US 1003, 111 L Ed 2d 747, 110 S Ct 3236.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

Same case below, 890 F2d 255.

No. 89-1377. Ann Troitino Johnston, Petitioner v Texas

497 US 1003, 111 L Ed 2d 747, 110 S Ct 3236.

June 25, 1990. Petition for writ of

certiorari to the Court of Appeals of Texas, Fourteenth District, denied.

No. 89-1413. Donaciano Hernandez-Escarsega, Petitioner v United States

497 US 1003, 111 L Ed 2d 748, 110 S Ct 3237.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 886 F2d 1560.

No. 89-1511. American Mining Congress and Solite Corporation, Petitioners v United States Environmental Protection Agency, et al.

497 US 1003, 111 L Ed 2d 748, 110 S Ct 3237.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.

Same case below, 280 App DC 373, 886 F2d 390.

No. 89-1527. Railway Labor Executives' Association, et al., Petitioners v Chicago and North Western Transportation Company, et al.

497 US 1003, 111 L Ed 2d 748, 110 S Ct 3237.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 890 F2d 1024.

No. 89-1611. Timothy Scott Reese, Petitioner v Pennsylvania

497 US 1003, 111 L Ed 2d 748, 110 S Ct 3237.

June 25, 1990. Petition for writ of certiorari to the Superior Court of Pennsylvania, Philadelphia Office, denied.

Same case below, 389 Pa Super 652, 560 A2d 829.

No. 89-1617. Wesley P. Bernard, et al., Petitioners v Gulf Oil Corporation, et al.

497 US 1003, 111 L Ed 2d 748, 110 S Ct 3237.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 281 US App DC 313, 890 F2d 735.

No. 89-1641. News/Sun Sentinel Company, Petitioner v National Labor Relations Board, et al.

497 US 1003, 111 L Ed 2d 748, 110 S Ct 3238.

June 25, 1990. Petition for writ of

certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.

Same case below, 890 F2d 430.

No. 89-1660. Peter J. Castiglia, Petitioner v United States

497 US 1004, 111 L Ed 2d 749, 110 S Ct 3238.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 894 F2d 533.

No. 89-1674. Rose Carota, Petitioner v Celotex Corporation

497 US 1004, 111 L Ed 2d 749, 110 S Ct 3238.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the First Circuit denied.

Same case below, 893 F2d 448.

No. 89-1687. Communications Satellite Corporation, Petitioner v Federal Communications Commission, et al.

497 US 1004, 111 L Ed 2d 749, 110 S Ct 3238, reh den 497 US 1050, 111 L Ed 2d 829, 111 S Ct 15.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.

No. 89-1688. Gregory Gates, Petitioner v Michigan

497 US 1004, 111 L Ed 2d 749, 110 S Ct 3238.

June 25, 1990. Petition for writ of certiorari to the Supreme Court of Michigan denied.

Same case below, 434 Mich 146, 452 NW2d 627.

No. 89-1695. Law Engineering, Inc., Petitioner v Georgetown Steel Corporation, et al.

497 US 1004, 111 L Ed 2d 749, 110 S Ct 3238.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 892 F2d 1041.

No. 89-1702. Mennen Company, et al., Petitioners v Andrew S. Martin

497 US 1004, 111 L Ed 2d 749, 110 S Ct 3239.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 898 F2d 141.

No. 89-1703. Reginald B. Snyder, Petitioner v Christopher Lewis, Secretary of the Commonwealth of Pennsylvania

497 US 1004, 111 L Ed 2d 750, 110 S Ct 3239, reh den 497 US 1050, 111 L Ed 2d 829, 111 S Ct 15.

June 25, 1990. Petition for writ of certiorari to the Supreme Court of Pennsylvania, Middle District, denied.

Same case below, 524 Pa 470, 574 A2d 57.

No. 89-1704. Illinois Human Rights Commission, et al., Petitioners v Babcock & Wilcox Company

497 US 1004, 111 L Ed 2d 750, 110 S Ct 3239.

June 25, 1990. Petition for writ of certiorari to the Appellate Court of Illinois, Second District, denied.

Same case below, 189 Ill App 3d 827, 137 Ill Dec 146, 545 NE2d 799.

No. 89-1712. Northwest Food Processors Association, et al., Petitioners v William K. Reilly, Administrator, Environmental Protection Agency

497 US 1004, 111 L Ed 2d 750, 110 S Ct 3239.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 886 F2d 1075.

No. 89-1730. Susanne C. Fink, Petitioner v Peter Fink

497 US 1004, 111 L Ed 2d 750, 110 S Ct 3239.

June 25, 1990. Petition for writ of certiorari to the Court of Appeal of California, Second Appellate District, denied.

No. 89-1739. U.S. Gold & Silver Investments, Inc., Petitioner v United States, et al.

497 US 1004, 111 L Ed 2d 750, 110 S Ct 3239.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 885 F2d 620.

No. 89-1749. Public Service Commission of the State of New York, et al., Petitioners v National Fuel Gas Supply Corporation

497 US 1004, 111 L Ed 2d 750, 110 S Ct 3240.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 894 F2d 571.

No. 89-1764. Frieda Miller, Petitioner v Prudential Bache Securities, Inc. and Samuel Kaplan

497 US 1004, 111 L Ed 2d 751, 110 S Ct 3240.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 884 F2d 128.

No. 89-1776. Michael R. Fontham, Petitioner v Committee on Professional Responsibility, Louisiana State Bar Association

497 US 1005, 111 L Ed 2d 751, 110 S Ct 3240.

June 25, 1990. Petition for writ of certiorari to the Supreme Court of Louisiana denied.

No. 89-1791. John Lamborn, Petitioner v Delaware

497 US 1005, 111 L Ed 2d 751, 110 S Ct 3240.

June 25, 1990. Petition for writ of certiorari to the Supreme Court of Delaware denied.

Same case below, 574 A2d 263.

No. 89-1796. John Hasso, Elissa N.V., Rumba, N.V., Pacific Midland N.V., Kondoland Corp., and Grape Capital Corp., Petitioners v Charles Duggan

497 US 1005, 111 L Ed 2d 751, 110 S Ct 3240.

June 25, 1990. Petition for writ of certiorari to the Court of Appeal of California, First Appellate District, denied.

No. 89-1812. Jamie H. Espinueva, Petitioner v H. Lawrence Garrett, III, Secretary of the Navy

497 US 1005, 111 L Ed 2d 751, 110 S Ct 3241, reh den (US) 112 L Ed 2d 198, 111 S Ct 238.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 895 F2d 1164.

No. 89-1826. Church By Mail, Inc., Petitioner v United States, et al.

497 US 1005, 111 L Ed 2d 751, 110 S Ct 3241.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.

No. 89-1830. Donald L. Jackson, et ux., Petitioners v United States District Court for the Eastern District of California (Western Farm Credit Bank, et al., Real Parties in Interest)

497 US 1005, 111 L Ed 2d 752, 110 S Ct 3241.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 893 F2d 1338.

No. 89-1839. Blue Cross and Blue Shield of Kansas, Inc. and HMO Kansas, Inc., Petitioners v Walter L. Reazin, et al.

497 US 1005, 111 L Ed 2d 752, 110 S Ct 3241.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

Same case below, 899 F2d 951.

No. 89-1841. David A. Nordstrom, et al., Petitioners v Washington, et al.

497 US 1005, 111 L Ed 2d 752, 110 S Ct 3241.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 895 F2d 1418.

No. 89-1851. James Donofrio, Petitioner v United States

497 US 1005, 111 L Ed 2d 752, 110 S Ct 3241.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 896 F2d 1301.

No. 89-1858. Eastern Auto Distributors, Inc., Petitioner v Peugeot Motors of America, Inc.

497 US 1005, 111 L Ed 2d 752, 110 S Ct 3242.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 892 F2d 355.

No. 89-1860. Glenn A. Main, III, Petitioner v United States

497 US 1005, 111 L Ed 2d 752, 110 S Ct 3242.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 900 F2d 257.

No. 89-1864. Duvan Arboleda, Individually and as President of Gold and Gems Trading, Inc., Petitioner v United States

497 US 1005, 111 L Ed 2d 752, 110 S Ct 3242.

June 25, 1990. Petition for writ of

certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 882 F2d 417.

No. 89-1870. Jerome C. Utz, Petitioner v United States

497 US 1005, 111 L Ed 2d 753, 110 S Ct 3242.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 886 F2d 1148.

No. 89-5654. Gerald Keith Redmond, Petitioner v United States

497 US 1006, 111 L Ed 2d 753, 110 S Ct 3242.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 880 F2d 1324.

No. 89-6618. Ellis L. Barnett, Petitioner v Oklahoma

497 US 1006, 111 L Ed 2d 753, 110 S Ct 3242.

June 25, 1990. Petition for writ of certiorari to the Court of Criminal Appeals of Oklahoma denied.

No. 89-6959. William Shaffer, Petitioner v Daniel Senkowski, Superintendent, Clinton Correctional Facility, et al.

497 US 1006, 111 L Ed 2d 753, 110 S Ct 3243.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

No. 89-7047. Eddie Joe Buckley, Petitioner v A. L. Lockhart, Director, Arkansas Department of Correction

497 US 1006, 111 L Ed 2d 753, 110 S Ct 3243.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 892 F2d 715.

No. 89-7081. Johnny Lee Wallace, Petitioner v United States

497 US 1006, 111 L Ed 2d 753, 110 S Ct 3243.

June 25, 1990. Petition for writ of

certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 889 F2d 580.

No. 89-7100. Edmond Gifford, Petitioner v United States

No. 89-7294. Joseph Kelly, Petitioner v United States

497 US 1006, 111 L Ed 2d 754, 110 S Ct 3243.

June 25, 1990. Petitions for writs of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same cases below, 892 F2d 263 (first case) and 892 F2d 255 (second case).

No. 89-7153. Gale Watson, Petitioner v United States

497 US 1006, 111 L Ed 2d 754, 110 S Ct 3243.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 893 F2d 970.

No. 89-7166. Leon Paris, Petitioner v Johnnie Young

497 US 1006, 111 L Ed 2d 754, 110 S Ct 3244.

June 25, 1990. Petition for writ of certiorari to the Circuit Court of Maryland, Baltimore City, denied.

No. 89-7238. Abdul Wakil Amiri, Petitioner v Norma H. Johnson, Judge, United States District Court for District of Columbia

497 US 1006, 111 L Ed 2d 754, 110 S Ct 3244, reh den 497 US 1047, 111 L Ed 2d 823, 111 S Ct 8.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.

No. 89-7255. Joe Santiago, Petitioner v United States

497 US 1006, 111 L Ed 2d 754, 110 S Ct 3244.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 889 F2d 1029.

No. 89-7274. Tony Hanif Lee, Petitioner v Gary McCaughtry, Superintendent, Waupun Correctional Institution

497 US 1006, 111 L Ed 2d 754, 110 S Ct 3244.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 892 F2d 1318.

No. 89-7337. Donnelle Gallion, Petitioner v William H. Zinn, et al.

497 US 1006, 111 L Ed 2d 755, 110 S Ct 3244.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 902 F2d 1573.

No. 89-7338. Robert Steven Belle, Petitioner v Robert M. Freeman, et al.

497 US 1006, 111 L Ed 2d 755, 110 S Ct 3244.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

No. 89-7339. Winston Willis, Petitioner v First Bank National Association

497 US 1006, 111 L Ed 2d 755, 110 S Ct 3245.

June 25, 1990. Petition for writ of certiorari to the Court of Appeals of Ohio, Cuyahoga County, denied.

No. 89-7340. Fred Whitaker, Petitioner v Bay Area Rapid Transit

497 US 1007, 111 L Ed 2d 755, 110 S Ct 3245.

June 25, 1990. Petition for writ of certiorari to the Court of Appeal of California, First Appellate District, denied.

No. 89-7342. Clifford M. Deming, Petitioner v A. A. Richner, Jr., et al.

497 US 1007, 111 L Ed 2d 755, 110 S Ct 3245.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 892 F2d 1045.

No. 89-7344. Dennis Nelson Fixel, Petitioner v George Deeds, Warden, et al.

497 US 1007, 111 L Ed 2d 755, 110 S Ct 3245.

June 25, 1990. Petition for writ of certiorari to the Supreme Court of Nevada denied.

No. 89-7353. Robert Christopherson and Jeanette Christopherson, Petitioners v Shawano County

497 US 1007, 111 L Ed 2d 755, 110 S Ct 3245, reh den 497 US 1051, 111 L Ed 2d 831, 111 S Ct 18.

June 25, 1990. Petition for writ of

certiorari to the Court of Appeals of Wisconsin, District III, denied.

No. 89-7358. James Thomas, et ux., Petitioners v SouthTrust Bank of Alabama, as Assignee of SouthTrust Mobile Services

497 US 1007, 111 L Ed 2d 756, 110 S Ct 3245.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 883 F2d 991.

No. 89-7365. Byron Shuman, Petitioner v Richard Celeste, Governor of Ohio, et al.

497 US 1007, 111 L Ed 2d 756, 110 S Ct 3246.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 894 F2d 1337.

No. 89-7368. Ronald E. Long, Sr., et al., Petitioners v William H. Fauver, Commissioner, New Jersey Department of Corrections, et al.

497 US 1007, 111 L Ed 2d 756, 110 S Ct 3246.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 898 F2d 141.

No. 89-7371. James Moore, Petitioner v District of Columbia Department of Public Works

497 US 1007, 111 L Ed 2d 756, 110 S Ct 3246.

June 25, 1990. Petition for writ of certiorari to the District of Columbia Court of Appeals denied.

No. 89-7372. David Joe Kerns, Petitioner v James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division

497 US 1007, 111 L Ed 2d 756, 110 S Ct 3246.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

No. 89-7373. Betty Jean Klacsmann, Petitioner v Guiseppe C. Castellano

497 US 1007, 111 L Ed 2d 756, 110 S Ct 3246.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

No. 89-7374. Betty Jean Klacsmann, Petitioner v Lawrence S. Fedak

497 US 1007, 111 L Ed 2d 757, 110 S Ct 3246.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

No. 89-7375. Robert Kurtz, Petitioner v Robert D. Edmiston, Superintendent, Southern State Correctional Facility, et al.

497 US 1007, 111 L Ed 2d 757, 110 S Ct 3247, reh den 497 US 1051, 111 L Ed 2d 832, 111 S Ct 19.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

No. 89-7381. Carson Lynn Brown, Petitioner v Raymond Toombs, et al.

497 US 1007, 111 L Ed 2d 757, 110 S Ct 3247.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 898 F2d 153.

No. 89-7384. Linwood Cosby, Petitioner v P. Doyle, et al.

497 US 1007, 111 L Ed 2d 757, 110 S Ct 3247.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 896 F2d 545.

No. 89-7389. Carson Lynn Brown, Petitioner v Jerry Sherman, et al.

497 US 1008, 111 L Ed 2d 757, 110 S Ct 3247.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 898 F2d 153.

No. 89-7404. William Lawrence Potter, Petitioner v United States

497 US 1008, 111 L Ed 2d 757, 110 S Ct 3247.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 895 F2d 1231.

No. 89-7407. Robert D. Bryant, Petitioner v Art Tate, Jr., Superintendent, Chillicothe Correctional Institute

497 US 1008, 111 L Ed 2d 758, 110 S Ct 3247.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 889 F2d 1086.

No. 89-7415. Joseph Sun, Petitioner v Michael Kessler, et al.

497 US 1008, 111 L Ed 2d 758, 110 S Ct 3248.

June 25, 1990. Petition for writ of certiorari to the Court of Appeals of Georgia denied.

No. 89-7422. Otis T. Bell, aka Trouble Bell, Petitioner v Texas

497 US 1008, 111 L Ed 2d 758, 110 S Ct 3248.

June 25, 1990. Petition for writ of certiorari to the Court of Appeals of Texas, Third District, denied.

Same case below, 774 SW2d 371.

No. 89-7428. John Robert Demos, Petitioner v Court of Appeals of Washington

497 US 1008, 111 L Ed 2d 758, 110 S Ct 3248.

June 25, 1990. Petition for writ of certiorari to the Supreme Court of Washington denied.

No. 89-7429. John Robert Demos, Petitioner v Supreme Court of Washington

497 US 1008, 111 L Ed 2d 758, 110 S Ct 3248.

June 25, 1990. Petition for writ of certiorari to the Supreme Court of Washington denied.

No. 89-7431. Bobbie R. Benson, Petitioner v James F. Barrasso, et al.

497 US 1008, 111 L Ed 2d 758, 110 S Ct 3248.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 884 F2d 1392.

No. 89-7435. Lee Earnest Davis, Jr., Matthew Charles Johnson, Robert Eric Ladd, and Jessie Norris, Petitioners v County of Jefferson, Alabama, et al.

497 US 1008, 111 L Ed 2d 758, 110 S Ct 3248.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 894 F2d 411.

No. 89-7471. Richard Poorman, Petitioner v Kentucky

497 US 1008, 111 L Ed 2d 759, 110 S Ct 3249.

June 25, 1990. Petition for writ of certiorari to the Supreme Court of Kentucky denied.

Same case below, 782 SW2d 603.

No. 89-7497. John Robert Demos, Jr., Petitioner v Donald Bonamy, Superintendent, Special Offender Center

497 US 1008, 111 L Ed 2d 759, 110 S Ct 3249.

June 25, 1990. Petition for writ of certiorari to the Supreme Court of Washington denied.

No. 89-7499. John Robert Demos, Jr., Petitioner v Donald Bonamy, Superintendent, Special Offender Center

497 US 1008, 111 L Ed 2d 759, 110 S Ct 3249.

June 25, 1990. Petition for writ of certiorari to the Supreme Court of Washington denied.

No. 89-7501. Joseph William Dougherty, Petitioner v United States

497 US 1008, 111 L Ed 2d 759, 110 S Ct 3249.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

No. 89-7506. John Lester Harris, Petitioner v United States

497 US 1008, 111 L Ed 2d 759, 110 S Ct 3249.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 900 F2d 256.

No. 89-7508. Jesse McMillan, Petitioner v United States

497 US 1008, 111 L Ed 2d 759, 110 S Ct 3249.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 900 F2d 265.

No. 89-7514. Phi P. Huynh, aka John, Petitioner v United States

497 US 1008, 111 L Ed 2d 759, 110 S Ct 3250.

June 25, 1990. Petition for writ of certiorari to the United States Court

of Appeals for the Second Circuit denied.

Same case below, 895 F2d 1411.

No. 89-7515. James A. Block, Petitioner v American Telephone & Telegraph Company, et al.

497 US 1009, 111 L Ed 2d 760, 110 S Ct 3250.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

No. 89-7516. Heriberto Betancourt, Petitioner v United States

497 US 1009, 111 L Ed 2d 760, 110 S Ct 3250.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 901 F2d 1114.

No. 89-7524. Juan Becerra and Victoria Becerra, Petitioners v United States

497 US 1009, 111 L Ed 2d 760, 110 S Ct 3250.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 896 F2d 557.

No. 89-7532. William A. Mathis, Petitioner v United States

497 US 1009, 111 L Ed 2d 760, 110 S Ct 3250.

June 25, 1990. Petition for writ of certiorari to the District of Columbia Court of Appeals denied.

No. 89-7533. Carlos Libreros, Petitioner v United States

497 US 1009, 111 L Ed 2d 760, 110 S Ct 3250.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 897 F2d 26.

No. 89-7544. Robert Reino, Petitioner v United States

497 US 1009, 111 L Ed 2d 760, 110 S Ct 3251.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 899 F2d 1220.

No. 89-7545. Eval Ramos-Benavidez, Petitioner v United States

497 US 1009, 111 L Ed 2d 761, 110 S Ct 3251.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

No. 89-7552. Carl Proctor, Petitioner v John Jabe, Warden

497 US 1009, 111 L Ed 2d 761, 110 S Ct 3251.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

No. 89-7553. Jose Corpus, Petitioner v United States

497 US 1009, 111 L Ed 2d 761, 110 S Ct 3251.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the First Circuit denied.

Same case below, 882 F2d 546.

No. 89-7556. Eddie Gamble, Petitioner v United States

497 US 1009, 111 L Ed 2d 761, 110 S Ct 3251.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 902 F2d 1566.

No. 89-7557. Gregorio Rodriguez, Petitioner v United States

497 US 1009, 111 L Ed 2d 761, 110 S Ct 3251.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 897 F2d 526.

No. 89-7560. Carlos Sierra, Petitioner v United States

497 US 1009, 111 L Ed 2d 761, 110 S Ct 3251.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 897 F2d 525.

No. 89-7563. Jerry Lee Pulliam, Petitioner v United States

497 US 1009, 111 L Ed 2d 761, 110 S Ct 3252.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

No. 89-7566. Bruce Barber, Petitioner v United States

497 US 1009, 111 L Ed 2d 762, 110 S Ct 3252.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 898 F2d 157.

No. 89-7567. Ronald Duane Beaulieu, Petitioner v United States

497 US 1009, 111 L Ed 2d 762, 110 S Ct 3252.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

Same case below, 900 F2d 1531.

No. 89-7568. John Beaulieu, Petitioner v United States

497 US 1009, 111 L Ed 2d 762, 110 S Ct 3252.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

Same case below, 900 F2d 1537.

No. 89-7573. Alan Frank, Petitioner v United States

497 US 1010, 111 L Ed 2d 762, 110 S Ct 3252.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 898 F2d 143.

No. 89-7575. Felix Sanchez-Rodriguez, Petitioner v United States

497 US 1010, 111 L Ed 2d 762, 110 S Ct 3252.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 901 F2d 1115.

No. 89-7579. Ahmad Mukhtar, Petitioner v United States

497 US 1010, 111 L Ed 2d 762, 110 S Ct 3253, reh den 497 US 1051, 111 L Ed 2d 832, 111 S Ct 19.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 896 F2d 550.

No. 89-7585. Rafael Romero and Albert Rodriguez, Petitioners v United States

497 US 1010, 111 L Ed 2d 762, 110 S Ct 3253.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 897 F2d 47.

No. 89-7590. Aaron Holsey, Petitioner v Eugene Nuth, Warden

497 US 1010, 111 L Ed 2d 763, 110 S Ct 3253.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 898 F2d 145.

No. 89-7611. Michael Ray Evans, Petitioner v United States

497 US 1010, 111 L Ed 2d 763, 110 S Ct 3253.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 898 F2d 155.

No. 89-7620. Alan Williams, Petitioner v United States

497 US 1010, 111 L Ed 2d 763, 110 S Ct 3253.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 900 F2d 264.

No. 89-7622. Carlos Ramirez, Petitioner v United States

497 US 1010, 111 L Ed 2d 763, 110 S Ct 3253.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 901 F2d 1115.

No. 89-7624. Larry White, Petitioner v United States

497 US 1010, 111 L Ed 2d 763, 110 S Ct 3254.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 890 F2d 1012.

No. 88-1958. Supreme Beef Processors, Inc., Petitioner v Robert Yaquinto, Jr., Trustee for Caravan Refrigerated Cargo, Inc.

497 US 1010, 111 L Ed 2d 763, 110 S Ct 3254.

The motion of Shippers National Freight Claims Council, Inc. for leave to file a brief as amicus curiae is granted. The motion of National Industrial Transportation League, et al. for leave to file a brief as amici curiae is granted. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 864 F2d 388.

No. 88-7318. James Russell Cain, Petitioner v South Carolina

497 US 1010, 111 L Ed 2d 764, 110 S Ct 3254, reh den 497 US 1050, 111 L Ed 2d 828, 111 S Ct 14.

June 25, 1990. Petition for writ of certiorari to the Supreme Court of South Carolina denied.

Same case below, 297 SC 497, 377 SE2d 556.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 88-7432. Stephen Michael West, Petitioner v Tennessee

497 US 1010, 111 L Ed 2d 764, 110 S Ct 3254.

June 25, 1990. Petition for writ of certiorari to the Supreme Court of Tennessee, Middle Division, denied.

Same case below, 767 SW2d 387.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-516. Wilbert Lee Evans, Petitioner v Charles Thompson, Superintendent, Mecklenburg Correctional Center

497 US 1010, 111 L Ed 2d 764, 110 S Ct 3255.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 881 F2d 117.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-6062. David Leslie Murtishaw, Petitioner v California

497 US 1010, 111 L Ed 2d 764, 110 S Ct 3255.

June 25, 1990. Petition for writ of certiorari to the Supreme Court of California denied.

Same case below, 48 Cal 3d 1001, 258 Cal Rptr 821, 773 P2d 172.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-6091. Kenneth Ray Ransom, Petitioner v Texas

497 US 1010, 111 L Ed 2d 765, 110 S Ct 3255.

June 25, 1990. Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied.

Same case below, 789 SW2d 572.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-6324. William N. Moore, Petitioner v Walter Zant, Superintendent, Georgia Diagnostic and Classification Center

497 US 1010, 111 L Ed 2d 765, 110 S Ct 3255, reh den (US) 112 L Ed 2d 337, 111 S Ct 375.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 885 F2d 1497.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-6509. Mark A. Hopkinson, Petitioner v Duane Shillinger, Warden, et al.

497 US 1010, 111 L Ed 2d 765, 110 S Ct 3256.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

Same case below, 866 F2d 1185 and 888 F2d 1286.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-7007. John Kennedy Barefield, Petitioner v Texas

497 US 1011, 111 L Ed 2d 766, 110 S Ct 3256.

June 25, 1990. Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied.

Same case below, 784 SW2d 38.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-7307. Bruce Edwin Callins, Petitioner v Texas

497 US 1011, 111 L Ed 2d 766, 110 S Ct 3256.

June 25, 1990. Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied.

Same case below, 780 SW2d 176.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-7308. Edward Charles Pickens, Petitioner v Arkansas

497 US 1011, 111 L Ed 2d 766, 110 S Ct 3257.

June 25, 1990. Petition for writ of certiorari to the Supreme Court of Arkansas denied.

Same case below, 301 Ark 244, 783 SW2d 341.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-7322. Herman Charles Barnes, Petitioner v Charles E. Thompson, Warden

497 US 1011, 111 L Ed 2d 766, 110 S Ct 3257.

June 25, 1990. Petition for writ of certiorari to the Supreme Court of Virginia denied.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-7380. Ronald Barrow, Petitioner v Illinois

497 US 1011, 111 L Ed 2d 767, 110 S Ct 3257, reh den 497 US 1051, 111 L Ed 2d 832, 111 S Ct 19.

June 25, 1990. Petition for writ of certiorari to the Supreme Court of Illinois denied.

Same case below, 133 Ill 2d 226, 139 Ill Dec 728, 549 NE2d 240.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-7442. Richard Dale Huffman, Petitioner v Indiana

497 US 1011, 111 L Ed 2d 767, 110 S Ct 3257.

June 25, 1990. Petition for writ of certiorari to the Supreme Court of Indiana denied.

Same case below, 543 NE2d 360.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-1756. Royal Crown Cola Co., Petitioner v Coca-Cola Company, et al.

497 US 1011, 111 L Ed 2d 767, 110 S Ct 3258.

June 25, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied. Justice Blackmun took no part in the consideration or decision of this petition.

Same case below, 887 F2d 1480.

No. 89-1759. A. L. Lockhart, Director, Arkansas Department of Correction, Petitioner v William Lloyd Hill

497 US 1011, 111 L Ed 2d 767, 110 S Ct 3258.

June 25, 1990. The motion of respondent for leave to proceed in forma pauperis is granted. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 894 F2d 1009.

No. 89-5346. William J. Bradley, Petitioner v Ohio

497 US 1011, 111 L Ed 2d 768, 110 S Ct 3258, reh den 497 US 1050, 111 L Ed 2d 830, 111 S Ct 16.

June 25, 1990. The petition for writ of certiorari to the Supreme Court of Ohio denied.

Same case below, 42 Ohio St 3d 136, 538 NE2d 373.

Justice Brennan, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant certiorari and vacate the death sentence in this case.

Justice Marshall, dissenting.

In Miranda v Arizona, 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602, 10 ALR3d 974 (1966), this Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Id., at 444, 16 L Ed 2d 694, 86 S Ct 1602, 10 ALR3d 974. Consistent with the need for a bright-line rule, the Court adopted a straightforward definition of "custodial interrogation": "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in a significant way." Ibid. In this case, petitioner, a prison inmate, challenged the admission of statements he made in response to direct questioning by prison officials following the murder of a prison employee on the ground that they had not given him the Miranda warnings. Notwithstanding Miranda's clear language, the State Court of Appeals held that petitioner was not in custody for purposes of Miranda, see No. 1583 (Sept. 22, 1987), App to Pet for Cert A-129—A-130, and the Ohio Supreme Court affirmed this point without discussion, 42 Ohio St 3d 136, 148, 538 NE2d 373, 375 (1989). Because the Courts of Appeals have approached the issue of what constitutes custody in the prison setting in differing ways,* this Court should grant the petition for certiorari to state clearly when Miranda applies in this context.

On February 2, 1984, the supervisor of the Southern Ohio Correctional Facility's sheet metal shop was beaten to death. Immediately after the murder, prison officials closed off the shop area and began to conduct a strip search of the inmates there. During the search, the officials found blood on one inmate's clothing. When he was asked for an explanation, another inmate, petitioner William Bradley, told the officials that the first prisoner "had nothing to do with this." 42 Ohio St 3d, at 138, 538 NE2d, at 376. The officials then searched petitioner and found blood on his clothing. The state court described the questioning that ensued:

---

* See United States v Cooper, 800 F2d 412, 414-415 (CA4 1986) (holding that prison inmate was not in custody for Miranda purposes because his freedom of movement was not restricted more than it would normally be in the prison environment); Flittie v Solem, 751 F2d 967, 974 (CA8 1985) ("Incarceration does not ipso facto make a statement involuntary"); Cervantes v Walker, 589 F2d 424, 427-429 (CA9 1978) (refusing to apply Miranda to questioning of a prison inmate that the court characterized as "on-the-scene questioning" and holding that prison inmate's freedom of movement was not diminished more than usual in the prison context); United States v Scalf, 725 F2d 1272, 1276 (CA10 1984) (same).

> "Corrections Officer Richard Taylor . . . asked for an explanation. [Petitioner] pointed to where [the] body had been and stated that it was the foreman's blood. Officer Taylor called the spot to the attention of Deputy Superintendent Seth, who repeated the questions to [petitioner] and received the same answers. Officer Taylor then asked [petitioner], '[D]id you do it?' [Petitioner] replied, '[Y]eah, I did it.' " Ibid.

Although petitioner was not apprised of his Miranda rights before this questioning, the trial court denied his motion to suppress the incriminating responses. Petitioner was convicted of aggravated murder and sentenced to death. On this direct appeal, the State Court of Appeals found that "the detention of [petitioner] and other inmates here was similar to those restrictions imposed with every incident that would take place at the prison, [so] it did not necessarily place an added imposition on his freedom of movement such as to make a reasonable person believe there had been a restriction of his freedom over and above that in his normal prisoner setting." App to Pet for Cert A-130. Thus, although it acknowledged that petitioner had been interrogated, the court found that petitioner had not been in custody, as defined by Miranda. The court therefore held that Miranda warnings were not required. The Supreme Court affirmed the conviction. 538 NE2d, at 385, 42 Ohio St 3d, at 148.

To determine whether a person is in custody for purposes of Miranda, "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." California v Beheler, 463 US 1121, 1125, 77 L Ed 2d 1275, 103 S Ct 3517 (1983) (per curiam) (quoting Oregon v Mathiason, 429 US 492, 495, 50 L Ed 2d 714, 97 S Ct 711 (1977)). This Court recently left open the question whether "[t]he bare fact of custody [would] in every instance require a warning even when the suspect is aware that he is speaking to an official." Illinois v Perkins, 496 US 292, 299, 110 L Ed 2d 243, 110 S Ct 2394 (1990). In my view, Miranda and its progeny have already answered that question. In this case, petitioner was clearly in custody because he had been formally arrested. Moreover, his incarceration resulted in a severe restraint on his freedom of movement. That his incarceration was the result of a conviction for a crime unrelated to the murder of the prison employee is irrelevant. See Mathis v United States, 391 US 1, 4-5, 20 L Ed 2d 381, 88 S Ct 1503 (1968) (holding that a person serving a prison sentence for one crime was in custody when he was interrogated about another, unrelated crime). His familiarity with the prison environment is also irrelevant to the Miranda analysis. See Orozco v Texas, 394 US 324, 326-327, 22 L Ed 2d 311, 89 S Ct 1095 (1969) (holding that suspect who had been arrested in his home and questioned in his bedroom ws in custody, notwithstanding his familiarity with his surroundings).

The state courts here, like some Courts of Appeals, see note, supra, nevertheless maintained that a prison inmate is in custody for purposes of Miranda only if some additional restriction on his freedom of movement is imposed. See App to Pet for Cert A-129. Even if this "additional restriction" test were consistent with Miranda, petitioner satisfies it: His freedom was curtailed more severely than was usual even in the controlled environment of prison—he was detained in the sheet metal shop, targeted as a suspect in a serious crime, and forcibly strip searched.

The second requirement for the application of Miranda—interrogation—is also present in this case. Prison officials asked petitioner a series of direct questions about a murder in which he was a suspect. Contrary to the State's assertion, Brief in Opposition 10-11, these questions cannot accurately be characterized as "on-the-scene questioning" exempt from the Miranda requirements. The Miranda Court stated that

> "[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present." 384 US, at 477-478, 16 L Ed 2d 694, 86 S Ct 1602, 10 ALR3d 974.

Here, though, prison officials had been summoned by a witness to the incident, had seen both the body and the weapon, and had detained those persons who could be responsible for the murder. The questioning of petitioner, directed at discovering whether he had committed the crime, thus went well beyond "on-the-scene questioning." Indeed, the State Court of Appeals acknowledged that this questioning constituted interrogation. App to Pet for Cert A-128.

Under this Court's recent decision in Perkins, supra, petitioner may also have to establish that his statements were "coerced." 496 US, at 299, 110 L Ed 2d 243, 110 S Ct 2394. The type of coercive environment described by the Court in Perkins was present in this case. First, the questioning occurred in prison, undoubtedly a " 'police-dominated atmosphere.' " Id., at 296, 110 L Ed 2d 243, 110 S Ct 2394. And when the guards rounded up the inmates and strip-searched them, the sense of police domination was increased. Second, the prison officials were openly acting as agents of the State, and petitioner knew that they were responsible for determining the extent of his freedom. See id., at 297, 110 L Ed 2d 243, 110 S Ct 2394 ("Questioning by captors, who appear to control the suspect's fate, may create mutually reinforcing pressures that the Court has assumed will weaken the suspect's will"). Given the virtually complete control that prison officials exercise over prisoners' lives, petitioner surely felt compelled to answer questions "by the fear of reprisal for remaining silent or in the hope of more lenient treatment should he confess." Ibid.

Thus, petitioner was in custody, was interrogated by prison officials, and was subjected to police coercion.

Because the guards did not inform him of his Miranda rights before interrogating him, his responses to their direct questioning could not be used against him at trial. This case represents more than an opportunity to correct an erroneous decision, however; it provides the Court a chance to clarify what constitutes "custody" for Miranda purposes in the prison setting. I would therefore grant the petition for certiorari. Even if I did not believe that this case otherwise merited review, I would grant the petition and vacate petitioner's death sentence on the ground that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976) (Marshall, J., dissenting).

No. 89-5934. William Thomas Cartwright, Petitioner v Oklahoma

497 US 1015, 111 L Ed 2d 771, 110 S Ct 3261, reh den 497 US 1051, 111 L Ed 2d 831, 111 S Ct 17.

June 25, 1990. Petition for writ of certiorari to the Court of Criminal Appeals of Oklahoma denied.

Same case below, 778 P2d 479.

Justice Brennan, with whom Justice Marshall joins, concurring in part and dissenting in part.

I join the Court's decision except insofar as the judgment, which is without prejudice to further sentencing proceedings, does not expressly preclude the reimposition of the death penalty. Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 49 L Ed 2d 859, 96 S Ct 2909 (1976) (Brennan, J., dissenting), I would direct that the resentencing proceedings be circumscribed such that the State may not reimpose the death sentence.

No. 89-7387. Carl Doughty and Larry Wilson, Petitioners v Board of County Commissioners for the County of Weld, et al.

497 US 1016, 111 L Ed 2d 771, 110 S Ct 3261.

June 25, 1990. The petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit before judgment is denied.

No. 89-7347. In Re Jackie Brooks, Petitioner

497 US 1002, 111 L Ed 2d 771, 110 S Ct 3261, reh den 497 US 1047, 111 L Ed 2d 824, 111 S Ct 10.

June 25, 1990. The petition for writ of prohibition is denied.

No. 89-81. Miriam Wilson, et al., Petitioners v Michael Lane, Director, Illinois Department of Corrections

497 US 1016, 111 L Ed 2d 771, 110 S Ct 3261.

June 25, 1990. The petition for rehearing is denied.

Former Decision, 495 US 923, 109 L Ed 2d 320, 110 S Ct 1958.

No. 89-1465. Daniel Kozak, Petitioner v United States Department of Agriculture

497 US 1016, 111 L Ed 2d 772, 110 S Ct 3262.

June 25, 1990. The petition for rehearing is denied.

Former Decision, 495 US 905, 109 L Ed 2d 289, 110 S Ct 1925.

No. 89-6914. David Meyers, Petitioner v Indiana

497 US 1016, 111 L Ed 2d 772, 110 S Ct 3262.

June 25, 1990. The petition for rehearing is denied.

Former Decision, 495 US 921, 109 L Ed 2d 316, 110 S Ct 1954.

No. 89-6954. Kenneth Earl Magwood, Petitioner v Alabama

497 US 1016, 111 L Ed 2d 772, 110 S Ct 3262.

June 25, 1990. The petition for rehearing is denied.

Former Decision, 495 US 923, 109 L Ed 2d 321, 110 S Ct 1959.

No. 89-7028. Louis Edward Fryhover, Petitioner v United States

497 US 1016, 111 L Ed 2d 772, 110 S Ct 3262.

June 25, 1990. The petition for rehearing is denied.

Former Decision, 495 US 922, 109 L Ed 2d 318, 110 S Ct 1956.

No. A-917 (89-7838). Alexzene Hamilton, as Natural Mother and Next Friend to James Edward Smith, Petitioner v Texas

No. A-921 (89-7842). Alexzene Hamilton, as Natural Mother and Next Friend to James Edward Smith, Petitioner v James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division

497 US 1016, 111 L Ed 2d 772, 110 S Ct 3262.

June 26, 1990. The applications for stay of execution of sentence of death, presented to Justice White, and by him referred to the Court, are denied. Justice Blackmun and Justice Stevens dissent and would grant the applications for stay.

Justice Brennan, with whom Justice Marshall joins, dissenting.

Tonight, for the second time within a month, see Demosthenes v Baal, 495 US 731, 109 L Ed 2d 762, 110 S Ct 2223 (1990), this Court permits a State to execute a prisoner who has waived further appeals on his behalf when serious doubts remain concerning his mental competence. I believe that we shirk our responsibility if we do not articulate standards by which the adequacy of procedures in state competency hearings may be judged. I would grant the petitions for certiorari and the corresponding applications for stay of execution. Indeed, four Members of this Court have voted to grant certiorari in this case, but because a stay cannot be entered without five votes, the execution cannot be halted. For the first time in recent memory, a man will be executed after the Court has decided to hear his claim. Cf. Watson v Butler, 483 US 1037, 1038, 97 L Ed 2d 796, 108 S Ct 6 (1987) (stay denied although four Justices voted to hold, rather than to grant, petition for certiorari).

I

In Whitmore v Arkansas, 495 US 149, 109 L Ed 2d 135, 110 S Ct 1717 (1990), this Court held that "one necessary condition for 'next friend' standing in federal court is a showing by the proposed 'next friend' that the real party in interest is unable to litigate his own cause due to mental incapacity." Id., at 165, 109 L Ed 2d 135, 110 S Ct 1717. Although the Court noted that this prerequisite is not satisfied "where an evidentiary hearing shows that the defendant has given a knowing, intelligent, and voluntary waiver of his right to proceed," ibid., we did not have occasion in that case to decide the *procedures* that are required when a state court determines that a prisoner is competent to forgo further appeals in his case. We face that issue tonight.

Petitioner, the mother of condemned prisoner James Edward Smith, challenges the decision of the Texas courts, to which the United States District Court for the Southern District of Texas and the United States Court of Appeals for the Fifth Circuit have deferred, that Smith is competent to waive further appeal of his case. The state trial court held a hearing to determine Smith's competency, a hearing which seems to have been little more than a nonadversarial, ex parte chat among the trial judge, the prosecutor, and Smith. The hearing was scheduled without notice to Smith's mother and next friend, Ms. Alexzene Hamilton, despite the fact that Ms. Hamilton had appeared as petitioner on Smith's behalf as early as May 7, 1988. Indeed, it was upon her application that we granted a stay of execution in Hamilton v Texas, 485 US 1042, 100 L Ed 2d 187, 108 S Ct 1761 (1988). Smith was unrepresented by counsel; although the trial judge had arranged for an attorney to be present in the event that Smith wished to consult with him, the judge stated: "I'm not going to force a lawyer to represent you." After Smith indicated that he did not wish to speak with the attorney, that was the end of the matter. There was no cross-examination at the hearing. No evidence was received beyond the bare reports of a Harris County psychiatrist and a Harris County psychologist who did not perform psychological tests and who were not given access to several reports of the history of Smith's mental illness, including the fact that he had been found not guilty by reason of insanity of a prior Florida robbery.

Whether Smith is competent to waive his right to appeal may be a complex, fact-intensive question.* But we need not face it tonight. Instead, we need judge only the adequacy of the state procedures used to determine his competency. These, I submit, were dubious procedures indeed. In Ford v Wainwright, 477 US 399, 410-418, 91 L Ed 2d 335, 106 S Ct 2595 (1986) (plurality opinion), Justice Marshall outlined certain procedures to be used in ascertaining the sanity of a prisoner prior to execution. Justice Marshall stressed the importance of an adversarial proceeding, noting that "without any adversarial assistance from the prisoner's representative—especially when the psychiatric opinion he proffers is based on much more extensive evaluation than that of the state-appointed commission—the factfinder loses the substantial benefit of potentially probative information." Id., at 414, 91 L Ed 2d 335, 106 S Ct 2595. In addition, Justice Marshall observed that "[c]ross-examination of the psychiatrists, or perhaps a less formal equivalent, would contribute markedly to the process of seeking truth in sanity disputes by bringing to light the bases for each expert's beliefs, the precise factors underlying those beliefs, any history of error or caprice of the examiner, any personal bias with respect to the issue of capital punishment, the expert's degree of certainty about his or her own conclusions, and the precise meaning of ambiguous words used in the report." Id., at 415, 91 L Ed 2d 335, 106 S Ct 2595. In sum, Justice Marshall found that "any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate" and that "the adversar[ial] presentation of relevant information [must] be as unrestricted as possible." Id., at 414, 417, 91 L Ed 2d 335, 106 S Ct 2595. Although these procedures are not directly applicable in a context in which prisoners seeking to waive their appeals actively resist appointment of counsel on their behalf, they might provide a useful guide. I would grant the petitions for certiorari to examine this important question.

A related issue presented by the instant case results from the failure of the District Court to grant an evidentiary hearing of its own. Both the District Court and the Fifth Circuit accorded the state trial court's findings deference despite the procedural inadequacies of the state-court proceedings. The District Court believed that it was "bound by the state court's findings," Civ Action No. H-90-2011 (June 24, 1990), p 7, and the Fifth Circuit maintained that because the findings were "fairly supported by the record," they were "binding" on the Court of Appeals. 905 F2d 825, 828 (1990). Regardless of a State's obligation to provide a competency hearing, it is clearly error for a federal court to accord deference to state-court findings when the state hearing is procedurally inadequate. A federal court is obliged to hold its own evidentiary hearing on habeas corpus if, among other factors, "the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing," 28 USC § 2254(d)(2) [28 USCS § 2254(d)(2)]; or "the material facts were not adequately developed at the State court hearing," § 2254(d)(3); or "the applicant did not receive a full, fair, and adequate hearing in the State court proceeding." § 2254(d)(6). This case presents the important legal question of the procedures required to determine the competence of a prisoner to forgo further appeals, a question which has relevance both for state courts and for federal courts reviewing the state-court findings on habeas corpus.

---

* There is a great deal of evidence casting Smith's competence in doubt. Smith has had a long history of mental illness dating from his discharge from the Navy and his hospitalization for psychiatric evaluation in the Great Lakes Naval Hospital in 1972. In 1978, he was found not guilty by reason of insanity in a robbery prosecution by a Florida state court. In 1981, he attempted suicide and was placed under psychiatric care. In 1985, the Texas trial court determined that Smith was *not* competent to handle his appeal and appointed an attorney to prosecute his appeal. Smith has suffered several head injuries in car accidents and falls. Smith's mother has retained a clinical psychologist—an associate professor at Florida State University—who has sought access to Smith for the purpose of performing neurological tests. Although these tests have not yet been conducted, the psychologist has formed a conclusion on the basis of existing evidence:

"I have formed a professional opinion with a reasonable degree of medical certainty concerning James Edwards Smith's current mental state. My opinion is that Mr. Smith has a history of schizophrenia that appears to be paranoid in nature, marked by suicidal tendencies and religious delusions. There is also the possibility of organic brain damage, indicated by Mr. Smith's history of head injuries, drug and alcohol abuse, and symptoms of neurological damage. At this time, based on Mr. Smith's condition, it is my opinion that he is mentally ill; that this illness prevents Mr. Smith from understanding his actual legal position and the options available to him; and that this illness prevents Mr. Smith from making a rational choice among his options." Pet for Cert in No. 89-7838, p 17.

II

Even apart from the merits of the instant case, I would grant the applications for stay of execution pending disposition of the petitions for certiorari. I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. See Gregg v Georgia, 428 US 153, 227, 49 L Ed 2d 859, 96 S Ct 2909 (1976) (Brennan, J., dissenting).

No. 89-628. Mountain States Legal Foundation, et al., Petitioners v National Wildlife Federation

497 US 1020, 111 L Ed 2d 775, 110 S Ct 3265.

June 28, 1990. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of Lujan v National Wildlife Federation, 497 US 871, 111 L Ed 2d 695, 110 S Ct 3177 (1990).

Same case below, 278 App DC 320, 878 F2d 422.

No. 89-1052. Three Buoys Houseboat Vacations USA, Ltd., Petitioner v Harvey G. Morts, et al.

497 US 1020, 111 L Ed 2d 775, 110 S Ct 3265.

June 28, 1990. On petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of Sisson v Ruby, 497 US 358, 111 L Ed 2d 292, 110 S Ct 2892 (1990).

Same case below, 878 F2d 1096.

No. 89-1506. Joseph M. Gedan, et al., Petitioners v Earle A. Partington, et al.

497 US 1020, 111 L Ed 2d 776, 110 S Ct 3265.

June 28, 1990. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of Cooter & Gell v Hartmarx Corporation, 496 US 384, 110 L Ed 2d 359, 110 S Ct 2447 (1990).

Same case below, 880 F2d 116.

No. 89-1697. Patrick M. O'Riley, Petitioner v Union Oil Company of California

497 US 1020, 111 L Ed 2d 776, 110 S Ct 3265.

June 28, 1990. On petition for writ of certiorari to the Court of Appeal of California, Second Appellate District. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeal of California, Second Appellate District, for further consideration in light of Tafflin v Levitt, 493 US 455, 107 L Ed 2d 887, 110 S Ct 792 (1990). Justice White, Justice Blackmun, and Justice O'Connor dissent.

No. 89-1754. Texaco Refining and Marketing, Inc., et al., Petitioners v Estate of Dau Van Tran, et al.

497 US 1020, 111 L Ed 2d 776, 110 S Ct 3266.

June 28, 1990. On petition for writ of certiorari to the Court of Appeals of Texas, Ninth District. The motion of Maritime Law Association of the United States for leave to file a brief as amicus curiae is granted. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeals of Texas, Ninth District, for further consideration in light of Sisson v Ruby, 497 US 358, 111 L Ed 2d 292, 110 S Ct 2892 (1990). Justice Stevens dissents.

Same case below, 777 SW2d 783.

No. 89-1760. Immuno, A.G., Petitioner v Jan Moor-Jankowski

497 US 1021, 111 L Ed 2d 776, 110 S Ct 3266.

June 28, 1990. On petition for writ of certiorari to the Court of Appeals of New York. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeals of New York for further consideration in light of Milkovich v Lorain Journal Co. 497 US 1, 111 L Ed 2d 1, 110 S Ct 2695 (1990).

Same case below, 74 NY2d 548, 549 NYS2d 938, 549 NE2d 129.

No. 89-5396. Marvin Howard Bockting, Petitioner v Nevada

497 US 1021, 111 L Ed 2d 777, 110 S Ct 3266.

June 28, 1990. On petition for writ of certiorari to the Supreme Court of Nevada. The motion of petitioner for leave to proceed in forma pauperis and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Nevada for further consideration in light of Idaho v Wright, 497 US 805, 111 L Ed 2d 638, 110 S Ct 3139 (1990).

Same case below, 105 Nev 1023, 810 P2d 317.

No. 89-6260. Everette Randolph Huff, Petitioner v North Carolina

497 US 1021, 111 L Ed 2d 777, 110 S Ct 3266.

June 28, 1990. On petition for writ of certiorari to the Supreme Court of North Carolina. The motion of petitioner for leave to proceed in forma pauperis and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of North Carolina for further consideration in light of McKoy v North Carolina, 494 US 433, 108 L Ed 2d 369, 110 S Ct 1227 (1990).

Same case below, 325 NC 1, 381 SE2d 635.

No. 89-6289. Roy Spotted War Bonnet, Petitioner v United States

497 US 1021, 111 L Ed 2d 777, 110 S Ct 3267.

June 28, 1990. On petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit. The motion of petitioner for leave to proceed in forma pauperis and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of Idaho v Wright, 497 US 805, 111 L Ed 2d 638, 110 S Ct 3139 (1990).

Same case below, 882 F2d 1360.

No. ——. Charles K. Kanekoa, et al., Petitioners v City and County of Honolulu, et al.

497 US 1021, 111 L Ed 2d 777, 110 S Ct 3267.

June 28, 1990. The motion of Charles K. Kanekoa for leave to proceed in forma pauperis is granted. The motion for leave to proceed in forma pauperis without affidavits of indigency executed by petitioners Warren E. Kanekoa and Damien Melemai is denied.

No. A-844. Shahsultan Jaffer, Applicant v Gilbert K. Granet, et al.

497 US 1021, 111 L Ed 2d 778, 110 S Ct 3267.

June 28, 1990. The application for stay of lower court proceedings, addressed to Justice Marshall and referred to the Court is denied.

No. A-881. Love Preston Thomas, et ux., Applicants v Manufacturers Hanover Mortgage Corporation

497 US 1021, 111 L Ed 2d 778, 110 S Ct 3267.

June 28, 1990. The application for stay, addressed to Justice Marshall and referred to the Court is denied.

No. D-891. In the Matter of Disbarment of George A. Day

497 US 1021, 111 L Ed 2d 778, 110 S Ct 3267.

June 28, 1990. Disbarment order entered.

Justice Marshall, with whom The Chief Justice joins, dissenting.

After respondent pleaded guilty to various felonies, the State Bar of Texas brought a disciplinary action in state court seeking respondent's disbarment. The state trial court enjoined respondent from practicing law in Texas. This Court then issued an order suspending respondent from the practice of law in this Court and requiring respondent to show cause why he should not be disbarred from such practice. Respondent has appealed the trial court's ruling, and that appeal is currently pending.

In view of the pendency of respondent's appeal, I do not believe it is appropriate that this Court should enter a disbarment order. This Court should not provide fewer procedural protections than the States themselves provide for appealing an adverse disciplinary determination. If the State of Texas affords respondent a means of challenging his suspension from practice, this Court should await the result of that challenge before disbarring respondent in this Court. Unless and until respondent's suspension becomes final under state law, then, I cannot join the Court's disposition. We place great weight on state procedures in determining whether to admit attorneys to practice in this Court. I do not believe that we should ignore those procedures when we decide whether discipline here is appropriate.

No. 89-1889. Simon J. Pinhas, Petitioner v Summit Health, Ltd., et al.

497 US 1022, 111 L Ed 2d 778, 110 S Ct 3268.

June 28, 1990. The motion of the parties to expedite consideration of the cross-petition for a writ of certiorari or, in the alternative, to delay briefing in No. 89-1679, Summit Health, Ltd. v Pinhas, is denied.

No. 89-1929. Louis W. Sullivan, Secretary of Health and Human Services, Petitioner v Massachusetts, et al.

497 US 1022, 111 L Ed 2d 779, 110 S Ct 3268.

June 28, 1990. The motion of respondent to consolidate this case with No. 89-1391, Rust v Sullivan, and No. 89-1392, New York v Sullivan, is denied.

No. 89-7189. Nan Wei, Petitioner v Delaware

497 US 1022, 111 L Ed 2d 779, 110 S Ct 3268.

June 28, 1990. The motion of petitioner for reconsideration of May 21, 1990, order denying leave to proceed in forma pauperis is denied.

No. 89-7272. Ronald Allen Harmelin, Petitioner v Michigan

497 US 1022, 111 L Ed 2d 779, 110 S Ct 3269.

June 28, 1990. The motion for appointment of counsel is granted, and it is ordered that Carla J. Johnson, Esq., of Detroit, Michigan, be appointed to serve as counsel for the petitioner in this case.

No. 89-7401. Paul A. Clarke, Petitioner v West Virginia Board of Regents, et al.

497 US 1023, 111 L Ed 2d 779, 110 S Ct 3269.

June 28, 1990. The motion of petitioner for leave to proceed in forma pauperis is denied. Petitioner is allowed until July 19, 1990, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

Justice Brennan, Justice Marshall, Justice Blackmun, and Justice Stevens, dissenting.

For the reasons expressed in Brown v Herald Co., Inc. 464 US 928, 78 L Ed 2d 301, 104 S Ct 331 (1983), we would deny the petition for a writ of certiorari without reaching the merits of the motion to proceed in forma pauperis.

No. 89-1715. Cathy Burns, Petitioner v Rick Reed

497 US 1023, 111 L Ed 2d 779, 110 S Ct 3269.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit granted.

Same case below, 894 F2d 949.

No. 89-1784. Insurance Company of the State of Pennsylvania, et al., Petitioners v Ben Cooper, Inc.

497 US 1023, 111 L Ed 2d 779, 110 S Ct 3269.

June 28, 1990. Petition for writ of

certiorari to the United States Court of Appeals for the Second Circuit granted.

Same case below, 896 F2d 1394.

No. 89-1629. Salve Regina College, Petitioner v Sharon L. Russell

497 US 1023, 111 L Ed 2d 780, 110 S Ct 3269.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the First Circuit granted limited to Question 1 presented by the petition.

Same case below, 890 F2d 484.

No. 89-5961. Robert Lacy Parker, Petitioner v Richard L. Dugger, Secretary, Florida Department of Corrections, et al.

497 US 1023, 111 L Ed 2d 780, 110 S Ct 3270.

June 28, 1990. Motion of petitioner for leave to proceed in forma pauperis and petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit granted.

Same case below, 876 F2d 1470.

No. 89-7260. William J. Burns, Petitioner v United States

497 US 1023, 111 L Ed 2d 780, 110 S Ct 3270.

June 28, 1990. Motion of petitioner for leave to proceed in forma pauperis and petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted.

Same case below, 282 US App DC 194, 893 F2d 1343.

No. 89-30. Janice Endsley, Executrix of the Estate of William Endsley, Deceased, et al., Petitioners v John Young

497 US 1024, 111 L Ed 2d 780, 110 S Ct 3270.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 872 F2d 176.

No. 89-1345. Beverly Hills Savings & Loan Association, et al., Petitioners v Melvin Memphrey Carter

497 US 1024, 111 L Ed 2d 780, 110 S Ct 3270.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 884 F2d 1186.

No. 89-1366. Arden Brett Bullock, Petitioner v Utah

497 US 1024, 111 L Ed 2d 780, 110 S Ct 3270.

June 28, 1990. Petition for writ of

certiorari to the Supreme Court of Utah denied.

Same case below, 791 P2d 155.

No. 89-1454. James Hamilton, Petitioner v Mississippi

497 US 1024, 111 L Ed 2d 781, 110 S Ct 3271.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Mississippi denied.

Same case below, 556 So 2d 685.

No. 89-1567. Vincent Aspromonti, Petitioner v United States

497 US 1024, 111 L Ed 2d 781, 110 S Ct 3271.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 895 F2d 1411.

No. 89-1569. Solid Waste Services, Inc., et al., Petitioners v Elizabeth Dole, Secretary of Labor

497 US 1024, 111 L Ed 2d 781, 110 S Ct 3271.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 897 F2d 521.

No. 89-1570. Thomas H. Hajecate, et ux., Petitioners v United States

497 US 1024, 111 L Ed 2d 781, 110 S Ct 3271.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 889 F2d 1466.

No. 89-1593. Carl E. McAfee, Petitioner v United States

497 US 1024, 111 L Ed 2d 781, 110 S Ct 3271.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 896 F2d 1368.

No. 89-1642. United Transportation Union, Petitioner v Interstate Commerce Commission, et al.

497 US 1024, 111 L Ed 2d 781, 110 S Ct 3271.

June 28, 1990. Petition for writ of certiorari to the United States Court

of Appeals for the District of Columbia Circuit denied.

Same case below, 282 US App DC 38, 891 F2d 908.

No. 89-1643. Gordon Strube, Petitioner v United States

497 US 1024, 111 L Ed 2d 782, 110 S Ct 3272.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 888 F2d 130.

No. 89-1710. Iron Workers Mid-South Pension Fund, et al., Petitioners v Borden Chemical

497 US 1024, 111 L Ed 2d 782, 110 S Ct 3272.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 891 F2d 548.

No. 89-1719. Joseph Pantoja, et al., Petitioners v Texas Gas Transmission Corporation, et al.

497 US 1024, 111 L Ed 2d 782, 110 S Ct 3272, reh den (US) 112 L Ed 2d 242, 111 S Ct 287.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 890 F2d 955.

No. 89-1720. Alvin Douglas, Petitioner v Michael P. W. Stone, Secretary of the Army

497 US 1025, 111 L Ed 2d 782, 110 S Ct 3272.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 895 F2d 1416.

No. 89-1724. Celebrity World, Inc. and John Ledes, Petitioners v Celebrity Service International, Inc.

497 US 1025, 111 L Ed 2d 782, 110 S Ct 3272.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

No. 89-1725. Winston J. Perron, Petitioner v Gulf Oil Corporation

497 US 1025, 111 L Ed 2d 782, 110 S Ct 3273.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 893 F2d 344.

No. 89-1733. Gene A. Foreman, Petitioner v Aetna Casualty & Surety Company

497 US 1025, 111 L Ed 2d 783, 110 S Ct 3273, reh den (US) 112 L Ed 2d 197, 111 S Ct 237.

June 28, 1990. Petition for writ of certiorari to the Court of Appeals of Texas, Fourteenth District, denied.

No. 89-1741. Joseph Murray Hayse, Petitioner v Board of Trustees of the University of Kentucky

497 US 1025, 111 L Ed 2d 783, 110 S Ct 3273.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Kentucky denied.

Same case below, 782 SW2d 609.

No. 89-1742. Cleveland Christmas, Petitioner v Joseph Marson, et al.

497 US 1025, 111 L Ed 2d 783, 110 S Ct 3273.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 897 F2d 521.

No. 89-1746. Reliance Insurance Company, Petitioner v Glados, Inc.

497 US 1025, 111 L Ed 2d 783, 110 S Ct 3273.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 888 F2d 1309.

No. 89-1747. Carlissa Churchill, Informal Administrator of the Estate of Patrick Churchill, Deceased, et al., Petitioners v F/V Fjord, et al.

497 US 1025, 111 L Ed 2d 783, 110 S Ct 3273.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 892 F2d 763.

No. 89-1750. Local 4501, Communications Workers of America, Petitioner v Ohio State University, et al.

497 US 1025, 111 L Ed 2d 783, 110 S Ct 3274.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Ohio denied.

Same case below, 49 Ohio St 3d 1, 550 NE2d 164.

No. 89-1751. Eastern Publishing and Advertising, Inc., t/a Armed Forces News, Petitioner v Chesapeake Publishing and Advertising, Inc., t/a The Military News, et al.

497 US 1025, 111 L Ed 2d 784, 110 S Ct 3274.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 895 F2d 971.

No. 89-1752. C. Vernon Mason, Petitioner v Departmental Disciplinary Committee, Appellate Division of the Supreme Court of New York, First Judicial Department, et al.

497 US 1025, 111 L Ed 2d 784, 110 S Ct 3274.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 894 F2d 512.

No. 89-1761. Troy D. Barnett, et al., Petitioners v Petro-Tex Chemical Corporation, et al.

497 US 1025, 111 L Ed 2d 784, 110 S Ct 3274.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 893 F2d 800.

No. 89-1762. William Blythe Myers, et al., Petitioners v AP Propane, Inc.

497 US 1026, 111 L Ed 2d 784, 110 S Ct 3274.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

No. 89-1763. Brenda Cornwell, Petitioner v Gary Crawford and City of Riverside

497 US 1026, 111 L Ed 2d 784, 110 S Ct 3274.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 896 F2d 398.

No. 89-1766. United Brotherhood of Carpenters and Joiners of America, Union No. 1149, et al., Petitioners v Seaview Industries, Inc.

497 US 1026, 111 L Ed 2d 784, 110 S Ct 3275.

June 28, 1990. Petition for writ of certiorari to the Court of Appeal of California, First Appellate District, denied.

No. 89-1783. Charles L. Meyer, Petitioner v State Bar of Texas; and Charles L. Meyer, Petitioner v Peter Lowry, District Judge, 261st Judicial District, Travis County, Texas, et al.

497 US 1026, 111 L Ed 2d 785, 110 S Ct 3275, reh den 497 US 1050, 111 L Ed 2d 829, 111 S Ct 15.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Texas denied.

No. 89-1792. Harold I. Pollack, Petitioner v Edward G. Gruis and Eugene L. Krizek

497 US 1026, 111 L Ed 2d 785, 110 S Ct 3275.

June 28, 1990. Petition for writ of certiorari to the District of Columbia Court of Appeals denied.

No. 89-1803. Michael Schaefer, Petitioner v Marjorie Gallego, et al.

497 US 1026, 111 L Ed 2d 785, 110 S Ct 3275, reh den 497 US 1051, 111 L Ed 2d 832, 111 S Ct 20.

June 28, 1990. Petition for writ of certiorari to the Court of Appeal of California, Second Appellate District, denied.

No. 89-1809. H. Vaughn Townsend, et al., Petitioners v Henry G. Cramblett, et al.

497 US 1026, 111 L Ed 2d 785, 110 S Ct 3275.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 892 F2d 80.

No. 89-1823. Stephen E. Kopcho, Petitioner v United States

497 US 1026, 111 L Ed 2d 785, 110 S Ct 3276.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 899 F2d 1218.

No. 89-1825. Maria Graciela Ramirez, Petitioner v Richard J. Woods, Judge, District Court of Texas, Webb County, et al.

497 US 1026, 111 L Ed 2d 785, 110 S Ct 3276.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 898 F2d 151.

No. 89-1844. Richard Thomas McLendon, Petitioner v Charles B. Pettey

497 US 1026, 111 L Ed 2d 785, 110 S Ct 3276.

June 28, 1990. Petition for writ of

certiorari to the Court of Appeals of Texas, Twelfth District, denied.

No. 89-1872. City of Sansom Park, Texas, et al., Petitioners v Dana Peelman, et al.

497 US 1026, 111 L Ed 2d 786, 110 S Ct 3276.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 894 F2d 1334.

No. 89-6917. Donnelle Gallion, Petitioner v William Zinn

497 US 1026, 111 L Ed 2d 786, 110 S Ct 3276.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 894 F2d 1340.

No. 89-6988. Gary Clark, Petitioner v Illinois

497 US 1026, 111 L Ed 2d 786, 110 S Ct 3276.

June 28, 1990. Petition for writ of certiorari to the Appellate Court of Illinois, Fourth District, denied.

Same case below, 188 Ill App 3d 79, 135 Ill Dec 743, 544 NE2d 100.

No. 89-7044. Willie Gene Lloyd, Jr., Petitioner v California

497 US 1026, 111 L Ed 2d 786, 110 S Ct 3277.

June 28, 1990. Petition for writ of certiorari to the Court of Appeal of California, Second Appellate District, denied.

Same case below, 216 Cal App 3d 1425, 265 Cal Rptr 422.

No. 89-7051. Robert E. Lee, Petitioner v Mary Flannigan, Administrator, Menard Psychiatric Center, et al.

497 US 1027, 111 L Ed 2d 786, 110 S Ct 3277.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 884 F2d 945.

No. 89-7069. Michelle M. Etlin, Petitioner v Vladimir N. Etlin; and In Re Michelle M. Etlin, Petitioner

497 US 1027, 111 L Ed 2d 786, 110 S Ct 3277.

June 28, 1990. Petition for writ of certiorari to the Court of Appeals of Virginia denied.

No. 89-7104. Ignuster Nunn, et al., Petitioners v Illinois

497 US 1027, 111 L Ed 2d 787, 110 S Ct 3277.

June 28, 1990. Petition for writ of certiorari to the Appellate Court of Illinois, First District, denied.

Same case below, 184 Ill App 3d 253, 133 Ill Dec 345, 541 NE2d 182.

No. 89-7182. Spencer T. Myers, Petitioner v United States

497 US 1027, 111 L Ed 2d 787, 110 S Ct 3277.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 896 F2d 1368.

No. 89-7306. John Winston, Petitioner v United States

497 US 1027, 111 L Ed 2d 787, 110 S Ct 3277.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.

Same case below, 282 US App DC 96, 892 F2d 112.

No. 89-7364. Raymond Hauges, Petitioner v United States Postal Service

497 US 1027, 111 L Ed 2d 787, 110 S Ct 3278.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Federal Circuit denied.

Same case below, 895 F2d 1422.

No. 89-7394. Ralph Lepiscopo, Petitioner v Sam Esquibel, et al.

497 US 1027, 111 L Ed 2d 787, 110 S Ct 3278.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

No. 89-7395. Darrell Johnson, Petitioner v Walter Leapley, et al.

497 US 1027, 111 L Ed 2d 787, 110 S Ct 3278.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

No. 89-7410. Elma Lou Turner, Petitioner v Illinois

497 US 1027, 111 L Ed 2d 787, 110 S Ct 3278.

June 28, 1990. Petition for writ of certiorari to the Appellate Court of Illinois, First District, denied.

Same case below, 193 Ill App 3d 1108, 161 Ill Dec 205, 578 NE2d 332.

No. 89-7416. Raymond Accolla, Petitioner v James Sullivan, Superintendent, Sing Sing Correctional Facility, et al.

497 US 1027, 111 L Ed 2d 788, 110 S Ct 3278, reh den 497 US 1051, 111 L Ed 2d 832, 111 S Ct 19.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

No. 89-7417. Londell Watkins, Petitioner v Edward Murray, et al.

497 US 1027, 111 L Ed 2d 788, 110 S Ct 3278.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 900 F2d 257.

No. 89-7418. Clifford M. Curtis, Petitioner v American Bakeries Company, et al.

497 US 1027, 111 L Ed 2d 788, 110 S Ct 3279, reh den 497 US 1051, 111 L Ed 2d 832, 111 S Ct 19.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 898 F2d 151.

No. 89-7419. Royce Calvin Sands, II, Petitioner v Roger Crist, Warden, et al.

497 US 1027, 111 L Ed 2d 788, 110 S Ct 3279.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 892 F2d 1046.

No. 89-7420. Lee Edward Franklin, Petitioner v A. L. Lockhart, Director, Arkansas Department of Correction

497 US 1028, 111 L Ed 2d 788, 110 S Ct 3279.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 902 F2d 1571.

No. 89-7424. Pierce Spillers, Petitioner v Brenda Burns, Warden, et al.

497 US 1028, 111 L Ed 2d 788, 110 S Ct 3279.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

No. 89-7426. James Wood, et ux., Petitioners v Ohio

497 US 1028, 111 L Ed 2d 788, 110 S Ct 3279.

June 28, 1990. Petition for writ of

certiorari to the Court of Appeals of Ohio, Lucas County, denied.

Same case below, 63 Ohio App 3d 855, 580 NE2d 484.

No. 89-7434. Clarence Davis, Petitioner v Bryon Bush and Jeff C. Clames

497 US 1028, 111 L Ed 2d 789, 110 S Ct 3279.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

No. 89-7440. Wilbert Reed, Petitioner v Edward W. Murray, Director, Virginia Department of Corrections

497 US 1028, 111 L Ed 2d 789, 110 S Ct 3280.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 900 F2d 254.

No. 89-7445. Quintin Littlejohn, Petitioner v South Carolina

497 US 1028, 111 L Ed 2d 789, 110 S Ct 3280, reh den (US) 112 L Ed 2d 198, 111 S Ct 238.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 900 F2d 253.

No. 89-7446. James L. Martin, Petitioner v Joseph J. Farnan, Jr.

497 US 1028, 111 L Ed 2d 789, 110 S Ct 3280, reh den 497 US 1047, 111 L Ed 2d 825, 111 S Ct 10.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

No. 89-7449. James L. Martin, Petitioner v Daniel H. Huyett

497 US 1028, 111 L Ed 2d 789, 110 S Ct 3280, reh den 497 US 1047, 111 L Ed 2d 825, 111 S Ct 10.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

No. 89-7450. Ralph M. Lepiscopo, Petitioner v Karl L. Sannicks

497 US 1028, 111 L Ed 2d 789, 110 S Ct 3280.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

No. 89-7453. Frances Evans, Petitioner v Pennsylvania

497 US 1028, 111 L Ed 2d 789, 110 S Ct 3280.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Pennsylvania, Eastern District, denied.

Same case below, 522 Pa 594, 562 A2d 319.

No. 89-7454. Basil Walker, Petitioner v E. W. Jones, Superintendent, Great Meadows Correctional Facility, et al.

497 US 1028, 111 L Ed 2d 790, 110 S Ct 3281.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 898 F2d 137.

No. 89-7457. Frederick M. Hilliard, Petitioner v Thomas A. Fulcomer, Superintendent, Huntingdon Correctional Institution

497 US 1028, 111 L Ed 2d 790, 110 S Ct 3281.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

No. 89-7458. Betty Jean Klacsmann, Petitioner v Adrian Jensen

497 US 1028, 111 L Ed 2d 790, 110 S Ct 3281.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

No. 89-7459. Ralph M. Lepiscopo, Petitioner v Robert J. Tansy, Warden

497 US 1028, 111 L Ed 2d 790, 110 S Ct 3281.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

No. 89-7460. Frank Morgan, Petitioner v Charles Rowe, et al.

497 US 1028, 111 L Ed 2d 790, 110 S Ct 3281.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 897 F2d 531.

No. 89-7461. Joseph William O'Melia, Petitioner v Santa Monica Municipal Court, et al.

497 US 1029, 111 L Ed 2d 790, 110 S Ct 3281.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

No. 89-7466. Gerald Rogers, Petitioner v John Slansky, et al.

497 US 1029, 111 L Ed 2d 790, 110 S Ct 3282.

June 28, 1990. Petition for writ of

certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 895 F2d 1418.

No. 89-7467. James Ramsey, Petitioner v David Garraghty, et al.

497 US 1029, 111 L Ed 2d 791, 110 S Ct 3282.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 891 F2d 287.

No. 89-7470. Claude Earn Carter, Petitioner v Kentucky

497 US 1029, 111 L Ed 2d 791, 110 S Ct 3282.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Kentucky denied.

Same case below, 782 SW2d 597.

No. 89-7472. Curtis Leon Taylor, Petitioner v J. W. Jones, et al.

497 US 1029, 111 L Ed 2d 791, 110 S Ct 3282.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 898 F2d 147.

No. 89-7500. Larry Williams, et ux., Petitioners v United States, et al.

497 US 1029, 111 L Ed 2d 791, 110 S Ct 3282.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 902 F2d 1573.

No. 89-7504. Eve Lyn Moerlien, Petitioner v Helen Grgurinovich, et al.

497 US 1029, 111 L Ed 2d 791, 110 S Ct 3282.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

No. 89-7505. Jorge Mario Herrera, Petitioner v Oklahoma

497 US 1029, 111 L Ed 2d 791, 110 S Ct 3283.

June 28, 1990. Petition for writ of certiorari to the Court of Criminal Appeals of Oklahoma denied.

No. 89-7510. Richard C. Lussy, Petitioner v Ticor Title Insurance Company

497 US 1029, 111 L Ed 2d 792, 110 S Ct 3283.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Montana denied.

No. 89-7523. Bobby Boren, Petitioner v N. L. Industries, Inc., et al.

497 US 1029, 111 L Ed 2d 792, 110 S Ct 3283.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 889 F2d 1463.

No. 89-7529. Betty Jean Klacsmann, Petitioner v Lockheed Space Operations Company

497 US 1029, 111 L Ed 2d 792, 110 S Ct 3283.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

No. 89-7538. William F. Manchester, Petitioner v United States

497 US 1029, 111 L Ed 2d 792, 110 S Ct 3283.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 900 F2d 253.

No. 89-7562. Danny Lee Wey, Petitioner v United States

497 US 1029, 111 L Ed 2d 792, 110 S Ct 3283.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 895 F2d 429.

No. 89-7580. James Michael Levine, Petitioner v United States

497 US 1029, 111 L Ed 2d 792, 110 S Ct 3284.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 894 F2d 1245.

No. 89-7601. Luis Eduardo Martinez, Petitioner v United States

497 US 1029, 111 L Ed 2d 792, 110 S Ct 3284.

June 28, 1990. Petition for writ of certiorari to the United States Court

of Appeals for the Fifth Circuit denied.

Same case below, 915 F2d 1567.

No. 89-7608. Walter A. Connor, Jr., Petitioner v United States

497 US 1029, 111 L Ed 2d 793, 110 S Ct 3284.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 898 F2d 942.

No. 89-7612. Pearly Wilson, Petitioner v Victor Kassicieh, et al.

497 US 1030, 111 L Ed 2d 793, 110 S Ct 3284.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 899 F2d 15.

No. 89-7630. Jameel-Ismail Hassan Saahir, Petitioner v United States

497 US 1030, 111 L Ed 2d 793, 110 S Ct 3284.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

No. 89-7635. George Harris, et al., Petitioners v United States

497 US 1030, 111 L Ed 2d 793, 110 S Ct 3284.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 898 F2d 148.

No. 89-7636. Donald Gary King, Petitioner v United States

497 US 1030, 111 L Ed 2d 793, 110 S Ct 3285.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 899 F2d 1226.

No. 89-7646. Sabrina L. Johnson, Petitioner v United States

497 US 1030, 111 L Ed 2d 793, 110 S Ct 3285.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 900 F2d 260.

No. 89-7650. Darryl Covington, Petitioner v United States

497 US 1030, 111 L Ed 2d 794, 110 S Ct 3285.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 900 F2d 256.

No. 89-7651. Albertus Fitz, Petitioner v United States

497 US 1030, 111 L Ed 2d 794, 110 S Ct 3285.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 898 F2d 148.

No. 89-7660. James Sheffield, Petitioner v John Keane, Superintendent, Sing Sing Correctional Facility, et al.

497 US 1030, 111 L Ed 2d 794, 110 S Ct 3285.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 904 F2d 34.

No. 89-7666. Reynaldo Hinojosa-Ramos, Petitioner v United States

497 US 1030, 111 L Ed 2d 794, 110 S Ct 3285.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 898 F2d 148.

No. 89-7670. Ceabon Jackson, Petitioner v United States

497 US 1030, 111 L Ed 2d 794, 110 S Ct 3286.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 895 F2d 722.

No. 89-7673. George Paul Laroque, Petitioner v United States, et al.

497 US 1030, 111 L Ed 2d 794, 110 S Ct 3286.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 902 F2d 1565.

No. 89-7677. Maurice Sullivan, Petitioner v United States

497 US 1030, 111 L Ed 2d 794, 110 S Ct 3286.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 897 F2d 530.

No. 89-7680. Mary T. Smith, Petitioner v United States

497 US 1030, 111 L Ed 2d 795, 110 S Ct 3286.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 902 F2d 1563.

No. 89-7688. John Cialoni, Petitioner v United States

497 US 1030, 111 L Ed 2d 795, 110 S Ct 3286.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 898 F2d 1218.

No. 89-7690. Miguel Garcia, Petitioner v United States

497 US 1030, 111 L Ed 2d 795, 110 S Ct 3286.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 902 F2d 1575.

No. 89-7693. Charles M. Goree, Petitioner v United States

497 US 1031, 111 L Ed 2d 795, 110 S Ct 3287.

June 28, 1990. Petition for writ of certiorari to the District of Columbia Court of Appeals denied.

No. 89-7709. Perry W. Hodgdon, II, Petitioner v United States

497 US 1031, 111 L Ed 2d 795, 110 S Ct 3287.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the First Circuit denied.

Same case below, 900 F2d 247.

No. 88-1553. Samuel A. Lewis, Director, Arizona Department of Corrections, et al., Petitioners v John Harvey Adamson

497 US 1031, 111 L Ed 2d 795, 110 S Ct 3287.

June 28, 1990. The motion of respondent for leave to proceed in forma pauperis is granted. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. The Chief Justice, Justice White, and Justice Scalia would grant the petition for a writ of certiorari, vacate the judgment, and remand the case to the United States Court of Appeals for the Ninth Circuit for further consideration in light of Walton v Arizona, 497 US 639, 111 L Ed 2d 511, 110 S Ct 3047 (1990), Lewis v Jeffers, 497 US 764, 111 L Ed 2d 606, 110 S Ct

3092 (1990), and Alabama v Smith, 490 US 794, 104 L Ed 2d 865, 109 S Ct 2201 (1989). Justice O'Connor and Justice Kennedy took no part in the consideration or decision of this motion and this petition.

Same case below, 865 F2d 1011.

No. 88-6512. Nicholas Todd Sutton, Petitioner v Tennessee

497 US 1031, 111 L Ed 2d 796, 110 S Ct 3287.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Tennessee, Eastern Division, denied.

Same case below, 761 SW2d 763.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 88-7332. Verneal Jimerson, Petitioner v Illinois

497 US 1031, 111 L Ed 2d 796, 110 S Ct 3288, reh den 497 US 1050, 111 L Ed 2d 828, 111 S Ct 14.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Illinois denied.

Same case below, 127 Ill 2d 12, 129 Ill Dec 124, 535 NE2d 889.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 88-7444. Gregory Thompson, Petitioner v Tennessee

497 US 1031, 111 L Ed 2d 796, 110 S Ct 3288.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Tennessee, Middle Division, denied.

Same case below, 768 SW2d 239.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 88-7451. Harold Lamont Otey, Petitioner v Gary Grammer, Warden

497 US 1031, 111 L Ed 2d 796, 110 S Ct 3288.

June 28, 1990. Petition for writ of

certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 859 F2d 575.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-5008. Manuel Salazar, Petitioner v Illinois

497 US 1031, 111 L Ed 2d 797, 110 S Ct 3288, reh den 497 US 1050, 111 L Ed 2d 829, 111 S Ct 15.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Illinois denied.

Same case below, 126 Ill 2d 424, 129 Ill Dec 1, 535 NE2d 766.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-5016. Laurence Keith Libberton, Petitioner v Arizona

497 US 1031, 111 L Ed 2d 797, 110 S Ct 3289, reh den 497 US 1050, 111 L Ed 2d 829, 111 S Ct 15.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Arizona denied.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-5121. James William Hamblen, Petitioner v Richard L. Dugger, Secretary, Florida Department of Corrections

497 US 1031, 111 L Ed 2d 797, 110 S Ct 3289.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-5133. Edward Lonzo McCall, Petitioner v Arizona

497 US 1031, 111 L Ed 2d 798, 110 S Ct 3289.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Arizona denied.

Same case below, 160 Ariz 119, 770 P2d 1165.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-5146. Thomas V. Odle, Petitioner v Illinois

497 US 1031, 111 L Ed 2d 798, 110 S Ct 3289, reh den 497 US 1050, 111 L Ed 2d 830, 111 S Ct 16.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Illinois denied.

Same case below, 128 Ill 2d 111, 131 Ill Dec 53, 538 NE2d 428.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-5219. William Young, Petitioner v Illinois

497 US 1031, 111 L Ed 2d 798, 110 S Ct 3290, reh den 497 US 1050, 111 L Ed 2d 830, 111 S Ct 16.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Illinois denied.

Same case below, 128 Ill 2d 1, 131 Ill Dec 78, 538 NE2d 453 and 538 NE2d 461.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-5232. John Paul Phillips, Petitioner v Illinois

497 US 1031, 111 L Ed 2d 798, 110 S Ct 3290, reh den 497 US 1050, 111 L Ed 2d 830, 111 S Ct 16.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Illinois denied.

Same case below, 127 Ill 2d 499, 131 Ill Dec 125, 538 NE2d 500.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed

2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-5265. Viva Leroy Nash, Petitioner v Arizona

497 US 1031, 111 L Ed 2d 799, 110 S Ct 3290.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Arizona denied.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-5435. Jerry Mahaffey, Petitioner v Illinois

497 US 1031, 111 L Ed 2d 799, 110 S Ct 3291.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Illinois denied.

Same case below, 128 Ill 2d 388, 132 Ill Dec 366, 539 NE2d 1172.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-5443. Mario Flores, Petitioner v Illinois

497 US 1031, 111 L Ed 2d 799, 110 S Ct 3291, reh den 497 US 1050, 111 L Ed 2d 830, 111 S Ct 16.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Illinois denied.

Same case below, 128 Ill 2d 66, 131 Ill Dec 106, 538 NE2d 481.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-5470. Richard C. Taylor, Petitioner v Tennessee

497 US 1031, 111 L Ed 2d 799, 110 S Ct 3291.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Tennessee, Middle Division, denied.

Same case below, 771 SW2d 387.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-5513. Steve Henley, Petitioner v Tennessee

497 US 1031, 111 L Ed 2d 800, 110 S Ct 3291.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Tennessee, Middle Division, denied.

Same case below, 774 SW2d 908.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-5545. William Bracy, Petitioner v Arizona

497 US 1031, 111 L Ed 2d 800, 110 S Ct 3292.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Arizona denied.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-5616. Randy Lynn McKinney, Petitioner v Idaho

497 US 1031, 111 L Ed 2d 800, 110 S Ct 3292, reh den 497 US 1050, 111 L Ed 2d 830, 111 S Ct 16.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Idaho denied.

Same case below, 115 Idaho 1125, 772 P2d 1219.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-5633. Murray Hooper, Petitioner v Arizona

497 US 1031, 111 L Ed 2d 801, 110 S Ct 3292.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Arizona denied.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-5635. David Earl Miller, Petitioner v Tennessee

497 US 1031, 111 L Ed 2d 801, 110 S Ct 3292, reh den 497 US 1050, 111 L Ed 2d 830, 111 S Ct 17.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Tennessee, Eastern Division, denied.

Same case below, 771 SW2d 401.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-5704. Stanley Edward Allen, Petitioner v Walter Zant, Superintendent, Georgia Diagnostic and Classification Center

497 US 1031, 111 L Ed 2d 801, 110 S Ct 3293, reh den 497 US 1050, 111 L Ed 2d 830, 111 S Ct 17.

June 28, 1990. Petition for writ of certiorari to the Superior Court of Georgia, Butts County, denied.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-5848. Charles A. Foster, Petitioner v Oklahoma

497 US 1032, 111 L Ed 2d 801, 110 S Ct 3293.

June 28, 1990. Petition for writ of certiorari to the Court of Criminal Appeals of Oklahoma denied.

Same case below, 779 P2d 591.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-5990. Edward Dean Kennedy, Petitioner v Richard L. Dugger, Secretary, Florida Department of Corrections

497 US 1032, 111 L Ed 2d 802, 110 S Ct 3293.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Florida denied.

Same case below, 551 So 2d 461.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-6298. Kenneth Allen Stewart, Petitioner v Florida

497 US 1032, 111 L Ed 2d 802, 110 S Ct 3294.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Florida denied

Same case below, 549 So 2d 171.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-6317. Alton Coleman, Petitioner v Illinois

497 US 1032, 111 L Ed 2d 802, 110 S Ct 3294, reh den 497 US 1051, 111 L Ed 2d 831, 111 S Ct 17.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Illinois denied.

Same case below, 129 Ill 2d 321, 135 Ill Dec 834, 544 NE2d 330.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-6459. Robin Wayne Owens, Petitioner v Illinois

497 US 1032, 111 L Ed 2d 802, 110 S Ct 3294, reh den 497 US 1051, 111 L Ed 2d 831, 111 S Ct 17.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Illinois denied.

Same case below, 129 Ill 2d 303, 135 Ill Dec 780, 544 NE2d 276.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-6461. Carl Jackson, Petitioner v Richard L. Dugger, Secretary, Florida Department of Corrections

497 US 1032, 111 L Ed 2d 803, 110 S Ct 3294.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Florida denied.

Same case below, 554 So 2d 1168.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-6600. Lawrence Lee Buxton, Petitioner v James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division

497 US 1032, 111 L Ed 2d 803, 110 S Ct 3295.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 879 F2d 140.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-6626. Mark Henry Lankford, Petitioner v Idaho

497 US 1032, 111 L Ed 2d 803, 110 S Ct 3295, reh den 497 US 1051, 111 L Ed 2d 831, 111 S Ct 18.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Idaho denied.

Same case below, 116 Idaho 860, 781 P2d 197.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-6778. Robert T. Sidebottom, Petitioner v Missouri

497 US 1032, 111 L Ed 2d 804, 110 S Ct 3295, reh den 497 US 1046, 111 L Ed 2d 822, 111 S Ct 6.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Missouri denied.

Same case below, 781 SW2d 791.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-6870. Tafford Holman, Petitioner v Illinois

497 US 1032, 111 L Ed 2d 804, 110 S Ct 3296, reh den 497 US 1051, 111 L Ed 2d 831, 111 S Ct 18.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Illinois denied.

Same case below, 132 Ill 2d 128, 138 Ill Dec 155, 547 NE2d 124.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-6953. Andrew Kokoraleis, Petitioner v Illinois

497 US 1032, 111 L Ed 2d 804, 110 S Ct 3296, reh den 497 US 1051, 111 L Ed 2d 831, 111 S Ct 18.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Illinois denied.

Same case below, 132 Ill 2d 235, 138 Ill Dec 233, 547 NE2d 202.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-7080. Anthony Bertolotti, Petitioner v Richard L. Dugger, Secretary, Florida Department of Corrections

497 US 1032, 111 L Ed 2d 804, 110 S Ct 3296.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 883 F2d 1503.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-7178. Kenneth Lloyd Collins, Petitioner v Maryland

497 US 1032, 111 L Ed 2d 805, 110 S Ct 3296.

June 28, 1990. Petition for writ of certiorari to the Court of Appeals of Maryland denied.

Same case below, 318 Md 269, 568 A2d 1.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-7474. Bobby Earl Lusk, Petitioner v Richard L. Dugger, Secretary, Florida Department of Corrections

497 US 1032, 111 L Ed 2d 805, 110 S Ct 3297, reh den 497 US 1047, 111 L Ed 2d 825, 111 S Ct 10.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 890 F2d 332.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-7512. Carl J. Isaacs, Petitioner v Georgia

497 US 1032, 111 L Ed 2d 805, 110 S Ct 3297, reh den 497 US 1051, 111 L Ed 2d 832, 111 S Ct 19.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Georgia denied.

Same case below, 259 Ga 717, 386 SE2d 316.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-7528. Danial Siebert, Petitioner v Alabama

497 US 1032, 111 L Ed 2d 806, 110 S Ct 3297.

June 28, 1990. Petition for writ of certiorari to the Supreme Court of Alabama denied.

Same case below, 555 So 2d 780.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 88-7629. Robert Wayne Vickers, Petitioner v Arizona

497 US 1033, 111 L Ed 2d 806, 110 S Ct 3298, reh den 497 US 1050, 111 L Ed 2d 829, 111 S Ct 14.

June 28, 1990. The petition for a writ of certiorari to the Supreme Court of Arizona is denied.

Same case below, 159 Ariz 532, 768 P2d 1177.

Justice Marshall, with whom Justice Brennan joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976) (Marshall, J., dissenting), I would grant the petition for certiorari and vacate the death penalty in this case. Even if I did not hold this view, I would grant the petition to decide whether the Constitution requires a State to provide an indigent defendant access to diagnostic testing necessary to prepare an effective defense based on his mental condition, when the defendant demonstrates that his sanity at the time of the offense will be a significant issue at trial. I believe that our decision in Ake v Oklahoma, 470 US 68, 84 L Ed 2d 53, 105 S Ct 1087 (1985), compels us to answer that question in the affirmative.

Petitioner Robert Wayne Vickers was convicted of murdering a prison inmate and sentenced to death. His only defense at trial was insanity. Specifically, Vickers claimed that he suffered from temporal lobe epilepsy, a brain disorder that can cause violent behavior and render a person unable to appreciate the nature and wrongfulness of his acts. Vickers' court-appointed psychiatrist, Dr. Paul Bindelglas, determined, after a lengthy interview and an exhaustive review of Vickers' medical records, that Vickers suffered from "definite dissociative reactions" possibly due to temporal lobe epilepsy. App to Pet for Cert B-7. Dr. Bindelglas based his opinion on Vickers' history of cerebral trauma and seizures, neurological deficits reported by a psychologist when Vickers was a child, improvement in Vickers' condition when he was placed on anti-convulsive and psychotropic medications and reversion when he was taken off the medication, and an abnormal electroencephalogram (EEG) performed four years before the murder. Ibid. Dr. Bindelglas further opined that Vickers probably was in a dissociative state at the time of the offense, which made him "incapable of rendering any judgement and . . .

unable to know right from wrong." Id., at B-9. Dr. Bindelglas stated that he could not make a definitive diagnosis, however, without certain neuropsychological testing. Ibid.

Based on Dr. Bindelglas' recommendation, petitioner requested that the trial court provide access to diagnostic testing. Petitioner included with his request an affidavit from a second psychiatrist, Dr. David Bear, who, after reviewing petitioner's records and examining him for five hours, agreed that there was a "substantial possibility" that Vickers suffered from temporal lobe epilepsy, which may have impaired his ability to "appreciate the quality and nature of the act and its wrongfulness." Id., at C-4, C-9. Dr. Bear also stated that diagnostic testing, including a careful neurological examination and multiple EEGs, was necessary "before professional judgment can be rendered regarding Mr. Vickers' mental state at the time of the subject offense." Id., at C-12. In addition, the State's own expert, Dr. Maier Tuchler, testified at petitioner's competency hearing that diagnostic testing was necessary to determine definitely whether Vickers suffered from temporal lobe epilepsy. Finally, petitioner supplied the court with the affidavits of two other psychiatrists who testified that strong evidence indicated that Vickers suffered from a mental disorder which impaired his capacity to make rational judgments, but that diagnostic testing was necessary before a firm conclusion could be reached. App to Pet for Cert D and E.

Despite the consensus of these medical experts that diagnostic testing was necessary, the court denied petitioner's request. The court relied on a two-paragraph letter from a psychiatrist appointed at the State's request, Dr. William Masland. Dr. Masland concluded, on the basis of a quick review of petitioner's medical records, conversations with prisoners and prison staff, and a brief interview with Vickers, that "there is absolutely nothing to suggest that this man is epileptic" and that "further diagnostic testing . . . would be totally superfluous." Id., at F. The court refused to reconsider its order after receiving additional affidavits from Dr. Bindelglas and Dr. Bear and two neurologists that vehemently contested Dr. Masland's opinion and reemphasized the need for diagnostic testing.

Because of the lack of diagnostic testing, Dr. Bindelglas could testify at trial only that there was a "definite probability" of temporal lobe epilepsy. 159 Ariz 532, 536, 768 P2d 1177, 1181 (1989). Before sentencing, petitioner again requested diagnostic testing to establish the brain disorder as a mitigating circumstance; again the court denied his motion.

The Arizona Supreme Court rejected petitioner's argument that the State violated due process by denying him an adequate opportunity to prove his insanity defense. Ibid. The court reasoned that the requested testing would have been expensive and would have posed a "burdensome security problem." Id., at 537, 768 P2d, at 1182. The court also claimed that nothing indicated that testing would have helped petitioner prove his insanity defense. Ibid.

In Ake v Oklahoma, supra, at 83, 84 L Ed 2d 53, 105 S Ct 1087, this Court held that when an indigent "defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a *competent* psychiatrist who will conduct an *appropriate* examination and assist in evaluation, preparation, and presentation of the defense." (Emphases added.) The right to a competent psychiatrist necessarily includes the right to have the State provide the psychiatrist with the tools he requires to conduct an adequate examination and evaluation of the defendant. To hold otherwise is analogous to requiring the State to provide an indigent defendant with an attorney, but not requiring it to pay for the attorney's legal research expenses.

This is not to say that an indigent defendant is entitled to every scientific procedure that has only a remote possibility of bolstering his defense. Thus, we recognized in Ake that "the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy." 470 US, at 77, 84 L Ed 2d 53, 105 S Ct 1087 (citing Ross v Moffitt, 417 US 600, 41 L Ed 2d 341, 94 S Ct 2437 (1974)). But when a defendant demonstrates that his sanity will be a significant issue at trial, and his psychiatrist makes a plausible showing that certain testing is necessary for him to perform his Ake function, that testing must be considered one of "the raw materials integral to the building of an effective defense" that the State must provide. 470 US, at 77, 84 L Ed 2d 53, 105 S Ct 1087. Ibid.

Petitioner undoubtedly satisfied the threshold requirements. First, his sanity was a significant factor in his defense. Vickers' "sole defense was that of insanity," id., at 86, 84 L Ed 2d 53, 105 S Ct 1087, and six experts testified that there was a substantial possibility that Vickers suffered from a mental disorder at the time of the offense that might have impaired his capacity to understand the nature of his actions. Indeed, the trial court's appointment of Dr. Bindelglas itself shows that petitioner's sanity was a significant issue. Second, Vickers' court-appointed psychiatrist established that testing was necessary for him to perform his Ake role adequately. Dr. Bindelglas stated in the clearest terms that he could not make a definitive diagnosis without specific testing. App to Pet for Cert B-9. Six other medical experts, including the State's expert, Dr. Tuchler, affirmed the need for testing. Pet for Cert 7. Without such testing, Dr. Bindelglas could offer only a tentative opinion at trial. Clearly, then, Dr. Bindelglas' ability to contribute to petitioner's defense was impaired unreasonably by the State's refusal to provide access to diagnostic testing.

The trial court's reliance on Dr. Masland's opinion that testing would be superfluous—an opinion not shared by *any* of the other doctors—does not justify its denial of access to testing. Ake requires the appointment of a psychiatrist who will assist in the preparation of the defense, not one who will merely give an independent assessment to the judge or jury. 470 US, at 83, 84 L Ed 2d 53, 105 S Ct 1087. Although a judge or jury may choose to believe the State's experts rather than the defendant's at trial, a court may not permit the State's experts to determine what resources the defendant's experts may use. To allow such a veto power is akin to permitting a prosecutor to decide on what cases defense counsel may rely or what witnesses he may call. As long as the defendant makes the threshold showing of the need for testing, the court must provide access to it.

The Arizona Supreme Court affirmed the trial court's decision in part on the assumption that the necessary testing would have to be performed out of state and would last four to six weeks, thus imposing substantial costs on the State and creating a security problem. 159 Ariz, at 537, 768 P2d, at 1182. The court based this assumption on Dr. Bindelglas' request that Vickers be tested in a California hospital "if at all possible" because the Arizona State Hospital might have been prejudiced in favor of its previous diagnosis and might not perform the job adequately. App to Pet for Cert B-9. The trial court, however, never sought a compromise; it refused to provide for testing altogether. Any problem posed by sending Vickers to California is a red herring, then, to the extent that less burdensome testing would have satisfied the State's obligation. If, however, the testing procedure suggested by Dr. Bindelglas was in fact the only adequate means of arriving at a medically sound diagnosis, the burden on the State does not justify denying that testing. As we held in Ake, the State's interest in preserving its fisc is not substantial when compared with the compelling interest of both the defendant and the State in the fair and accurate adjudication of a criminal case, particularly one in which the defendant's life is at stake. 470 US, at 78-79, 84 L Ed 2d 53, 105 S Ct 1087.

Finally, the Arizona high court maintained that further testing was of "questionable value" to petitioner's insanity defense and that the risk of an erroneous judgment was minimal because three state experts testified that Vickers was not insane at the time of the offense. 159 Ariz, at 537, 768 P2d, at 1182. This reasoning wrongly subjects Ake claims to harmless-error analysis. In Ake, we did not endeavor to determine whether the petitioner's case had been prejudiced by the lack of a psychiatrist. Rather, we determined that, in general, psychiatric assistance is of extreme importance in cases involving an insanity defense, id., at 79-82, 84 L Ed 2d 53, 105 S Ct 1087, and that without that assistance "the risk of an inaccurate resolution of sanity issues is extremely high," id., at 82, 84 L Ed 2d 53, 105 S Ct 1087. Because the petitioner had made the threshold showing that his sanity was a significant issue at trial and the State had failed to offer psychiatric assistance, we reversed and remanded for a new trial. In this case, then, the trial testimony of the State's experts is irrelevant. Vickers' sanity was a significant issue at trial and testing was necessary for his psychiatrist to perform his Ake function. Because the trial court nevertheless refused to require the State to provide access to the requisite testing, Vickers is entitled to a new trial.

Our decision in Ake v Oklahoma recognized the right of an indigent defendant to a competent court-appointed psychiatrist when his sanity is seriously in question. To deprive a defendant of diagnostic testing necessary for the psychiatrist to perform adequately his Ake function renders that right meaningless. I therefore dissent from the denial of certiorari.

No. 89-867. F. & H. R. Farman-Farmaian Consulting Engineers Firm, et al., Petitioners v Harza Engineering Company

497 US 1038, 111 L Ed 2d 809, 110 S Ct 3301.

June 28, 1990. Petition for writ of

certiorari to the United States Court of Appeals for the Seventh Circuit denied. Justice White would grant certiorari.

Same case below, 882 F2d 281.

No. 89-1556. Margaret T. Whitacre, Petitioner v James F. Davey

497 US 1038, 111 L Ed 2d 810, 110 S Ct 3301.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied. Justice White would grant certiorari.

Same case below, 281 US App DC 363, 890 F2d 1168.

No. 89-1372. Paul Delo, Superintendent, Potosi Correctional Center, Petitioner v Rayfield Newlon

497 US 1038, 111 L Ed 2d 810, 110 S Ct 3301.

June 28, 1990. The motion of respondent for leave to proceed in forma pauperis is granted. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 885 F2d 1328.

No. 89-1757. Charles Scully, Superintendent, Greenhaven Correctional Facility, et al., Petitioners v Frank C. Peterson

497 US 1038, 111 L Ed 2d 810, 110 S Ct 3301.

June 28, 1990. The motion of respondent for leave to proceed in forma pauperis is granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 896 F2d 661.

No. 89-1425. Maryland, Petitioner v Avery V. Ferrell

497 US 1038, 111 L Ed 2d 810, 110 S Ct 3301.

June 28, 1990. The motion of respondent for leave to proceed in forma pauperis without an affidavit of indigency executed by respondent is granted. Petition for writ of certiorari to the Court of Appeals of Maryland denied.

Same case below, 318 Md 235, 567 A2d 937.

No. 89-1531. Earle A. Partington, Petitioner v Joseph M. Gedan, et al.

497 US 1038, 111 L Ed 2d 810, 110 S Ct 3302.

June 28, 1990. The motion of petitioner to strike suggestion of mootness is denied. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 880 F2d 116.

No. 89-1882. Tom Foley, Petitioner v WCCO TV, Inc., Steven Eckert and John Lindsay

497 US 1038, 111 L Ed 2d 811, 110 S Ct 3302.

June 28, 1990. Petition for writ of certiorari to the Court of Appeals of Minnesota denied. Justice Blackmun took no part in the consideration or decision of this petition.

Same case below, 449 NW2d 497.

No. 89-7175. Darrell Beaulieu, Petitioner v United States

497 US 1038, 111 L Ed 2d 811, 110 S Ct 3302.

June 28, 1990. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

Same case below, 893 F2d 1177.

Justice White, dissenting.

The issue presented is whether a district judge may rely on testimony from the trial of a defendant's co-conspirators in sentencing the defendant. The Tenth Circuit held that the District Court's reliance on such evidence did not violate any constitutional provision. 900 F2d 1531 (1990). The Tenth Circuit expressly rejected the position adopted by the Eleventh Circuit which has concluded that reliance on such testimony violates a defendant's rights. See United States v Castellanos, 882 F2d 474 (CA11 1989). I would grant certiorari to resolve the conflict.

Rule 10 of the Rules of this Court "indicate character of reasons" that will be considered in granting or denying petitions for certiorari. Among these considerations is whether there is a conflict between two courts of appeals, between a court of appeals and the highest court of a State, or between two state courts of last resort. These considerations frequently lead to granting certiorari. Just this past Monday, we granted certiorari in two cases that, absent conflict between Courts of Appeals, very likely would not have been granted. Dole v Occupational Safety and Health Review Comm'n, ante, p 1002, 111 L Ed 2d 747, 110 S Ct 3235; Business Guides, Inc. v Chromatic Communications, Enterprises, Inc., ante, p 1002, 111 L Ed 2d 746, 110 S Ct 3235. This is a weekly occurrence, but it also regularly happens that certiorari is denied in other cases presenting the kind of conflicts singled out by Rule 10. This case is one of them, and there are many others this Term, as there have been in other Terms.

As of June 21, I had noted my dissent from denial of certiorari 67 times during this Term. My notes on these dissents indicate that on 48 occasions I dissented because in my view there were conflicts among Courts of Appeals sufficiently crystallized to warrant certiorari if the federal law is to be maintained in any satisfactory, uniform condition. In seven other cases, there were differences on the same federal issue between Courts of Appeals and state courts; in another case, state courts of last resort differed with each other. Finally, there were 11 cases that did not involve a conflict between courts but in my view presented important issues that should be settled by this Court.

In some of these cases it is perhaps arguable that the alleged conflict was not "real" or "square." In most of these cases, however, it is very difficult to deny the conflict, especially where, as in this case, the court of appeals expressly differs with another court, yet certiorari is denied because the conflict is "tolerable" or "narrow," or because other courts of appeals should have the opportunity to weigh in on one side or another of the unsettled issue, or for some other unstated reason. In any event, denial underlines the fact that the federal law is being administered in different ways in different parts of the country; citizens in some circuits are subject to liabilities or entitlements that citizens in other circuits are not burdened with or entitled to.

It is surely arguable that we should not grant more cases in one Term than we can decide in one Term. Being current in our docket is a major consideration; and it may not be wise to delay prompt review in every case, even though many of them involve issues of paramount importance, simply to overcrowd our argument docket with many other cases of lesser significance. But I suggest that we should do what we can, and it is plain enough to me that quite a number of the cases involving conflicts have been denied review but could have been granted without presenting any danger of not being current in our docket.

Of course, even if we have taken all of the cases that we could be expected to decide, which is not the fact as I see it, there would remain those unreviewed cases that leave in place the many different interpretations and applications of the federal law as administered in the courts of appeals, an issue that merits the attention of Congress and the legal establishment.

No. 89-7507. In Re Arthur Brennan Malloy, Petitioner

497 US 1023, 111 L Ed 2d 812, 110 S Ct 3303.

June 28, 1990. The petition for writ of common-law certiorari is denied.

No. 89-7581. In Re Talmon Hegwood, Jr., Petitioner

497 US 1023, 111 L Ed 2d 812, 110 S Ct 3303.

June 28, 1990. The petition for writ of mandamus is denied.

No. 89-7664. In Re Arthur D'Amario, III, Petitioner

497 US 1023, 111 L Ed 2d 812, 110 S Ct 3303.

June 28, 1990. The petition for writ of mandamus is denied.

No. 89-333. California, Petitioner v Federal Energy Regulatory Commission, et al.

497 US 1040, 111 L Ed 2d 813, 110 S Ct 3304.

June 28, 1990. The petition for rehearing is denied.

Former Decision, 495 US 490, 109 L Ed 2d 474, 110 S Ct 2024.

No. 89-1574. General Motors Corporation, et al., Petitioners v Department of Revenue of Alabama

No. 89-1587. Reynolds Metals Company, Petitioner v James M. Sizemore, Jr., Commissioner of Revenue of Alabama

497 US 1040, 111 L Ed 2d 813, 110 S Ct 3304.

June 28, 1990. The petitions for rehearing are denied.

Former Decision, 496 US 912, 110 L Ed 2d 282, 110 S Ct 2602.

No. 89-1592. Maria Graciela Ramirez, Petitioner v United States

497 US 1040, 111 L Ed 2d 813, 110 S Ct 3304.

June 28, 1990. The petition for rehearing is denied.

Former Decision, 495 US 933, 109 L Ed 2d 504, 110 S Ct 2176.

No. 89-6243. Florentino Leal, Petitioner v James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division

497 US 1040, 111 L Ed 2d 813, 110 S Ct 3304.

June 28, 1990. The petition for rehearing is denied.

Former Decision, 495 US 934, 109 L Ed 2d 506, 110 S Ct 2177.

No. 89-6494. Abraham Van Kojo Asante, Petitioner v United States

497 US 1040, 111 L Ed 2d 813, 110 S Ct 3304.

June 28, 1990. The petition for rehearing is denied.

Former Decision, 495 US 934, 109 L Ed 2d 506, 110 S Ct 2177.

No. 89-6706. Sara White Berbick, Petitioner v Provident National Bank, et al.

497 US 1040, 111 L Ed 2d 813, 110 S Ct 3305.

June 28, 1990. The petition for rehearing is denied.

Former Decision, 494 US 1085, 108 L Ed 2d 951, 110 S Ct 1821.

No. 89-6764. Sheila A. Scott, Petitioner v Department of the Army

497 US 1040, 111 L Ed 2d 813, 110 S Ct 3305.

June 28, 1990. The petition for rehearing is denied.

Former Decision, 495 US 935, 109 L Ed 2d 508, 110 S Ct 2179.

No. 89-6912. Karen Taylor, Petitioner v Department of Health and Human Services

497 US 1040, 111 L Ed 2d 813, 110 S Ct 3305.

June 28, 1990. The petition for rehearing is denied.

Former Decision, 494 US 1090, 108 L Ed 2d 961, 110 S Ct 1832.

No. 89-6944. Ruth Cooper, Petitioner v Remax Wyandotte County Real Estate, Inc., et al.

497 US 1040, 111 L Ed 2d 814, 110 S Ct 3305.

June 28, 1990. The petition for rehearing is denied.

Former Decision, 495 US 935, 109 L Ed 2d 510, 110 S Ct 2181.

No. 89-6972. Thomas W. Lake, Petitioner v California

497 US 1040, 111 L Ed 2d 814, 110 S Ct 3305.

June 28, 1990. The petition for rehearing is denied.

Former Decision, 495 US 960, 109 L Ed 2d 750, 110 S Ct 2568.

No. 89-6976. Mary Ellen Klein, Appellant v Massachusetts

497 US 1040, 111 L Ed 2d 814, 110 S Ct 3305.

June 28, 1990. The petition for rehearing is denied.

Former Decision, 495 US 916, 109 L Ed 2d 306, 110 S Ct 1943.

No. 89-6979. Dana Hamilton Fox, Petitioner v United States Department of the Interior

497 US 1040, 111 L Ed 2d 814, 110 S Ct 3306.

June 28, 1990. The petition for rehearing is denied.

Former Decision, 495 US 936, 109 L Ed 2d 512, 110 S Ct 2183.

No. 89-6991. Robert Mikesell, Petitioner v Department of Transportation, National Transportation Safety Board

497 US 1041, 111 L Ed 2d 814, 110 S Ct 3306.

June 28, 1990. The petition for rehearing is denied.

Former Decision, 495 US 949, 109 L Ed 2d 538, 110 S Ct 2212.

No. 89-7000. Ricky Allan Roe, Petitioner v Texas

497 US 1041, 111 L Ed 2d 814, 110 S Ct 3306.

June 28, 1990. The petition for rehearing is denied.

Former Decision, 495 US 937, 109 L Ed 2d 513, 110 S Ct 2185.

No. 89-7009. Jose R. Castillo and Carmen Crespo, Petitioners v United States

497 US 1041, 111 L Ed 2d 814, 110 S Ct 3306.

June 28, 1990. The petition for rehearing is denied.

Former Decision, 495 US 960, 109 L Ed 2d 750, 110 S Ct 2568.

No. 89-7017. Jorge B. Castillo, Petitioner v James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division

497 US 1041, 111 L Ed 2d 814, 110 S Ct 3306.

June 28, 1990. The petition for rehearing is denied.

Former Decision, 495 US 937, 109 L Ed 2d 514, 110 S Ct 2186.

No. 89-7057. John Webster Flanagan, Petitioner v United States

497 US 1041, 111 L Ed 2d 815, 110 S Ct 3306.

June 28, 1990. The petition for rehearing is denied.

Former Decision, 495 US 938, 109 L Ed 2d 515, 110 S Ct 2187.

No. 89-7070. Mitchell Williams, Petitioner v Georgia

497 US 1041, 111 L Ed 2d 815, 110 S Ct 3306.

June 28, 1990. The petition for rehearing is denied.

Former Decision, 495 US 950, 109 L Ed 2d 539, 110 S Ct 2213.

No. 89-7111. Ben W. Allustiarte and Linda M. Allustiarte, Petitioners v W. Austin Cooper

497 US 1041, 111 L Ed 2d 815, 110 S Ct 3307.

June 28, 1990. The petition for rehearing is denied.

Former Decision, 495 US 960, 109 L Ed 2d 751, 110 S Ct 2569.

No. 89-7117. Thomas L. Baasch, Petitioner v United States, et al.

497 US 1041, 111 L Ed 2d 815, 110 S Ct 3307.

June 28, 1990. The petition for rehearing is denied.

Former Decision, 495 US 938, 109 L Ed 2d 516, 110 S Ct 2188.

No. 89-7118. James L. Martin, Petitioner v Supreme Court of Pennsylvania, et al.

497 US 1041, 111 L Ed 2d 815, 110 S Ct 3307.

June 28, 1990. The petition for rehearing is denied.

Former Decision, 495 US 960, 109 L Ed 2d 752, 110 S Ct 2570.

No. 89-7119. James L. Martin, Petitioner v Supreme Court of Pennsylvania

497 US 1041, 111 L Ed 2d 815, 110 S Ct 3307.

June 28, 1990. The petition for rehearing is denied.

Former Decision, 495 US 960, 109 L Ed 2d 752, 110 S Ct 2570.

No. 89-7126. James L. Martin, Petitioner v Rowland Shank, et al.

497 US 1041, 111 L Ed 2d 815, 110 S Ct 3307.

June 28, 1990. The petition for rehearing is denied.

Former Decision, 495 US 961, 109 L Ed 2d 752, 110 S Ct 2570.

No. 89-7129. John Hawk-Bey, Petitioner v United States

497 US 1041, 111 L Ed 2d 815, 110 S Ct 3307.

June 28, 1990. The petition for rehearing is denied.

Former Decision, 495 US 938, 109 L Ed 2d 517, 110 S Ct 2189.

No. 89-7173. James O. Kelley, Petitioner v International Total Services, Inc., et al.

497 US 1041, 111 L Ed 2d 816, 110 S Ct 3308.

June 28, 1990. The petition for rehearing is denied.

Former Decision, 496 US 909, 110 L Ed 2d 277, 110 S Ct 2597.

No. 89-7205. Wayne S. Donald, Petitioner v United States Department of Education

497 US 1041, 111 L Ed 2d 816, 110 S Ct 3308.

June 28, 1990. The petition for rehearing is denied.

Former Decision, 496 US 910, 110 L Ed 2d 279, 110 S Ct 2598.

No. 89-7243. George McLaughlin, Petitioner v Arthur Latessa

497 US 1041, 111 L Ed 2d 816, 110 S Ct 3308.

June 28, 1990. The petition for rehearing is denied.

Former Decision, 495 US 952, 109 L Ed 2d 542, 110 S Ct 2217.

No. 89-7263. John Whirty, Petitioner v Arthur Latessa, Superintendent, Massachusetts Correctional Institution

497 US 1041, 111 L Ed 2d 816, 110 S Ct 3308.

June 28, 1990. The petition for rehearing is denied.

Former Decision, 495 US 952, 109 L Ed 2d 543, 110 S Ct 2218.

No. 89-7285. Robert M. Cochran, Petitioner v C. A. Turner, Warden

497 US 1041, 111 L Ed 2d 816, 110 S Ct 3308.

June 28, 1990. The petition for rehearing is denied.

Former Decision, 496 US 929, 110 L Ed 2d 647, 110 S Ct 2627.

No. 89-1545. James D. Quarterman, et ux., Petitioners v Commissioner of Internal Revenue

497 US 1041, 111 L Ed 2d 816, 110 S Ct 3308.

June 28, 1990. The motion of petitioners for leave to proceed further herein in forma pauperis is granted. The petition for rehearing is denied.

Former Decision, 495 US 932, 109 L Ed 2d 503, 110 S Ct 2174.

No. 89-7280. J. David Golub, Petitioner v IBM Corporation; J. David Golub, Petitioner v Ernst & Whinney, et al.; J. David Golub, Petitioner v Weiner & Co.; and J. David Golub, Petitioner v University of Chicago

497 US 1041, 111 L Ed 2d 816, 110 S Ct 3309.

June 28, 1990. The petition for rehearing is denied. Justice Blackmun and Justice Stevens took no part in the consideration or decision of this petition.

Former Decision, 495 US 941, 109 L Ed 2d 522, 110 S Ct 2195.

No. A-929. Brian Karem, Applicant v Pat Priest, et al.

497 US 1042, 111 L Ed 2d 817, 110 S Ct 3309.

July 9, 1990. The application for stay pending appeal to the United States Court of Appeals for the Fifth Circuit, addressed to Justice Brennan and referred to the Court, is denied. Justice Brennan and Justice Marshall would grant the application for stay.

No. 90-5103 (A-35). Wallace Norrell Thomas, Petitioner v Charlie Jones, Warden

497 US 1042, 111 L Ed 2d 817, 111 S Ct 1.

July 12, 1990. The application for stay of execution of sentence of death, presented to Justice Kennedy, and by him referred to the Court, is denied. The petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit is denied.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant the application for stay of execution and the petition for a writ of certiorari and would vacate the death sentence in this case.

No. 89-7094. In re Douglas Loren Marsh, Petitioner

497 US 1042, 111 L Ed 2d 817, 111 S Ct 1.

July 16, 1990. The petition for a writ of mandamus in the above-entitled case was dismissed today pursuant to Rule 46 of this court.

No. A-43. Mikel James Derrick, Applicant v James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division

497 US 1042, 111 L Ed 2d 817, 111 S Ct 1.

July 17, 1990. The application for stay of execution of sentence of death and certificate of probable cause, presented to Justice White, and by him referred to the Court, is denied. Justice Blackmun and Justice Stevens would grant the application for stay.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant the application for stay of execution in order to give applicant time to file a petition for a writ of certiorari and would grant the petition and vacate the death sentence in this case.

No. A-46. Richard L. Dugger, Secretary, Florida Department of Corrections, Applicant v James William Hamblen

497 US 1043, 111 L Ed 2d 818, 111 S Ct 1.

July 18, 1990. The application of the Attorney General of Florida for an order to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eleventh Circuit, presented to Justice Kennedy, and by him referred to the Court, is denied.

No. A-48. Richard L. Dugger, Secretary, Florida Department of Corrections, Applicant v Jerry White

497 US 1043, 111 L Ed 2d 818, 111 S Ct 2.

July 19, 1990. The application of the Attorney General of Florida for an order to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eleventh Circuit, presented to Justice Kennedy, and by him referred to the Court, is denied.

No. A-54 (90-5195). Richard T. Boggs, Petitioner v Raymond Muncy, Warden

497 US 1043, 111 L Ed 2d 818, 111 S Ct 2.

July 19, 1990. The application for stay of execution of sentence of death, presented to The Chief Justice, and by him referred to the Court, is denied.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant the application for stay of execution and the petition for a writ of certiorari and would vacate the death sentence in this case.

No. A-77. Anthony Bertolotti, Applicant v Richard L. Dugger, Secretary, Florida Department of Corrections

497 US 1044, 111 L Ed 2d 818, 111 S Ct 2.

July 27, 1990. The application for stay of execution of sentence of death, presented to Justice Kennedy, and by him referred to the Court, is denied.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant the application for stay of execution in order to give the applicant time to file a petition for a writ of certiorari, and would grant the petition and vacate the death sentence in this case.

No. A-677 (89-6967). Kevin Burke, Petitioner v Howard L. Beyer

497 US 1044, 111 L Ed 2d 819, 111 S Ct 5.

August 13, 1990. The application for bail, addressed to Justice White and referred to the Court, is denied.

No. D-876. In the Matter of Disbarment of Thomas P. Tobin

497 US 1044, 111 L Ed 2d 819, 111 S Ct 3.

August 13, 1990. Disbarment order entered.

No. D-882. In the Matter of Disbarment of Thomas W. Tierney

497 US 1045, 111 L Ed 2d 819, 111 S Ct 3.

August 13, 1990. Disbarment order entered.

No. D-889. In the Matter of Disbarment of Jack Martin Mazur

497 US 1045, 111 L Ed 2d 819, 111 S Ct 3.

August 13, 1990. Disbarment order entered.

No. D-898. In the Matter of Disbarment of Frank Allan Kelly

497 US 1045, 111 L Ed 2d 819, 111 S Ct 3.

August 13, 1990. Disbarment order entered.

No. D-903. In the Matter of Disbarment of Gary L. Hagman

497 US 1045, 111 L Ed 2d 819, 111 S Ct 3.

August 13, 1990. Disbarment order entered.

No. D-915. In the Matter of Disbarment of Bruce G. Kokernak

497 US 1045, 111 L Ed 2d 819, 111 S Ct 3.

August 13, 1990. It is ordered that Bruce G. Kokernak, of Sarasota, Florida, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-916. In the Matter of Disbarment of Robert Bruce Johnstone

497 US 1045, 111 L Ed 2d 820, 111 S Ct 3.

August 13, 1990. It is ordered that Robert Bruce Johnstone, of Eagle Creek, Oregon, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-917. In the Matter of Disbarment of Barry J. Henderson

497 US 1045, 111 L Ed 2d 820, 111 S Ct 4.

August 13, 1990. It is ordered that Barry J. Henderson, of Baltimore, Maryland, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-918. In the Matter of Disbarment of Howell Lovell, Jr.

497 US 1045, 111 L Ed 2d 820, 111 S Ct 4.

August 13, 1990. It is ordered that Howell Lovell, Jr., of San Francisco, California, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-919. In the Matter of Disbarment of John A. Nichols

497 US 1045, 111 L Ed 2d 820, 111 S Ct 4.

August 13, 1990. It is ordered that John A. Nichols, of Parchman, Mississippi, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-920. In the Matter of Disbarment of James Colvin Dodge

497 US 1045, 111 L Ed 2d 820, 111 S Ct 4.

August 13, 1990. It is ordered that James Colvin Dodge, of West Liberty, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-921. In the Matter of Disbarment of David Harrison Yinger, Jr.

497 US 1046, 111 L Ed 2d 820, 111 S Ct 4.

August 13, 1990. It is ordered that

David Harrison Yinger, Jr., of Frederick, Maryland, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-922. In the Matter of Disbarment of Ralph Weiss

497 US 1046, 111 L Ed 2d 821, 111 S Ct 5.

August 13, 1990. It is ordered that Ralph Weiss, of Baltimore, Maryland, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-923. In the Matter of Disbarment of Charles Stanley Morrow

497 US 1046, 111 L Ed 2d 821, 111 S Ct 5.

August 13, 1990. It is ordered that Charles Stanley Morrow, of Mars, Pennsylvania, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 88-1943. Office of Personnel Management, Petitioner v Charles Richmond

497 US 1046, 111 L Ed 2d 821, 111 S Ct 5.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 496 US 414, 110 L Ed 2d 387, 110 S Ct 2465.

No. 89-1509. Richard J. Wagner, Petitioner v United States Bankruptcy Court

497 US 1046, 111 L Ed 2d 821, 111 S Ct 5.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 495 US 905, 109 L Ed 2d 289, 110 S Ct 1925.

No. 89-1551. Johnny L. Pogue, Petitioner v White Stone Baptist Church and Roosevelt Turner

497 US 1046, 111 L Ed 2d 821, 111 S Ct 5.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 495 US 957, 109 L Ed 2d 745, 110 S Ct 2562.

No. 89-1682. Alan J. Stalheim, Petitioner v Albert Lea Medical Surgical Center, Ltd., et al.

497 US 1046, 111 L Ed 2d 821, 111 S Ct 6.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 496 US 937, 110 L Ed 2d 664, 110 S Ct 3217.

No. 89-1693. John E. Norton, Petitioner v Paul C. Nicholson, et al.

497 US 1046, 111 L Ed 2d 822, 111 S Ct 6.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 496 US 938, 110 L Ed 2d 665, 110 S Ct 3217.

No. 89-1767. Chester A. Wilk, et al., Petitioners v Joint Commission on Accreditation of Hospitals, et al.

497 US 1046, 111 L Ed 2d 822, 111 S Ct 6.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 496 US 927, 110 L Ed 2d 642, 110 S Ct 2621.

No. 89-5962. William Henry Taylor, Petitioner v United States

497 US 1046, 111 L Ed 2d 822, 111 S Ct 6.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 496 US 907, 110 L Ed 2d 273, 110 S Ct 2592.

No. 89-6223. Lawrence Sigmond Bittaker, Petitioner v California

497 US 1046, 111 L Ed 2d 822, 111 S Ct 6.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 496 US 931, 110 L Ed 2d 651, 110 S Ct 2632.

No. 89-6778. Robert T. Sidebottom, Petitioner v Missouri

497 US 1046, 111 L Ed 2d 822, 111 S Ct 6.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1032, 111 L Ed 2d 804, 110 S Ct 3295.

No. 89-6795. Andrew McCarter, Petitioner v California

497 US 1046, 111 L Ed 2d 822, 111 S Ct 7.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 496 US 927, 110 L Ed 2d 643, 110 S Ct 2622.

No. 89-6882. Victor Vernard Roberts, Petitioner v Georgia

497 US 1046, 111 L Ed 2d 822, 111 S Ct 7.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 495 US 963, 109 L Ed 2d 758, 110 S Ct 2576.

No. 89-6889. In re Ralph McFadden, Petitioner

497 US 1046, 111 L Ed 2d 822, 111 S Ct 7.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 496 US 904, 110 L Ed 2d 284, 110 S Ct 2604.

No. 89-6920. Henry Daniel Stull, Petitioner v United States

497 US 1046, 111 L Ed 2d 822, 111 S Ct 7.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 495 US 959, 109 L Ed 2d 749, 110 S Ct 2567.

No. 89-7048. David Loomus Cargill, Petitioner v Walter Zant, Warden

497 US 1046, 111 L Ed 2d 823, 111 S Ct 7.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 495 US 963, 109 L Ed 2d 758, 110 S Ct 2576.

No. 89-7095. Ralph McFadden, Petitioner v Commissioner of Internal Revenue

497 US 1046, 111 L Ed 2d 823, 111 S Ct 7.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 496 US 909, 110 L Ed 2d 275, 110 S Ct 2595.

No. 89-7109. Ben W. Allustiarte and Linda M. Allustiarte, Petitioners v W. Austin Cooper

497 US 1046, 111 L Ed 2d 823, 111 S Ct 7.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 495 US 960, 109 L Ed 2d 751, 110 S Ct 2569.

No. 89-7146. Darryl Eugene Freeman, Petitioner v Alabama

497 US 1046, 111 L Ed 2d 823, 111 S Ct 8.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 496 US 912, 110 L Ed 2d 284, 110 S Ct 2604.

No. 89-7150. Robert Salsman, et ux., Petitioners v United States

497 US 1047, 111 L Ed 2d 823, 111 S Ct 8.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 495 US 939, 109 L Ed 2d 517, 110 S Ct 2189.

No. 89-7212. Dennis Everson, Petitioner v John Ott, et al.

497 US 1047, 111 L Ed 2d 823, 111 S Ct 8.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 496 US 910, 110 L Ed 2d 279, 110 S Ct 2599.

No. 89-7224. Damon Henry Downs, Petitioner v James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division

497 US 1047, 111 L Ed 2d 823, 111 S Ct 8.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 496 US 928, 110 L Ed 2d 645, 110 S Ct 2624.

No. 89-7238. Abdul Wakil Amiri, Petitioner v Norma H. Johnson, Judge, United States District Court for District of Columbia

497 US 1047, 111 L Ed 2d 823, 111 S Ct 8.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1006, 111 L Ed 2d 754, 110 S Ct 3244.

No. 89-7239. Abdul Wakil Amiri, Petitioner v District of Columbia, et al.

497 US 1047, 111 L Ed 2d 824, 111 S Ct 8.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 496 US 928, 110 L Ed 2d 646, 110 S Ct 2626.

No. 89-7253. Edward Lee Elmore, Petitioner v South Carolina

497 US 1047, 111 L Ed 2d 824, 111 S Ct 9.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 496 US 931, 110 L Ed 2d 652, 110 S Ct 2633.

No. 89-7259. Nicholas E. Fluker, Jr., Petitioner v J. R. Townsend

497 US 1047, 111 L Ed 2d 824, 111 S Ct 9.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 496 US 940, 110 L Ed 2d 669, 110 S Ct 3222.

No. 89-7266. Michael Sindram, Petitioner v District of Columbia, et al.

497 US 1047, 111 L Ed 2d 824, 111 S Ct 9.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 496 US 940, 110 L Ed 2d 669, 110 S Ct 3222.

No. 89-7273. George Jackson, et ux., Petitioners v Gwendolyn Dixon-Bookman

497 US 1047, 111 L Ed 2d 824, 111 S Ct 9.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 496 US 929, 110 L Ed 2d 647, 110 S Ct 2626.

No. 89-7275. Phillip McCollum, Petitioner v Indiana

497 US 1047, 111 L Ed 2d 824, 111 S Ct 9.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 496 US 931, 110 L Ed 2d 653, 110 S Ct 2633.

No. 89-7277. Gary Lee McColpin, Petitioner v City of Wichita, et al.

497 US 1047, 111 L Ed 2d 824, 111 S Ct 9.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 496 US 940, 110 L Ed 2d 670, 110 S Ct 3223.

No. 89-7314. Thomas Warren Whisenhant, Petitioner v Alabama

497 US 1047, 111 L Ed 2d 824, 111 S Ct 9.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 496 US 943, 110 L Ed 2d 676, 110 S Ct 3230.

No. 89-7347. In re Jackie Brooks, Petitioner

497 US 1047, 111 L Ed 2d 824, 111 S Ct 10.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1002, 111 L Ed 2d 771, 110 S Ct 3261.

No. 89-7377. Warren Wexler, Petitioner v Department of the Interior

497 US 1047, 111 L Ed 2d 825, 111 S Ct 10.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 496 US 929, 110 L Ed 2d 647, 110 S Ct 2627.

No. 89-7423. In re Kwasi Seitu, Petitioner

497 US 1047, 111 L Ed 2d 825, 111 S Ct 10.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 496 US 903, 110 L Ed 2d 284, 110 S Ct 2604.

No. 89-7446. James L. Martin, Petitioner v Joseph J. Farnan, Jr.

497 US 1047, 111 L Ed 2d 825, 111 S Ct 10.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1028, 111 L Ed 2d 789, 110 S Ct 3280.

No. 89-7449. James L. Martin, Petitioner v Daniel H. Huyett

497 US 1047, 111 L Ed 2d 825, 111 S Ct 10.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1028, 111 L Ed 2d 789, 110 S Ct 3280.

No. 89-7474. Bobby Earl Lusk, Petitioner v Richard L. Dugger, Secretary, Florida Department of Corrections

497 US 1047, 111 L Ed 2d 825, 111 S Ct 10.

August 13, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1032, 111 L Ed 2d 805, 110 S Ct 3297.

No. 89-243. Eli Lilly and Company, Petitioner v Medtronic, Inc.

497 US 1047, 111 L Ed 2d 825, 111 S Ct 11.

August 13, 1990. The petition for rehearing is denied. Justice O'Connor took no part in the consideration or decision of this petition.

Former Decision, 496 US 661, 110 L Ed 2d 605, 110 S Ct 2683.

No. 89-6285. Olivia Chambers, Petitioner v Office of Federal Contract Compliance Programs, et al.

497 US 1047, 111 L Ed 2d 825, 111 S Ct 11.

August 13, 1990. The motion for leave to file a petition for rehearing is denied.

Former Decision, 494 US 1032, 108 L Ed 2d 620, 110 S Ct 1484.

No. 89-7730. Cesar Roberto Fierro, Petitioner v Texas

497 US 1047, 111 L Ed 2d 825, 111 S Ct 2.

August 14, 1990. The petition for a writ of certiorari to the Court of Criminal Appeals of Texas in the above-entitled case was dismissed today pursuant to Rule 46 of this court.

No. 90-5248 (A-87). Michael Allen Williams, Petitioner v California

497 US 1048, 111 L Ed 2d 826, 111 S Ct 11.

August 15, 1990. The application for stay of execution of sentence of death, presented to Justice O'Connor, and by her referred to the Court, is denied. The petition for writ of certiorari to the Supreme Court of California is denied.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant the application for stay of execution and the petition for a writ of certiorari and would vacate the death sentence in this case.

No. A-126 (89-6324). William N. Moore, Petitioner v Walter Zant, Superintendent, Georgia Diagnostic and Classification Center

497 US 1048, 111 L Ed 2d 826, 111 S Ct 11.

August 21, 1990. The application for stay of execution of sentence of death, presented to Justice Kennedy, and by him referred to the Court, is granted pending this Court's action on the petition for rehearing. The respondent is invited to file a response to the petition for rehearing within thirty days.

No. A-14 (90-272). Tyrone Brooks, et al., Appellants v Georgia State Board of Elections, et al.

497 US 1048, 111 L Ed 2d 826, 111 S Ct 13.

August 30, 1990. The application for injunction and stay pending appeal, addressed to Justice White and referred to the Court, is denied.

No. A-910 (89-6967). Kevin Burke, Petitioner v Howard L. Beyer

497 US 1048, 111 L Ed 2d 826, 111 S Ct 13.

August 30, 1990. The application for transfer, addressed to Justice O'Connor and referred to the Court, is denied.

No. 89-1080. Board of Education of Oklahoma City Public Schools, Independent School District No. 89, Oklahoma County, Oklahoma, Petitioner v Robert L. Dowell, et al.

497 US 1048, 111 L Ed 2d 826, 111 S Ct 12.

August 30, 1990. The motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument is granted.

No. 89-1149. Coy R. Grogan, et al., Petitioners v Frank J. Garner, Jr.

497 US 1049, 111 L Ed 2d 827, 111 S Ct 12.

August 30, 1990. The motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument is granted.

No. 89-1298. Ingersoll-Rand Company, Petitioner v Perry McClendon

497 US 1049, 111 L Ed 2d 827, 111 S Ct 12.

August 30, 1990. The motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument is granted.

No. 89-1436. United States, Petitioner v R. Enterprises, Inc., et al.

497 US 1049, 111 L Ed 2d 827, 111 S Ct 12.

August 30, 1990. The motion of the Solicitor General to dispense with printing the joint appendix is granted. The motion of respondents for divided argument is denied.

No. 89-1448. Virginia Bankshares, Inc., et al., Petitioners v Doris I. Sandberg, et al.

497 US 1049, 111 L Ed 2d 827, 111 S Ct 12.

August 30, 1990. The motion of American Corporate Counsel Association, et al. for leave to file a brief as amici curiae is granted. The motion of American Bankers Association, et al. for leave to file a brief as amici curiae is granted. The motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument is granted.

No. 89-1646. United States, et al., Petitioners v Marcus S. Smith, et al.

497 US 1049, 111 L Ed 2d 827, 111 S Ct 13.

August 30, 1990. The motion of the Solicitor General to dispense with printing the joint appendix is granted.

No. 89-5120. Michael Owen Perry, Petitioner v Louisiana

497 US 1049, 111 L Ed 2d 827, 111 S Ct 13.

August 30, 1990. The motion of Coalition for the Fundamental Rights and Equality of Ex-Patients for leave to file a brief as amicus curiae is granted.

No. 89-6332. Robert S. Minnick, Petitioner v Mississippi

497 US 1049, 111 L Ed 2d 828, 111 S Ct 13.

August 30, 1990. The motion of Mississippi State Bar for leave to file a brief as amicus curiae is granted.

No. 90-5581 (A-157). George C. Gilmore, Petitioner v Paul Delo, Superintendent, Potosi Correctional Center

497 US 1049, 111 L Ed 2d 828, 111 S Ct 20.

August 30, 1990. The application for stay of execution of sentence of death, presented to Justice Blackmun, and by him referred to the Court, is denied. The petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit is denied. Justice Scalia took no part in the consideration or decision of this application and this petition.

Same case below, 908 F2d 385.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

No. 88-1872. Cynthia Rutan, et al., Petitioners v Republican Party of Illinois, et al.

No. 88-2074. Mark Frech, et al., Petitioners v Cynthia Rutan, et al.

497 US 1050, 111 L Ed 2d 828, 111 S Ct 13.

August 30, 1990. The petitions for rehearing are denied.

Former Decision, 497 US 62, 111 L Ed 2d 52, 110 S Ct 2729.

No. 88-7318. James Russell Cain, Petitioner v South Carolina

497 US 1050, 111 L Ed 2d 828, 111 S Ct 14.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1010, 111 L Ed 2d 764, 110 S Ct 3254.

No. 88-7332. Verneal Jimerson, Petitioner v Illinois

497 US 1050, 111 L Ed 2d 828, 111 S Ct 14.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1031, 111 L Ed 2d 796, 110 S Ct 3288.

No. 88-7351. Jeffrey Alan Walton, Petitioner v Arizona

497 US 1050, 111 L Ed 2d 828, 111 S Ct 14.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 639, 111 L Ed 2d 511, 110 S Ct 3047.

No. 88-7629. Robert Wayne Vickers, Petitioner v Arizona

497 US 1050, 111 L Ed 2d 829, 111 S Ct 14.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1033, 111 L Ed 2d 806, 110 S Ct 3298.

No. 89-189. Samuel A. Lewis, Director, Arizona Department of Corrections, et al., Petitioners v Jimmie Wayne Jeffers

497 US 1050, 111 L Ed 2d 829, 111 S Ct 14.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 764, 111 L Ed 2d 606, 110 S Ct 3092.

No. 89-453. Metro Broadcasting, Inc., Petitioner v Federal Communications Commission, et al.

497 US 1050, 111 L Ed 2d 829, 111 S Ct 15.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 547, 111 L Ed 2d 445, 110 S Ct 2997.

No. 89-1687. Communications Satellite Corporation, Petitioner v Federal Communications Commission, et al.

497 US 1050, 111 L Ed 2d 829, 111 S Ct 15.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1004, 111 L Ed 2d 749, 110 S Ct 3238.

No. 89-1703. Reginald B. Snyder, Petitioner v Christopher Lewis, Secretary of the Commonwealth of Pennsylvania

497 US 1050, 111 L Ed 2d 829, 111 S Ct 15.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1004, 111 L Ed 2d 750, 110 S Ct 3239.

No. 89-1783. Charles L. Meyer, Petitioner v State Bar of Texas; and Charles L. Meyer, Petitioner v Peter Lowry, District Judge, 261st Judicial District, Travis County, Texas, et al.

497 US 1050, 111 L Ed 2d 829, 111 S Ct 15.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1026, 111 L Ed 2d 785, 110 S Ct 3275.

No. 89-5008. Manuel Salazar, Petitioner v Illinois

497 US 1050, 111 L Ed 2d 829, 111 S Ct 15.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1031, 111 L Ed 2d 797, 110 S Ct 3288.

No. 89-5016. Laurence Keith Libberton, Petitioner v Arizona

497 US 1050, 111 L Ed 2d 829, 111 S Ct 15.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1031, 111 L Ed 2d 797, 110 S Ct 3289.

No. 89-5146. Thomas V. Odle, Petitioner v Illinois

497 US 1050, 111 L Ed 2d 830, 111 S Ct 16.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1031, 111 L Ed 2d 798, 110 S Ct 3289.

No. 89-5219. William Young, Petitioner v Illinois

497 US 1050, 111 L Ed 2d 830, 111 S Ct 16.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1031, 111 L Ed 2d 798, 110 S Ct 3290.

No. 89-5232. John Paul Phillips, Petitioner v Illinois

497 US 1050, 111 L Ed 2d 830, 111 S Ct 16.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1031, 111 L Ed 2d 798, 110 S Ct 3290.

No. 89-5346. William J. Bradley, Petitioner v Ohio

497 US 1050, 111 L Ed 2d 830, 111 S Ct 16.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1011, 111 L Ed 2d 768, 110 S Ct 3258.

No. 89-5443. Mario Flores, Petitioner v Illinois

497 US 1050, 111 L Ed 2d 830, 111 S Ct 16.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1031, 111 L Ed 2d 799, 110 S Ct 3291.

No. 89-5616. Randy Lynn McKinney, Petitioner v Idaho

497 US 1050, 111 L Ed 2d 830, 111 S Ct 16.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1031, 111 L Ed 2d 800, 110 S Ct 3292.

No. 89-5635. David Earl Miller, Petitioner v Tennessee

497 US 1050, 111 L Ed 2d 830, 111 S Ct 17.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1031, 111 L Ed 2d 801, 110 S Ct 3292.

No. 89-5704. Stanley Edward Allen, Petitioner v Walter Zant, Superintendent, Georgia Diagnostic and Classification Center

497 US 1050, 111 L Ed 2d 830, 111 S Ct 17.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1031, 111 L Ed 2d 801, 110 S Ct 3293.

No. 89-5809. Robert Sawyer, Peti-

tioner v Larry Smith, Interim Warden

497 US 1051, 111 L Ed 2d 830, 111 S Ct 17.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 227, 111 L Ed 2d 193, 110 S Ct 2822.

No. 89-5934. William Thomas Cartwright, Petitioner v Oklahoma

497 US 1051, 111 L Ed 2d 831, 111 S Ct 17.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1015, 111 L Ed 2d 771, 110 S Ct 3261.

No. 89-6317. Alton Coleman, Petitioner v Illinois

497 US 1051, 111 L Ed 2d 831, 111 S Ct 17.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1032, 111 L Ed 2d 802, 110 S Ct 3294.

No. 89-6459. Robin Wayne Owens, Petitioner v Illinois

497 US 1051, 111 L Ed 2d 831, 111 S Ct 17.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1032, 111 L Ed 2d 802, 110 S Ct 3294.

No. 89-6626. Mark Henry Lankford, Petitioner v Idaho

497 US 1051, 111 L Ed 2d 831, 111 S Ct 18.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1032, 111 L Ed 2d 803, 110 S Ct 3295.

No. 89-6870. Tafford Holman, Petitioner v Illinois

497 US 1051, 111 L Ed 2d 831, 111 S Ct 18.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1032, 111 L Ed 2d 804, 110 S Ct 3296.

No. 89-6953. Andrew Kokoraleis, Petitioner v Illinois

497 US 1051, 111 L Ed 2d 831, 111 S Ct 18.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1032, 111 L Ed 2d 804, 110 S Ct 3296.

No. 89-7110. Theodore C. Knapp, Petitioner v Herbert Maschner, et al.

497 US 1051, 111 L Ed 2d 831, 111 S Ct 18.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 496 US 939, 110 L Ed 2d 668, 110 S Ct 3221.

No. 89-7213. George Ford and Arbary P. Jackson, Petitioners v William Rutledge, et al.

497 US 1051, 111 L Ed 2d 831, 111 S Ct 18.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 496 US 910, 110 L Ed 2d 279, 110 S Ct 2599.

No. 89-7353. Robert Christopher-

son and Jeanette Christopherson, Petitioners v Shawano County

497 US 1051, 111 L Ed 2d 831, 111 S Ct 18.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1007, 111 L Ed 2d 755, 110 S Ct 3245.

No. 89-7375. Robert Kurtz, Petitioner v Robert D. Edmiston, Superintendent, Southern State Correctional Facility, et al.

497 US 1051, 111 L Ed 2d 832, 111 S Ct 19.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1007, 111 L Ed 2d 757, 110 S Ct 3247.

No. 89-7380. Ronald Barrow, Petitioner v Illinois

497 US 1051, 111 L Ed 2d 832, 111 S Ct 19.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1011, 111 L Ed 2d 767, 110 S Ct 3257.

No. 89-7416. Raymond Accolla, Petitioner v James Sullivan, Superintendent, Sing Sing Correctional Facility, et al.

497 US 1051, 111 L Ed 2d 832, 111 S Ct 19.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1027, 111 L Ed 2d 788, 110 S Ct 3278.

No. 89-7418. Clifford M. Curtis, Petitioner v American Bakeries Company, et al.

497 US 1051, 111 L Ed 2d 832, 111 S Ct 19.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1027, 111 L Ed 2d 788, 110 S Ct 3279.

No. 89-7512. Carl J. Isaacs, Petitioner v Georgia

497 US 1051, 111 L Ed 2d 832, 111 S Ct 19.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1032, 111 L Ed 2d 805, 110 S Ct 3297.

No. 89-7579. Ahmad Mukhtar, Petitioner v United States

497 US 1051, 111 L Ed 2d 832, 111 S Ct 19.

August 30, 1990. The petition for rehearing is denied.

Former Decision, 497 US 1010, 111 L Ed 2d 762, 110 S Ct 3253.

No. 89-1380. Randy William Crider, Petitioner v United States

497 US 1051, 111 L Ed 2d 832, 111 S Ct 20.

August 30, 1990. The motion of petitioner to defer consideration of the petition for rehearing is denied. The petition for rehearing is denied.

Former Decision, 495 US 956, 109 L Ed 2d 743, 110 S Ct 2561.

No. 89-1803. Michael Schaefer, Pe-

titioner v Marjorie Gallego, et al.

497 US 1051, 111 L Ed 2d 832, 111 S Ct 20.

August 30, 1990. The motion of petitioner for leave to proceed further herein in forma pauperis is granted. The petition for rehearing is denied.

Former Decision, 497 US 1026, 111 L Ed 2d 785, 110 S Ct 3275.

No. 89-7350. In re Raymond Swentek, Petitioner

497 US 1051, 111 L Ed 2d 833, 111 S Ct 20.

August 30, 1990. The motion for leave to file a petition for rehearing is denied.

Former Decision, 496 US 904, 110 L Ed 2d 284, 110 S Ct 2604.

No. A-169. George C. Gilmore, Applicant v Missouri

497 US 1051, 111 L Ed 2d 833, 111 S Ct 20.

August 31, 1990. The application for stay of execution of sentence of death, presented to Justice Blackmun, and by him referred to the Court, is denied. Justice Scalia took no part in the consideration or decision of this application.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant the application for stay of execution in order to give the applicant time to file a petition for a writ of certiorari and would grant the petition and vacate the death sentence in this case.

No. 90-5599 (A-167). George C. Gilmore, Petitioner v Paul Delo, Superintendent, Potosi Correctional Center

497 US 1052, 111 L Ed 2d 833, 111 S Ct 21.

August 31, 1990. The application for stay of execution of sentence of death, presented to Justice Blackmun, and by him referred to the Court, is denied. The petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit is denied. Justice Scalia took no part in the consideration or decision of this application and this petition.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

No. A-178. A. L. Lockhart, Director, Arkansas Department of Correction, Applicant v Barry Lee Fairchild

497 US 1052, 111 L Ed 2d 833, 111 S Ct 21.

September 5, 1990. The application of the Attorney General of Arkansas for an order to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eighth Circuit, presented to Justice Blackmun, and by him referred to the Court, is denied.

No. 90-5610 (A-175). Barry Lee Fairchild, Petitioner v A. L. Lockhart, Director, Arkansas Department of Correction

497 US 1052, 111 L Ed 2d 834, 111 S Ct 21.

September 6, 1990. The application for stay of execution of sentence of death, presented to Justice Blackmun, and by him referred to the Court, is denied. The petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit is denied.

Same case below, 900 F2d 1292.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amemdments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant the application for stay of execution and the petition for a writ of certiorari and would vacate the death sentence in this case.

No. A-192. Charles Troy Coleman, Applicant v Oklahoma Pardon and Parole Board, et al.

497 US 1053, 111 L Ed 2d 834, 111 S Ct 22.

September 9, 1990. The application for stay of execution of sentence of death, presented to Justice White, and by him referred to the Court, is denied. Justice Blackmun took no part in the consideration or decision of this application.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant the application for stay of execution in order to give the applicant time to file a petition for a writ of certiorari and would grant the petition and vacate the death sentence in this case.

No. 90-5669 (A-191). Charles Troy Coleman, Petitioner v James Saffle, Warden, Oklahoma State Penitentiary

497 US 1053, 111 L Ed 2d 834, 111 S Ct 22.

September 9, 1990. The application for stay of execution of sentence of death, presented to Justice White, and by him referred to the Court, is denied. The petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit is denied. Justice Blackmun took no part in the consideration or decision of this application and this petition.

Same case below, 912 F2d 1217.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant the application for stay of execution and the petition for a writ of certiorari and would vacate the death sentence in this case.

No. A-193. Charles Silagy and Walter Stewart, Applicants v James R. Thompson, Governor of Illinois, et al.

497 US 1054, 111 L Ed 2d 835, 111 S Ct 22.

September 11, 1990. The application for a temporary injunction, presented to Justice Stevens, and by him referred to the Court, is denied. Justice Marshall would grant the application. Justice Blackmun took no part in the consideration or decision of this application.

No. A-223. James William Hamblen, Applicant v Richard L. Dugger, Secretary, Florida Department of Corrections

497 US 1054, 111 L Ed 2d 835, 111 S Ct 22.

September 20, 1990. The application for stay of execution of sentence of death, presented to Justice Kennedy, and by him referred to the Court, is denied.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant the application for stay of execution in order to give the applicant time to file a petition for a writ of certiorari and would grant the petition and vacate the death sentence in this case.

No. A-900 (90-348). New Era Publications International, ApS, Petitioner v Carol Publishing Group

497 US 1054, 111 L Ed 2d 835, 111 S Ct 27.

September 21, 1990. The application for stay, addressed to Justice O'Connor and referred to the Court, is denied.

No. A-140 (90-5723). James Steeley, Petitioner v Alabama

497 US 1054, 111 L Ed 2d 835, 111 S Ct 27.

September 21, 1990. The application for stay, addressed to Justice Scalia and referred to the Court, is denied.

No. A-160. Mahmoud El-Abed Ahmad, Applicant v George Wigen, Warden

497 US 1054, 111 L Ed 2d 835, 111 S Ct 23.

September 21, 1990. The application for stay, addressed to Justice Stevens and referred to the Court, is denied.

No. A-170. Djelos Ivezaj, Applicant v Immigration and Naturalization Service, et al.

497 US 1055, 111 L Ed 2d 836, 111 S Ct 23.

September 21, 1990. The application for stay of deportation, addressed to Justice Marshall and referred to the Court, is denied.

No. D-854. In the Matter of Disbarment of Thomas J. McCallum

497 US 1055, 111 L Ed 2d 836, 111 S Ct 23.

September 21, 1990. Disbarment order entered.

No. D-878. In the Matter of Disbarment of Jeffrey Mark Schwartz

497 US 1055, 111 L Ed 2d 836, 111 S Ct 23.

September 21, 1990. Disbarment order entered.

No. D-894. In the Matter of Disbarment of Bernard Herbert Ostrowsky

497 US 1055, 111 L Ed 2d 836, 111 S Ct 23.

September 21, 1990. Disbarment order entered.

No. D-900. In the Matter of Disbarment of John M. Skevin

497 US 1055, 111 L Ed 2d 836, 111 S Ct 23.

September 21, 1990. Disbarment order entered.

No. D-901. In the Matter of Disbarment of Bruce A. Olster

497 US 1055, 111 L Ed 2d 836, 111 S Ct 24.

September 21, 1990. Disbarment order entered.

No. D-906. In the Matter of Disbarment of Jonathan Erickson

497 US 1055, 111 L Ed 2d 836, 111 S Ct 24.

September 21, 1990. Disbarment order entered.

No. D-912. In the Matter of Disbarment of Frederick Brockmeier, IV

497 US 1055, 111 L Ed 2d 836, 111 S Ct 24.

September 21, 1990. Disbarment order entered.

No. D-924. In the Matter of Disbarment of Charles Lionel Parker

497 US 1055, 111 L Ed 2d 837, 111 S Ct 24.

September 21, 1990. It is ordered that Charles Lionel Parker, of Akron, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-925. In the Matter of Disbarment of H. J. M. Melaro

497 US 1055, 111 L Ed 2d 837, 111 S Ct 24.

September 21, 1990. It is ordered that H. J. M. Melaro, of Silver Spring, Maryland, be suspended from the practice of law in this court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-926. In the Matter of Disbarment of Willard Carlos McBride

497 US 1055, 111 L Ed 2d 837, 111 S Ct 24.

September 21, 1990. It is ordered that Willard Carlos McBride, of Hillcrest Heights, Maryland, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-927. In the Matter of Disbarment of Michael Isaacson

497 US 1055, 111 L Ed 2d 837, 111 S Ct 25.

September 21, 1990. It is ordered that Michael Isaacson, of Baltimore, Maryland, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-928. In the Matter of Disbarment of Michael Jennings Keady

497 US 1056, 111 L Ed 2d 837, 111 S Ct 25.

September 21, 1990. It is ordered that Michael Jennings Keady, of Palo Alto, California, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-929. In the Matter of Disbarment of Robert E. Brimberry

497 US 1056, 111 L Ed 2d 838, 111 S Ct 25.

September 21, 1990. It is ordered that Robert E. Brimberry, of Brea, California, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-930. In the Matter of Disbarment of Donald L. Hobson

497 US 1056, 111 L Ed 2d 838, 111 S Ct 25.

September 21, 1990. It is ordered that Donald L. Hobson, of Detroit, Michigan, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-931. In the Matter of Disbarment of James P. Ryan

497 US 1056, 111 L Ed 2d 838, 111 S Ct 25.

September 21, 1990. It is ordered that James P. Ryan, of Fort Lauderdale, Florida, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-932. In the Matter of Disbarment of Charles L. Bussey, Jr.

497 US 1056, 111 L Ed 2d 838, 111 S Ct 25.

September 21, 1990. It is ordered that Charles L. Bussey, Jr., of St. Louis, Missouri, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-933. In the Matter of Disbarment of Arnold L. Ross

497 US 1056, 111 L Ed 2d 838, 111 S Ct 26.

September 21, 1990. It is ordered that Arnold L. Ross, of Agoura Hills, California, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-934. In the Matter of Disbarment of R. Michael Standard

497 US 1056, 111 L Ed 2d 838, 111 S Ct 26.

September 21, 1990. It is ordered that R. Michael Standard, of Los Angeles, California, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-935. In the Matter of Disbarment of Peter J. Antico

497 US 1056, 111 L Ed 2d 839, 111 S Ct 26.

September 21, 1990. It is ordered that Peter J. Antico, of Jersey City, New Jersey, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-936. In the Matter of Disbarment of David Phillip Feldman

497 US 1057, 111 L Ed 2d 839, 111 S Ct 26.

September 21, 1990. It is ordered that David Phillip Feldman, of East Amherst, New York, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-937. In the Matter of Disbarment of William Alan Deam

497 US 1057, 111 L Ed 2d 839, 111 S Ct 26.

September 21, 1990. It is ordered that William Alan Deam, of Yankton, South Dakota, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-938. In the Matter of Disbarment of Gregory F. Ireland

497 US 1057, 111 L Ed 2d 839, 111 S Ct 26.

September 21, 1990. It is ordered that Gregory F. Ireland, of Carmel, New York, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 90-5464. Ronald Rommann, Petitioner v United States

497 US 1057, 111 L Ed 2d 839, 111 S Ct 27.

September 26, 1990. The petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in the above-entitled case was dismissed today pursuant to Rule 46 of this court.

Same case below, 902 F2d 1570.

No. 90-121. Pittsburgh Corning Corporation, Petitioner v Helen E. Simpson, Individually and as Executrix of the Estate of David Simpson, Deceased

497 US 1057, 111 L Ed 2d 840, 111 S Ct 27.

September 27, 1990. The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit in the above-entitled case was dismissed today pursuant to Rule 46 of this court.

Same case below, 901 F2d 277.

No. 89-1769. Republic of China, Petitioner v Helen Liu

497 US 1058, 111 L Ed 2d 840, 111 S Ct 27.

September 28, 1990. The petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in the above-entitled case was dismissed today pursuant to Rule 46 of this court.

Same case below, 892 F2d 1419.

ANNOTATIONS AND BRIEFS

FOR CASES REPORTED IN THIS VOLUME

The annotations herein, prepared by the Editors, are indexed in the "Index to Decisions and Annotations" appearing at the end of this volume. For additional annotation references, consult appropriate topics and sections in the United States Supreme Court Digest, Lawyers' Edition, and consult the L Ed General Index to Decisions, Annotations, and Digest.

Selected summaries of briefs are by the publisher's staff.

UNITED STATES
SUPREME COURT REPORTS
LAWYERS' EDITION
ANNOTATIONS AND BRIEFS

MICHAEL MILKOVICH, Sr., Petitioner

v

LORAIN JOURNAL CO. et al.

Reported in this volume: p 1, supra.

Holding: First Amendment held not to require separate privilege for "opinion," where statements published in newspaper were allegedly defamatory under state law.

BRIEFS AND APPEARANCES OF COUNSEL

Brent L. English, of Cleveland, Ohio, argued the cause and, with **John D. Brown,** also of Cleveland, Ohio, filed briefs for petitioner:

This court has never recognized the need for or the validity of a broad First Amendment-based opinion privilege; such a privilege would unjustifiably protect defamers without any corresponding societal benefit.

The statements of fact published by the respondents are actionable because they are defamatory and can be proved false.

Any opinion privilege recognized by this court should be drawn narrowly and rest on a reasonable contextual analysis considered from the perspective of an average reader.

Any reasonable analysis of the statements in issue in this case leads to the conclusion that they are not privileged.

Richard D. Panza, of Lorain, Ohio, argued the cause and, with **William G. Wickens, David L. Herzer, Richard A. Naegele,** and **Thomas A. Downie,** all also of Lorain, Ohio, and **P. Cameron DeVore, Marshall J. Nelson, Donald S. Kunze,** and **Davis Wright Tremaine,** all of Seattle, Washington, filed a brief for respondents:

This court should dismiss the writ of certiorari as improvidently granted because any ruling on the sole issue presented by Milkovich for review would be advisory.

This court should dismiss the writ of certiorari as improvidently granted because the Ohio Supreme Court expressly based its conclusion that the column is protected opinion on adequate and independent state-law grounds.

Expressions of opinion concerning public figures and events are protected under the First Amendment.

The News-Herald column was an expression of opinion fully protected under the First Amendment.

The distinction between actionable fact and constitutionally protected opinion should reflect the core values of the First Amendment.

Robert D. Sack, Lester E. Greenman, S. Whitney Rahman, Richard J. Tofel, Richard M. Schmidt, Jr., Richard N. Winfield, Steven W. Korn, Benita Baird, Celeste Phillips, Devereux Chatillon, Douglas P. Jacobs, Barbara L. Wartelle, Harvey L. Lipton, Robert J. Hawley, Joseph H. Cooper, Laura R. Handman, Slade R. Metcalf, Richard J. Ovelmen, Debra O. Foust, Sandra S. Baron, Gayle C. Sproul, Alberto Ibargüen, Nancy E. Richman, Tina A. Ravitz, Deborah R. Linfield, George Freeman, Jane E. Kirtley, Constance A. Heymann, Natalie T. Levy, Bruce W. Sanford, Joseph P. Thornton, James L. Arnold, Barbara P. Percival, Martin P. Messinger, and **Mark H. Charles** filed a brief for Dow Jones & Co. et al. as amici curiae urging affirmance; and **Henry R. Kaufman** filed a brief for the American Civil Liberties Union et al. as amici curiae urging affirmance.

Louis A. Colombo, David L. Marburger, and **Michael K. Farrell** filed a brief for the Ohio Newspaper Association et al. as amici curiae.

JAMES A. COLLINS, Director, Texas Department of Criminal Justice,
Institutional Division, Petitioner

v

CARROLL F. YOUNGBLOOD

Reported in this volume: p 30, supra.

Holding: Ex post facto clause of Federal Constitution (Art I, § 10) held not violated by application to convicted person of new Texas statute which allowed reformation of jury verdict assessing unauthorized punishment.

BRIEFS AND APPEARANCES OF COUNSEL

Charles A. Palmer, Assistant Attorney General of Texas, of Austin, Texas, argued the cause and, with **Jim Mattox,** Attorney General, **Mary F. Keller,** First Assistant Attorney General, and **Michael P. Hodge** and **S. Michael Bozarth,** Assistant Attorneys General, all also of Austin, Texas, filed briefs for petitioner:

The retroactive application of Article 37.10(b) does not violate the ex post facto clause of the United States Constitution.

Jon R. Farrar, of Huntsville, Texas, argued the cause and filed a brief for respondent:

The retrospective application of Article 37.10(B) violates the ex post facto clause of the Constitution.

Solicitor General **Kenneth W. Starr,** Assistant Attorney General **Edward S. G. Dennis,** Deputy Solicitor General **William C. Bryson,** and **James A. Feldman** filed a brief for the United States as amicus curiae urging reversal.

Arthur F. Mathews, Thomas F. Connell, and **Mark D. Cain** filed a brief for Wilbert Lee Evans as amicus curiae.

CYNTHIA RUTAN, et al., Petitioners

v

REPUBLICAN PARTY OF ILLINOIS et al. (No. 88-1872)

MARK FRECH, et al., Petitioners

v

CYNTHIA RUTAN et al. (No. 88-2074)

Reported in this volume: p 52, supra.

Holding: Federal Constitution's First Amendment held to forbid basing decisions as to promotion, transfer, recall after layoff, and hiring of low-level public employees on party affiliation and support.

BRIEFS AND APPEARANCES OF COUNSEL

Mary Lee Leahy, of Springfield, Illinois, argued the cause and, with **Cheryl R. Johnson** and **Kathryn E. Eisenhart,** both also of Springfield, Illinois, and **Michael R. Berz,** of Kankakee, Illinois, filed briefs for petitioners in No. 88-1872 and cross-respondents in No. 88-2074:

Petitioners and Cross-Respondents were denied important aspects of employment due to their political beliefs and political affiliations.

Petitioners and Cross-Respondents have the right under the First Amendment not to support a particular political party or its candidates and the right to refrain from voting in a particular party primary.

There is no overriding or vital state interest that justifies interference with Petitioners' and Cross-Respondents' First Amendment rights.

Thomas P. Sullivan, of Chicago, Illinois, argued the cause and, with **Jeffrey D. Colman, Sidney I. Schenkier, Edward J. Lewis, Michael J. Hayes,** and **Roger P. Flahaven,** all also of Chicago, Illinois, filed a brief for respondents in No. 88-1872 and cross-petitioners in No. 88-2074:

The First and Fourteenth Amendments do not prohibit elected state and local officials from using the kinds of considerations involved here when they hire public employees from a pool of qualified applicants.

The complaint does not allege a strict partisan political patronage system designed to reward Republicans and only Republicans with jobs.

There is no cognizable claim for a failure to be promoted, transferred, or rehired under the circumstances alleged in the complaint.

The First Amendment does not preclude elected state and local officials from considering friendship and "politics" in the employment contexts of this case.

George Kaufmann and **Laurence Gold** filed a brief for the American Federation of Labor and Congress of Industrial Organizations as amicus curiae urging reversal in both cases; and **J. Michael McGuinness** filed a brief for the North Carolina Professional Fire Fighters Association as amicus curiae urging reversal in both cases.

C. Richard Johnson filed a brief for the Independent Voters of Illinois-Independent Precinct Organization et al. as amici curiae urging reversal in No. 88-1872.

Robert H. Chanin and **Jeremiah A. Collins** filed a brief for the National Education Association as amicus curiae urging reversal in No. 88-1872 and affirmance in No. 88-2074.

Hector Rivera Cruz, Secretary of Justice of Puerto Rico, **Jorge E. Perez Diaz,** Solicitor General, and **Lino J. Saldaña** filed a brief for the Commonwealth of Puerto Rico as amicus curiae urging affirmance.

MAISLIN INDUSTRIES, U. S., INC., et al., Petitioners

v

PRIMARY STEEL, INC., et al.

Reported in this volume: p 94, supra.

Holding: ICC's policy of relieving shipper of obligation of paying filed rate when shipper and motor common carrier have privately negotiated lower rate held inconsistent with Interstate Commerce Act.

BRIEFS AND APPEARANCES OF COUNSEL

Thomas M. Auchincloss, of Washington, D.C., argued the cause and, with **Brian L. Troiano,** also of Washington, D.C., and **David G. Sperry,** of Independence, Missouri, filed briefs for petitioner:

The filed rate doctrine precludes recognition of nontariff rates as a matter of law.

The ICC opinion does not make viable a statutory equitable defense.

The statutory reparations remedy did not create an equitable defense.

A remedy giving effect to negotiated rates is absolutely inconsistent with the statute.

No relevant statutory change permits equitable defenses.

Deputy Solicitor General **Thomas W. Merrill,** of the Department of Justice, Washington, D.C., argued the cause and, with Solicitor General **Kenneth W. Starr** and **Michael R. Dreeben,** both also of the Department of Justice, Washington, D.C., and **Robert S. Burk, Ellen D. Hanson,** and

Cecelia E. Higgins, all of the Interstate Commerce Commission, Washington, D.C., filed a brief for the respondent Interstate Commerce Commission under Supreme Court Rule 12.4:

The ICC's negotiated rates policy is a proper exercise of the Commission's power to protect against unreasonable practices.

Henry M. Wick, Jr. and **Charles J. Streiff,** both of Pittsburgh, Pennsylvania, and **Edward E. Schmitt,** of Kansas City, Missouri, filed a brief for respondent Primary Steel, Inc.:

The Court of Appeals correctly found that the equitable defenses can be considered pursuant to 49 USC § 10701(a) [49 USCS § 10701(a)] to determine the reasonableness of a motor common carrier's billing practices.

The determination of the reasonableness of the petitioner's billing practice under 49 USC § 10701(a) [49 USCS § 10701(a)] is within the Interstate Commerce Commission's primary jurisdiction.

The Interstate Commerce Commission's decision is a reasonable accommodation between competing sections of the Interstate Commerce Act.

The statutory provisions of the Interstate Commerce Act permit the Interstate Commerce Commission's consideration of the unreasonable practices provision of 49 USC § 10701(a) [49 USCS § 10701(a)].

Paul O. Taylor filed a brief for McLean Trucking Company et al. as amici curiae urging reversal; **Joseph L. Steinfeld, Robert B. Walker, John T. Siegler,** and **Miles L. Kavaller** filed a brief for Oneida Motor Freight, Inc. as amicus curiae urging reversal; **James A. Knauer, Judy L. Woods, James M. Carr, Jay Jaffe,** and **Martha R. Lehman** filed a brief for Overland Express, Inc. as amicus curiae urging reversal; and **Louis J. Wade** filed a brief for Robert Yaquinto, Jr. as amicus curiae urging reversal.

William H. Borghesani, Jr., Terrence D. Jones, Martin W. Bercovici, and **Marcia K. Cowan** filed a brief for the National-American Wholesale Grocers' Association et al. as amici curiae urging affirmance; **William J. Augello, Fritz R. Kahn,** and **Mark J. Andrews** filed a brief for Shippers National Freight Claim Council, Inc. as amicus curiae urging affirmance; **Daniel J. Sweeney, Frederic L. Wood, Nicholas J. DiMichael, Richard D. Fortin, Helene P. Long, Jan S. Amundson,** and **Quentin Riegel** filed a brief for the National Industrial Transportation League et al. as amici curiae urging affirmance; and **John W. Bryant** and **Neill T. Riddell** filed a brief for Supreme Beef Processors, Inc. as amicus curiae urging affirmance.

PORTLAND GOLF CLUB, Petitioner

v

COMMISSIONER OF INTERNAL REVENUE

Reported in this volume: p 126, supra.

Holding: Social club's losses from sales to nonmembers held not tax deductible against investment income, where profit motive as to such sales is not shown.

BRIEFS AND APPEARANCES OF COUNSEL

Leonard J. Henzke, Jr., of Washington, D.C., argued the cause and, with **Allen B. Bush,** of Portland, Oregon, filed briefs for petitioner:

Internal Revenue Code § 512(a)(3) does not require each unrelated business activity of a social club to earn taxable income in order to deduct all expenses directly connected with such activity.

Alternatively, if this court incorporates a profit motive requirement, it should adopt the Tax Court's economic profit test.

Clifford M. Sloan, of the Department of Justice, Washington, D.C., argued the cause and, with Solicitor General **Kenneth W. Starr,** Assistant Attorney General **Shirley D. Peterson,** Deputy Solicitor General **Lawrence G. Wallace, Alan I. Horowitz, Robert S. Pomerance,** and **Kenneth L. Greene,** all also of the Department of Justice, Washington, D.C., filed a brief for respondent:

Petitioner's reported net losses from sales of food and drink to nonmembers may not be used to reduce its unrelated investment income.

ILLINOIS, Petitioner

v

EDWARD RODRIGUEZ

Reported in this volume: p 148, supra.

Holding: Warrantless entry onto accused's premises held valid, under Fourth Amendment, where based on consent of third party whom police reasonably believe to possess common authority over premises.

Annotation: p 850, infra.

BRIEFS AND APPEARANCES OF COUNSEL

Joseph Claps, First Assistant Attorney General of Illinois, of Chicago, Illinois, argued the cause and, with **Neil F. Hartigan,** Attorney General, **Robert J. Ruiz,** Solicitor General, **Terence M. Madsen,** Assistant Attorney General, **Cecil A. Partee, Renée Goldfarb,** and **Paul Gliatta,** all also of Chicago, Illinois, filed briefs for petitioner:

The Illinois Appellate Court has misinterpreted the Fourth Amendment by refusing to recognize a valid exception to the warrant requirement when a police officer, in good faith, relies on a third party's apparent authority to permit a consensual entry. In the alternative, the good faith exception to the exclusionary rule should apply if the warrant requirement is not excused.

Where Gale Fischer referred to the apartment at 3519 South California Avenue as her apartment, retained possession of a key to such apartment which she termed her key, and kept all her possessions except three bags of clothing at the apartment, the Illinois Appellate Court misinterpreted United States v Matlock by finding that Gale lacked common authority to permit a consensual entry.

Michael R. Dreeben, of the Department of Justice, Washington, D.C., argued the cause and, with Solicitor General **Kenneth W. Starr,** Assistant Attorney General **Edward S. G. Dennis,** and Deputy Solicitor General **William C. Bryson,** all also of the Department of Justice, Washington, D.C., filed a brief for the United States as amicus curiae urging reversal:

The officers' entry into respondent's apartment, based on an apparently valid consent by a third party, was lawful.

James W. Reilley, of DesPlaines, Illinois, argued the cause and, with **Christine P. Curran** and **Dianne Ruthman,** both also of DesPlaines, Illinois, **Rick Halprin,** of Chicago, Illinois, and **Thomas Y. Davies,** of Knoxville, Tennessee, filed a brief for respondent:

Gail Fischer did not possess common authority over respondent's apartment and could not give police consent to enter.

The only issue properly before the court is whether Gail Fischer had actual authority to consent: the Illinois courts' ruling that only actual common authority can support a consent to search rests exclusively on Illinois state constitutional law, and should not be disturbed by this court.

Gail Fischer did not possess apparent authority to consent to entry.

The search cannot be justified on the ground that Gail Fischer appeared to have authority to consent in the eyes of the police.

The exceptions to the exclusionary rule created in Leon and Krull are wholly inapplicable to a warrantless search in which the police themselves determine whether there is a legal justification sufficient to undertake a search.

John K. Van de Kamp, Attorney General of California, **Richard B. Iglehart,** Chief Assistant Attorney General, **John H. Sugiyama,** Senior Assistant Attorney General, and **Ronald S. Matthias** and **Clifford K. Thompson, Jr.,** Deputy Attorneys General, filed a brief for the state of California as amicus curiae urging reversal; and **Gregory U. Evans, Daniel B. Hales, George D. Webster, John Jemilo, Joseph A. Morris, Jack E. Yelverton, Fred E. Inbau, Wayne W. Schmidt, Bernard J. Farber,** and **James P. Manak** filed a brief for Americans for Effective Law Enforcement, Inc. et al. as amici curiae urging reversal.

Benjamin S. Waxman and **Jeffrey S. Weiner** filed a brief for the National Association of Criminal Defense Lawyers as amicus curiae urging affirmance.

ILLINOIS v RODRIGUEZ
Reported p 148, infra

ANNOTATION

VALIDITY, UNDER FEDERAL CONSTITUTION'S FOURTH AMENDMENT, OF SEARCH CONDUCTED PURSUANT TO CONSENT—SUPREME COURT CASES

by

Tim A. Thomas, J.D.

I. Prefatory Matters

§ 1. Introduction
  [a] Scope
  [b] Related matters
§ 2. Summary and comment
  [a] Generally
  [b] Practice pointers

II. General Principles

§ 3. Rule that search is permissible pursuant to valid consent—generally
§ 4. —Consent by third party
§ 5. Requirement that consent be voluntary
  [a] Burden and elements of proof—generally

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

68 Am Jur 2d, Searches and Seizures §§ 46-53

Annotations: See the related matters listed in the annotation.

8 Federal Procedure, L Ed, Criminal Procedure § 22:156

7 Federal Procedural Forms, L Ed, Criminal Procedure §§ 20:615, 20:618

18 Am Jur Proof of Facts 2d 681, Third Party's Lack of Authority to Consent to Search of Premises or Effects; 26 Am Jur Proof of Facts 2d 465, Consent to Search Given Under Coercive Circumstances

5 Am Jur Trials 331, Excluding Illegally Obtained Evidence

USCS, Constitution, Amendment 4

L Ed Digest, Search and Seizure §§ 14, 25

L Ed Index, Search and Seizure

Index to Annotations, Reasonableness; Search and Seizure

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

Consult POCKET PART in this volume for later case service

[b] —Knowledge of right to refuse consent
[c] Effect of assertion by police of authority to conduct search—claim of warrant
[d] —Search of government property

III. VALIDITY OF SEARCH IN PARTICULAR CASES

§ 6. Search of residential premises
  [a] Consent to search granted by accused
  [b] Consent to search granted by another
§ 7. Search of business premises
  [a] Search held valid
  [b] Search held invalid
§ 8. Search of motor vehicle
  [a] Consent to search granted by accused
  [b] Consent to search granted by another
§ 9. Search of accused's person or personal effects
  [a] Consent to search granted by accused
  [b] Consent to search granted by another

INDEX

Accused, consent granted by, §§ 6[a], 8[a], 9[a]
Agency, law of, § 6[b]
Airport, § 9[a]
Apparent authority, §§ 4, 6[b]
Arrest, consent given while under, §§ 5[b, c], 7[b], 8[a], 9[a]
Automobiles, §§ 8, 9[a]
Belief that third party had authority to permit search, §§ 4, 6[b]
Bookstore, §§ 5[c], 7[b]
Burden of proof, voluntary consent, §§ 5[a-c], 8[b]
Business premises, § 7
Cars, §§ 8, 9[a]
Checks, stolen, § 8[b]
Claims of authority, acquiescence to, § 5[a, c]
College dormitory room, § 6[a]
Comment and summary, § 2
Common authority over property, § 4
Container in car, § 9[a]
Custodian of government property, §§ 5[d], 7[a]
Custody, consent given while in, §§ 5[b, c], 7[b], 8[a], 9[a]
Distilling of whiskey, § 6[b]
Documents, inspection where required to be kept, §§ 5[d], 7[a]
Dormitory room, § 6[a]
Drug courier profile, § 9[a]
Drugs and narcotics, §§ 6[a], 9[a]
Duffel bag, § 9[b]
Fact question, voluntary consent as, §§ 5[b], 8[b]
Family and relatives, consent by, §§ 6[b], 9[b]
Force or threats of force, §§ 5[a], 7[b], 8[a], 9[a]
Gasoline ration stamps, §§ 5[d], 7[a]
Government property, search of, § 5[d]
Heroin, § 9[a]
Hotel clerk, consent by, §§ 4, 6[b]
Husband and wife, § 6[a]
Introduction to annotation, § 1
Knowledge of right to refuse consent, §§ 5[b], 8
Landlord, consent by, §§ 4, 6[b]
Luggage, § 9[a]
Mail, stolen, § 8[a]
Marijuana, §§ 6[a], 9[a]
Miranda warnings, § 8[a]
Motor vehicles, §§ 8, 9[a]
Obscene material, bookstore search, §§ 5[c], 7[b]
Paper bag in car, § 9[a]
Passenger in car, consent by, § 8[b]
Person or personal effects, search of, § 9
Postal inspectors, search by, § 8[a]
Practice pointers, § 2[b]
Prefatory matters, §§ 1, 2
Private or government property, §§ 5[d], 7[a]
Public documents, inspection, §§ 5[d], 7[a]
Question of fact, voluntary consent as, §§ 5[b], 8[b]
Ration stamps, gasoline, §§ 5[d], 7[a]
Refusal of consent, knowledge of right to, §§ 5[b], 8
Related matters, § 1[b]
Relatives, consent by, §§ 6[b], 9[b]
Residential premises, § 6
Scope of annotation, § 1[a]
Spouses, § 6[a]
Stolen property, §§ 6[a], 8
Summary and comment, § 2
Third party, consent granted by, §§ 4, 6[b], 8[b], 9[b]
Threats, §§ 5[a], 7[b], 8[a], 9[a]

Voluntary consent, §§ 5, 8[b]
Warrant, claim of, § 5[c]
Whiskey, distilling of, § 6[b]
Wife and husband, § 6[a]

I. Prefatory Matters

§ 1. Introduction

[a] Scope

This annotation[1] collects and discusses the United States Supreme Court cases determining the validity, under the Federal Constitution's Fourth Amendment, of a search conducted pursuant to the consent of an accused or another person.[2]

[b] Related matters

Admissibility of evidence obtained by illegal search and seizure—Supreme Court cases. 6 L Ed 2d 1544.

Admissibility of evidence discovered in warrantless search of property or premises authorized by one having ownership interest in property or premises other than relative. 49 ALR Fed 511.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's relative. 48 ALR Fed 131.

Admissibility of evidence discovered in search of defendant's property or residence authorized by one, other than relative, who is cotenant or common resident with defendant —state cases. 4 ALR4th 1050.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's adult relative other than spouse—state cases. 4 ALR4th 196.

Admissibility of evidence discovered in warrantless search of rental property authorized by lessor of such property—state cases. 2 ALR4th 1173.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's spouse (resident or nonresident)—state cases. 1 ALR4th 673.

Admissibility of evidence discovered in search of defendant's property or residence authorized by domestic employee or servant. 99 ALR3d 1232.

Admissibility of evidence discovered in search of adult defendant's property or residence authorized by defendant's minor child-state cases. 99 ALR3d 598.

Validity of consent to search given by one in custody of officers. 9 ALR3d 858.

Authority to consent for another to search or seizure. 31 ALR2d 1078.

◆

Cook, Constitutional Rights of the Accused, 2d Ed.

§ 2. Summary and comment

[a] Generally

The Supreme Court has stated on several occasions that a search to which an individual has given a valid consent meets the requirements of the Federal Constitution's Fourth Amendment and is not constitutionally infirm by reason of the absence of a search warrant (§ 3, infra). A consent to search given by a third party is valid for the purposes of the Fourth Amendment where the third party possesses common authority with the accused over the property to be searched, or where the police reasonably believe at the time of the search that the third party possesses such authority (§ 4, infra). Where the prosecution seeks to rely upon consent to justify a search for Fourth Amendment purposes, it bears the burden of showing that such consent was freely and voluntarily given, and was not the result of duress or coercion (§ 5[a], infra). However, the prosecution is not required, in order to establish that consent to a search given by a person not in police custody was voluntary, to demonstrate that the person giving the consent knew that he had a right to refuse to consent (§ 5[b], infra). With regard to consent obtained pursuant to a claim by police of authority to conduct the search in question, the court has held that any consent to a search which is given after the police assert that they possess a warrant authorizing the search is invalid for Fourth Amendment purposes (§ 5[c], infra), but has also said that where law enforcement officers obtain consent to a search on the grounds that the object of the search is government property and a duty exists to permit the search, coercion is less likely to be found than where private property is involved (§ 5[d], infra).

---

[1] The present annotation supersedes the one at 36 L Ed 2d 1143.

[2] The annotation is thus limited to cases involving a search and seizure, and does not include cases dealing with the validity of statutory schemes negating the need for consent, or implying consent under particular circumstances.

The Supreme Court has reached differing results, according to the circumstances presented, regarding the validity of searches conducted pursuant to consent. In a case involving consent given by an accused to a search of his residence, the court in recognizing that the search was valid observed that the officer obtaining the consent had advised the accused of his right to refuse consent (§ 6[a], infra). However, the court has in several cases found that a search of the accused's residence conducted pursuant to a consent or alleged consent given by a person other than the accused was not valid, either because the court deemed no consent to have been given under the coercive circumstances of the case, or because the person giving the consent had no authority to do so (§ 6[b], infra).[3] With respect to searches of business premises, a search conducted pursuant to the accused's consent has been deemed valid where the object of the search was government property (§ 7[a], infra). But in another case where an employee cooperated with a search of his business premises after he was arrested and informed that the police had a warrant for the search, the court in holding the search violative of the Fourth Amendment stated that any consent given by the employee to the search had been invalid (§ 7[b], infra). Searches of motor vehicles by consent have been upheld where the consent was given by the accused (§ 8[a], infra), and where the consent was given by another person (§ 8[b], infra), the court in each case relying upon the absence of unduly coercive circumstances. A search of an accused's person pursuant to her consent was upheld where the accused had been advised of her right to refuse to consent and no threats or show of force had been made, and a search of a paper bag found in an automobile driven by an accused has been upheld where the accused gave the police a general consent to search the car for narcotics (§ 9[a], infra). In another case, however, a consent by an accused to a search of his luggage was held invalid by reason of the prior illegal detention of the accused (§ 9[a], infra). In a case involving consent given by a third party to a search of the accused's duffle bag, the court in upholding the search relied on the authority of the consenting party to consent (§ 9[b], infra).

---

[3] The court has since stated that a third party's lack of actual authority to consent to a search will not render the search constitutionally impermissible where the police reasonably believe at the time of the search that the third party possesses the authority to consent. See § 4, infra.

[b] Practice pointers

Defense counsel seeking to establish the constitutional invalidity of a consent to search should learn as much as possible about the circumstances surrounding the giving of the consent. Under the "totality of the circumstances" test applicable to the determination whether a consent given by one not in police custody was given voluntarily,[4] relevant circumstances would seem to include the factual particulars of the situation in which the consent was obtained, such as the length and conditions of any interrogation, as well as evidence of the consenter's personal susceptibility to coercion, comprising such matters as his or her intelligence, education, and prior experience with the criminal law. In addition to considering these factors, defense counsel should look for acts or omissions on the part of the police (such as a show of force, promises of leniency in exchange for cooperation, or failure to advise the consenter that he may refuse to consent to the requested search) which, although not dispositive on the issue of voluntariness, can be taken together as indicative of a generally coercive approach by the police.[5] Where a consent to search has been obtained from an accused in police custody, the Supreme Court's recognition of the inherently coercive nature of police custody may support an argument that, as a matter of law, the voluntariness of the consent can be established only by a showing of a knowing waiver of constitutional rights by the accused.[6] In prosecutions under state law, defense counsel should also consider the possibility of arguing that the state constitution requires waiver for a valid consent to search under any circumstances.[7]

---

[4] Schneckloth v Bustamonte (1973) 412 US 218, 36 L Ed 2d 854, 93 S Ct 2041.

[5] For a more complete discussion of factors relating to the voluntariness of a consent to a search, see the article at 26 Am Jur Proof of Facts 2d 465. See also the annotation at 9 ALR3d 858, dealing with the validity of a consent to search given by one in the custody of police.

[6] See Schneckloth v Bustamonte (1973) 412 US 218, 36 L Ed 2d 854, 93 S Ct 2041 (holding that knowing and intelligent waiver of constitutional rights is not necessary to show voluntariness of a consent to search given by one not in police custody, but noting that the inherently coercive nature of police custody makes necessary a showing of knowing and intelligent waiver of constitutional rights to establish the validity of a confession given while in police custody). But see United States v Watson (1976) 423 US 411, 46 L Ed 2d 598, 96 S Ct 820, reh den 424 US 979, 47 L Ed 2d 750, 96 S Ct 1488, in which the court employed the Schneckloth "totality of the circumstances" rule, rather than a waiver requirement, to determine the voluntariness of a consent to search obtained from a suspect who was under arrest when his consent was obtained. The court in Watson, however, noted that the consent was given while the suspect was on a public street rather than in the confines of a police station.

[7] As adopting this view, even with respect to noncustodial consents to search, see State v Johnson (1975) 68 NJ 349, 346 A2d 66.

At the appellate level, counsel for the prosecution defending a trial court's ruling as to the lawfulness of a search by consent should, in addition to determining the applicability of alternative bases for the admission of the evidence thereby discovered (such as the "plain view" doctrine[8] or the inevitable discovery rule),[9] also determine whether any error in the trial court's ruling was harmless under the circumstances of the case.[10]

II. General Principles

§ 3. Rule that search is permissible pursuant to valid consent —generally

The following Supreme Court cases ruling on the validity of a search conducted pursuant to consent support the rule that a search conducted pursuant to a valid consent is permissible under the Federal Constitution's Fourth Amendment and is not constitutionally infirm by reason of the absence of a search warrant or of probable cause: Bumper v North Carolina (1968) 391 US 543, 20 L Ed 2d 797, 88 S Ct 1788, 46 Ohio Ops 2d 382; Schneckloth v Bustamonte (1973) 412 US 218, 36 L Ed 2d 854, 93 S Ct 2041, infra; United States v Mendenhall (1980) 446 US 544, 64 L Ed 2d 497, 100 S Ct 1870, reh den 448 US 908, 65 L Ed 2d 1138, 100 S Ct 3051; Washington v Chrisman (1982) 455 US 1, 70 L Ed 2d 778, 102 S Ct 812; Florida v Royer (1983) 460 US 491, 75 L Ed 2d 229, 103 S Ct 1319; and Illinois v Rodriguez (1990, US) 111 L Ed 2d 148, 110 S Ct 2793.

It is well settled, said the court in Schneckloth v Bustamonte (1973) 412 US 218, 36 L Ed 2d 854, 93 S Ct 2041, that one of the specifically established exceptions to the requirement that there be both a warrant and probable cause for a search, under the Federal Constitution's Fourth and Fourteenth Amendments, is a search conducted pursuant to a valid consent. The court noted that in many cases a search authorized by a valid consent may be the only means of obtaining important and reliable evidence, as where there may be no probable cause for a search and yet a search may yield tangible evidence serving either as a basis for prosecution or as a safeguard for the innocent. A search pursuant to consent may result in considerably less inconvenience for the subject of the search, noted the court, and properly conducted is a constitutionally permissible and wholly legitimate aspect of effective police activity.

As recognizing the rule that a search conducted pursuant to a valid consent is permissible under the Fourth Amendment, see United States v Matlock (1974) 415 US 164, 39 L Ed 2d 242, 94 S Ct 988.

§ 4. —Consent by third party

The Supreme Court has said that a search conducted pursuant to a consent given by a person other the accused is valid for the purposes of the Federal Constitution's Fourth Amendment where (1) the consenting person possesses common authority with the accused over the property to be searched, or (2) the police, at the time of the search, reasonably believe the consenting person to have such authority.

---

[8] For Supreme Court cases discussing whether the seizure of an article is justified under the "plain view" doctrine, see the annotation at 110 L Ed 2d 704.

[9] For cases discussing what circumstances fall within the "inevitable discovery" exception to the rule precluding admission of evidence obtained in violation of the Federal Constitution, see the annotation at 81 ALR Fed 331.

[10] For discussion and analysis of United States Supreme Court cases determining whether the admission of evidence in violation of the Federal Constitution's prohibition of unreasonable searches and seizures constitutes prejudicial error or harmless error, see § 5 of the annotation at 31 L Ed 2d 921.

The court in Illinois v Rodriguez (1990, US) 111 L Ed 2d 148, 110 S Ct 2793, stated that a warrantless entry and search of premises by police, undertaken pursuant to the consent of a person other than the accused, does not violate the Fourth Amendment where the person consenting to the search possesses common authority with the accused over the property searched, or is reasonably believed by the police, at the time of the entry, to possess common authority over the property. The court cited its decision in United States v Matlock (1974) 415 US 164, 39 L Ed 2d 242, 94 S Ct 988, as establishing the rule that common authority over property to be searched will suffice to render a third party's consent to search adequate for the purposes of the Fourth Amendment. With respect to the proposition that reasonable belief in such common authority will also validate a search for Fourth Amendment purposes, the court observed that the Fourth Amendment does not assure that no government search of an accused's house will occur without his consent, but rather that no such search will occur that is "unreasonable." The court said that in order to satisfy the "reasonableness" requirement of the Fourth Amendment, what is generally required of the many factual determinations that must regularly be made by agents of the government is not that they always be correct, but that they always be reasonable. There is no reason, continued the court, to depart from this general rule with respect to facts bearing on the authority of a third party to consent to a search. Whether the basis for such authority exists, said the court, is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment, and all the Fourth Amendment requires is that they answer it reasonably. As with other factual determinations bearing upon search and seizure, said the court, determination of consent to enter and search must be judged against an objective standard, that is, whether the facts available to the officer at the moment would warrant a man of reasonable caution in the belief that the consenting party had authority over the premises.

☆ COMMENT: In Illinois v Rodriguez, supra, the court stated that Stoner v California (1964) 376 US 483, 11 L Ed 2d 856, 84 S Ct 889, reh den 377 US 940, 12 L Ed 2d 303, 84 S Ct 1330, infra § 6[b]—holding that a warrantless search of an accused's hotel room was not rendered lawful by the consent of the hotel clerk to the search—was not contrary to its instant holding. Although conceding that Stoner contained language which could be interpreted as meaning that the mere appearance of authority on the part of a third party to allow a search could never suffice for a valid consent to a search, the Rodriguez court stated that an alternate and perhaps preferable reading of Stoner was that the clerk's consent was insufficient to validate the search in that case because the police could not reasonably have believed under the circumstances that the clerk had authority to consent to the search. The Rodriguez court characterized Chapman v United States (1961) 365 US 610, 5 L Ed 2d 828, 81 S Ct 776, infra § 6[b]—holding that a warrantless search of a tenant's home was not validated by the consent of the landlord to the search—as being "[s]imilarly ambiguous in its implications."

§ 5. Requirement that consent be voluntary

[a] Burden and elements of proof—generally

The following Supreme Court cases support the rule that, where the prosecution seeks to justify a search under the Federal Constitution's Fourth Amendment on the ground of consent, the prosecution bears the burden of proving that the consent was freely and voluntarily given.

Where a prosecutor seeks to rely upon consent to justify the lawfulness of a search under the Fourth Amendment, he has the burden of proving that the consent was, in fact, freely and voluntarily given, the court stated in Bumper v North Carolina (1968) 391 US 543, 20 L Ed 2d 797, 88 S Ct 1788, 46 Ohio Ops 2d 382, noting that this burden would not be discharged by showing no more than acquiescence to a claim of lawful authority.

As citing Bumper v North Carolina, supra, in stating with little discussion that where the validity of a search for the purposes of the Fourth Amendment rests upon consent, the prosecution has the burden of proving that the necessary consent was given freely and voluntarily, see Florida v Royer (1983) 460 US 491, 75 L Ed 2d 229, 103 S Ct 1319.

The rule that the burden of proving that consent to a warrantless search was in fact freely and voluntarily given is upon the prosecution, where the prosecution relies upon such consent to justify the search under the Fourth Amendment, was reiterated in Schneckloth v Bustamonte (1973) 412 US 218, 36 L Ed 2d 854, 93 S Ct 2041. The Federal Constitution's Fourth and Fourteenth Amendments, said the court, require that consent to a search be shown not to have been coerced, by explicit or implicit means, or by implied threat or covert force, for no matter how subtly the coercion was applied, the resulting consent would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.

[b] —Knowledge of right to refuse consent

The Supreme Court has held that in order to establish that consent to a search given by a person not in police custody was voluntary, so as to render the search lawful under the Federal Constitution's Fourth Amendment, the prosecution is not required to demonstrate that the person giving the consent knew that he had a right to refuse to consent.

It was held in Schneckloth v Bustamonte (1973) 412 US 218, 36 L Ed 2d 854, 93 S Ct 2041, that where a person who is not in police custody consents to a search, and the prosecution subsequently attempts to justify the search under the Fourth Amendment on the basis of that consent, (1) the prosecution must demonstrate that the consent was voluntarily given and was not the result of duress or coercion, express or implied; (2) the voluntary nature of the consent is a question of fact to be determined from all the circumstances; and (3) while the consenter's knowledge of a right to refuse to consent to the search is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent. In determining the meaning of "voluntariness" in this context, the court turned to case law regarding the voluntariness of an accused's confession and noted that the cases yielded no mechanical definition of the term, the test being whether the confession was the product of an essentially free and unconstrained choice under the totality of the circumstances. There was no reason, said the court, to depart from the traditional definition of "voluntariness" in determining the voluntary nature of consents to search. The court stated that the requirement of a knowing and voluntary waiver of rights, while applicable to constitutional guarantees involving the preservation of a fair trial of criminal defendants, has no application to the wholly different protections of the Fourth Amendment.[11] The court added that the adoption of a waiver requirement would be inconsistent with its decisions approving third-party consents to search.

> ☆ COMMENT: The court in Schneckloth v Bustamonte, supra, warned that the present case did not require a determination of the proper standard to be applied in assessing the validity of a search authorized solely by an alleged consent obtained from a person after he has been placed in custody, the court noting that other courts had been "particularly sensitive" to the heightened possibilities for coercion when consent to a search is given by a person in custody.

As citing Schneckloth v Bustamonte, supra, in recognizing the rule that in order to establish that a consent to search was voluntary, so as to render the search permissible under the Federal Constitution, it is not essential for the prosecution to show that the consenter knew of his or her right to refuse consent, see United States v Matlock (1974) 415 US 164, 39 L Ed 2d 242, 94 S Ct 988.

[c] Effect of assertion by police of authority to conduct search—claim of warrant

The Supreme Court has recognized that a consent to a search which is obtained after the police assert that they possess a warrant authorizing the search is invalid for the purpose of justifying the search under the Federal Constitution's Fourth Amendment.

In Bumper v North Carolina (1968) 391 US 543, 20 L Ed 2d 797, 88 S Ct 1788, 46 Ohio Ops 2d 382, the Supreme Court held that a search of the accused's home, which the prosecution maintained was justified on the basis of consent given by the accused's grandmother after police had told her they had a search warrant for the house, was constitutionally impermissible, inasmuch as for the purposes of the Fourth Amendment, no consent to a search can be given after the official conducting the search has asserted that he possesses a warrant authorizing the search. The court observed that, when a prosecutor seeks to rely upon consent to establish the lawfulness of a search, he has the burden of proving that the consent was in fact freely and voluntarily given; this burden, said the court, cannot be discharged by showing no more than acquiescence to a claim of lawful authority. When a law enforcement officer claims authority to search a home under a warrant, said the court, he announces in effect that the occupant has no right to resist the search. Such a situation, continued the court, is instinct with coercion, and where there is coercion —even colorably lawful coercion— there can be no consent.

---

[11] Although acknowledging that in two prior cases—Johnson v United States (1948) 333 US 10, 92 L Ed 436, 68 S Ct 367; and Amos v United States (1921) 255 US 313, 65 L Ed 654, 41 S Ct 266—the Supreme Court had relied on the absence of any waiver of Fourth Amendment rights to hold searches violative of the Fourth Amendment, the court in Schneckloth characterized the holdings of those cases as (1) essentially involving the absence of consent and (2) based on analyses of the totality of the circumstances.

As citing Bumper v North Carolina, supra, to hold with little discussion that any consent given by a clerk in a bookstore to a search of premises for obscene material, after the clerk had been placed under arrest by the officials conducting the search and after he had been advised that the officials had a warrant for the search, was invalid under the Fourth Amendment, see Lo-Ji Sales, Inc. v New York (1979) 442 US 319, 60 L Ed 2d 920, 99 S Ct 2319, 5 Media L R 1177.

[d] —Search of government property

The Supreme Court has said that, where law enforcement officers obtain consent to a search on the grounds that the object of the search is government property and a duty exists to permit the search, coercion rendering the consent invalid for the purposes of justifying the search under the Federal Constitution's Fourth Amendment is less likely to be found than where private property is involved.

Affirming a conviction for unlawful possession of gasoline ration stamps, the Supreme Court in Davis v United States (1946) 328 US 582, 90 L Ed 1453, 66 S Ct 1256, reh den 329 US 824, 91 L Ed 700, 67 S Ct 107, indicated that, where law enforcement officers persuade a person to consent to a search on the grounds that the object of the search is government property and it is the person's duty to permit the search, the consent to the search under such circumstances is less likely to be deemed coerced and invalid under the Fourth Amendment than in a case where private property is involved. Where officers seek to inspect public documents at the place of business where they are required to be kept, said the court, permissible limits of persuasion are not so narrow as where private papers are sought. When the custodian is persuaded by argument that it is his duty to surrender them and he hands them over, duress and coercion will not be so readily implied as where private papers are involved. A custodian of government property in this situation, said the court, is not protected against the production of incriminating documents, and the strict test of consent, designed to protect an accused against production of incriminating evidence, is inapplicable.

III. Validity of Search in Particular Cases

§ 6. Search of residential premises

[a] Consent to search granted by accused

In the following case, the Supreme Court apparently recognized that a search of residential premises undertaken pursuant to the consent of the accused was, under the circumstances presented, permissible under the Federal Constitution's Fourth Amendment.

In Washington v Chrisman (1982) 455 US 1, 70 L Ed 2d 778, 102 S Ct 812, the Supreme Court stated with little discussion that the seizure by police of drugs discovered in a police search of the accused's college dormitory room, after the accused and his roommate had validly consented to the search, did not violate the Fourth Amendment. The request for consent to search was made by a police officer who had observed the accused's roommate carrying a bottle of gin and had accompanied the roommate to the dormitory room to see his identification. While standing in the doorway of the room watching the accused and his roommate, the officer observed what he believed to be marijuana seeds and a pipe in the room. The officer entered the room, confirmed his suspicion, and then informed the two students of their Miranda rights. In response to the officer's question whether there were any more drugs in the room, the students gave him a box containing marijuana and cash. After a second officer arrived, the students were asked to consent to a search of their room. While devoting most of its opinion to the question whether the first officer's presence in the doorway and his initial entry into the room were permissible under the Fourth Amendment, the court, in stating that the consent to the search of the room was valid, noted that the consent had been obtained after the students had been advised that their consent had to be voluntary and that they had an absolute right to refuse consent and demand that the police obtain a search warrant.

See United States v Mitchell (1944) 322 US 65, 88 L Ed 1140, 64 S Ct 896, reh den 322 US 770, 88 L Ed 1595, 64 S Ct 1257, holding that where the accused, while in police custody, had confessed to breaking into two houses and had voluntarily consented to the recovery by the police of stolen property from his home, the admission into evidence of the stolen property recovered from his house did not violate the Fourteenth Amendment, notwithstanding that after the accused had consented to the search of his home he was subsequently and illegally kept in police custody for eight days before his arraignment.

[b] Consent to search granted by another

In the following cases, the Supreme Court held under the circumstances presented that a search of residential premises conducted pursuant to consent by a person other than the accused was not permissible under the Federal Constitution's Fourth Amendment.

> ☆ Comment: The holdings of some of the cases discussed below appear to be based at least in part on the Supreme Court's conclusion that the person consenting to the search had no actual authority to do so. The court, however, has subsequently held that a consent by a third party to a search by police will suffice to make the search constitutionally permissible even if the third party in fact had no actual authority to permit the search, as long as the belief of the police that the third party had such authority was reasonable under the circumstances. See Illinois v Rodriguez (1990, US) 111 L Ed 2d 148, 110 S Ct 2793, supra § 4.

A warrantless search of a house which the accused was renting was not rendered lawful under the Fourth Amendment by the fact that the accused's landlord had consented to it, said the court in Chapman v United States (1961) 365 US 610, 5 L Ed 2d 828, 81 S Ct 776, and accordingly the accused's conviction for violation of federal liquor laws, based on evidence found in the search, was reversed. The landlord had gone to the house on a social call, found no one at home, smelled an odor of whiskey mash, and advised the police of his observations. The landlord accompanied the police to the home and gave them his permission to enter by forcing a window. The government argued that the landlord had authority to permit the search under state law permitting a landlord to enter leased premises "to view waste." The Supreme Court observed that state law did not permit a landlord, in the absence of an express covenant, to break into leased premises without the consent of the tenant in order to view waste. The court noted that in the instant case, the landlord and the police had forced open a window, and that their purpose in any event was not to view waste but to look for distilling equipment. The court went on to say that to uphold the search in this case would reduce to the Fourth Amendment to a nullity and leave tenants' homes secure only in the discretion of landlords; moreover, continued the court, it is unnecessary and ill-advised to import into the law of search and seizure subtle distinctions developed by the common law of property. The court concluded by rejecting the government's claim that the landlord's entry was justified under state statutes declaring the illegal manufacture of liquor to be a nuisance and providing for a forfeiture of the rights of a tenant who manufactures liquor illegally on leased premises. It was clear, said the court, that before the police made their forcible entry, the landlord did not know that the premises were being used for the manufacture of liquor, nor had he exercised his statutory power to forfeit the tenancy on that basis. Also, noted the court, proceedings to abate a nuisance were required under state law to proceed on an information filed by the solicitor general of the circuit.

In Stoner v California (1964) 376 US 483, 11 L Ed 2d 856, 84 S Ct 889, reh den 377 US 940, 12 L Ed 2d 303, 84 S Ct 1330, the court held that a warrantless search by police of the accused's hotel room was not justified for the purposes of the Fourth Amendment by the fact that the hotel clerk had consented to the search. The court said that even if a state statute giving a hotel proprietor blanket authority to search a guest's room could survive a constitutional challenge, there was no showing that such a law applied to the search at issue, nor was there any substance to the claim that the search was reasonable because the police had a reasonable basis for the belief that the clerk had authority to consent to the search. The rights protected by the Fourth Amendment, said the court, are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of "apparent authority." It was the accused's constitutional right, rather than the clerk's or the hotel's, which was at stake, said the court, and therefore that right could be waived only by the accused, either directly or through an agent. Although the clerk clearly consented to the search, noted the court, there was nothing to indicate that he had been authorized by the accused to permit the search.

But see United States v Matlock

(1974) 415 US 164, 39 L Ed 2d 242, 94 S Ct 988, in which police officers searched the accused's room pursuant to the consent of a woman who admitted the police to the house and told them that she occupied the room with the accused; the court expressed the view that under the circumstances of the case—which included evidence that both the accused and the woman had made prior out-of-court statements at various times and places, and to various persons, to the effect that they were husband and wife—the government had sustained its burden of proving that the woman's consent to the search was legally sufficient under the Fourth Amendment to justify admission of the evidence thereby discovered, but remanded the case to the District Court for determination of the issue.

◆

Where, in the accused's absence, law enforcement officers went to the accused's home, where he lived with his grandmother, and informed her that they had a warrant to search the house, neither showing her the warrant nor reading it to her, and she responded "Go ahead," and opened the door, it was held in Bumper v North Carolina (1968) 391 US 543, 20 L Ed 2d 797, 88 S Ct 1788, 46 Ohio Ops 2d 382, that (1) the accused's grandmother had not consented to the search; (2) inasmuch as the prosecution had relied only upon consent to justify the search, the admission into evidence of the objects obtained in the search was error; and (3) the accused's convictions for rape and felonious assault were accordingly due to be reversed. When a law enforcement officer claims authority to search a home under a warrant, said the court, he announces in effect that the occupant has no right to resist the search. Such a situation, said the court, is imbued with coercion, and under such circumstances there cannot be consent.

§ 7. Search of business premises

[a] Search held valid

In the following case, the Supreme Court held under the circumstances presented that a search of business premises conducted pursuant to the consent of the accused was valid under the Federal Constitution's Fourth Amendment.

The court in Davis v United States (1946) 328 US 582, 90 L Ed 1453, 66 S Ct 1256, reh den 329 US 824, 91 L Ed 700, 67 S Ct 107, held that the search of a gas station by federal agents did not violate the Fourth Amendment in view of the evidence supporting the finding of the District Court that the accused, who operated the station, had voluntarily consented to the search. The accused had been arrested by the agents at his station on a charge of selling gasoline without ration coupons. Upon his arrest, the accused asserted that he had, in a locked inner room, sufficient ration coupons to explain the reduced capacity of his gasoline storage tanks. The agents asked to see the coupons, stating that the coupons were government property. The accused at first refused to unlock the room in which the coupons were stored, but soon agreed to unlock it, apparently after he saw an agent trying to raise an outside window of the room. The Supreme Court noted that the case involved not private papers, but gasoline ration coupons which never became the private property of the holder and remained at all times the property of the government and subject to recall or inspection by it. Where officers seek to inspect public documents at the place of business where they are required to be kept, said the court, permissible limits of persuasion are not so narrow as where private papers are sought; when the custodian of such papers is persuaded by argument that it is his duty to surrender them and he hands them over, duress and coercion will not be so readily implied as where private papers are involved. The court stated that the public character of the property, the fact that the officers' demand was made during business hours at the place of business where the coupons were required to be kept, the existence of the right to inspect, the nature of the request, and the fact that the initial refusal to turn over the coupons was soon followed by acquiescence in the officers' demand, all supported the District Court's conclusion that the accused had voluntarily consented to the search.

[b] Search held invalid

In the following case involving a search of business premises, the Supreme Court stated that under the circumstances the search was not justified under the Federal Constitution's Fourth Amendment by any consent given to the search.

Where a bookstore clerk was arrested at his place of business on obscenity charges, and several law enforcement officials proceeded to conduct a wide-ranging search of the premises for obscene material pursuant to an open-ended search warrant, the Supreme Court in Lo-Ji Sales, Inc. v New York (1979) 442 US 319, 60 L Ed 2d 920, 99 S Ct 2319, 5 Media L R 1177, after declaring that the search could not be upheld under the Fourth Amendment on the basis of the open-ended warrant, stated that under the circumstances of the case, any consent by the clerk to the search was not valid, and accordingly reversed the accused's conviction for obscenity based on materials discovered in the search. After the clerk had been placed under arrest and advised that the arresting officers had a warrant to conduct a search, said the court, the clerk's conduct in cooperating with the officers in the search could not, under the record presented, be considered freely and voluntarily given; any "consent" given in the face of colorably lawful coercion could not validate the illegal acts of the officials.

See Go-Bart Importing Co. v United States (1931) 282 US 344, 75 L Ed 374, 51 S Ct 153, a case not discussing consent to a search, where it was held that a general exploratory search of business premises, the seizure of papers, and their retention for use as evidence could not be sustained where the search was made under a false claim of possession of a search warrant, by one who made an arrest of persons on the premises under color of an invalid warrant and who required one of the arrested persons to open a desk and safe by pretending to have the right to do so and by threat of force.

§ 8. Search of motor vehicle

[a] Consent to search granted by accused

In the following case, the Supreme Court held under the circumstances presented that a consent by an accused to a search of his car rendered the search of the car lawful for the purposes of the Federal Constitution's Fourth Amendment.[12]

Reversing a judgment which had set aside the accused's conviction for possession of stolen mail, the court in United States v Watson (1976) 423 US 411, 46 L Ed 2d 598, 96 S Ct 820, reh den 424 US 979, 47 L Ed 2d 750, 96 S Ct 1488, held that the circumstances of the case supported the conclusion of the District Court that the accused had, for the purposes of the Fourth Amendment, validly consented to a warrantless search of his car by postal inspectors which revealed evidence that was the basis of his conviction. In stating that the record was inadequate to show that the consent to search had not been the accused's free and unrestrained choice, the court observed that (1) there had been no overt acts, threats of force, promises, or indications of subtle forms of coercion, (2) the consent had been given while the accused was on a public street, not in the confines of a police station, (3) there was no indication that the accused was a newcomer to the law, mentally deficient, or unable in the face of a custodial arrest to exercise free choice, and (4) the accused had been given Miranda warnings and had been further cautioned that results of search of his car could be used against him. The court noted that although the accused had been arrested and was in custody when his consent had been obtained, the fact of custody alone has never been enough to show that consent to a search was coerced. Similarly, said the court, the absence of proof that the accused knew he could refuse to consent was not of controlling significance.

[b] Consent to search granted by another

Under the circumstances of the following case, the Supreme Court held that a search of an automobile, conducted pursuant to the consent of a person other than the accused, was lawful under the Federal Constitution's Fourth Amendment.

In Schneckloth v Bustamonte (1973) 412 US 218, 36 L Ed 2d 854, 93 S Ct 2041, the court, affirming the conviction of the accused based on his possession of stolen checks, held that the search by police of the automobile in which the accused had been riding, pursuant to the consent of one of the passengers who had been riding with the accused, had been permissible under the Fourth Amendment. The search had been conducted after police officers on routine patrol observed an automobile with one headlight and its license plate light burned out. The police stopped the vehicle, which contained six men. The driver was unable to produce a driver's license, but a passenger produced a license and explained that the car belonged to his brother. An officer asked the passenger if he could search the car. The passenger replied "Sure, go ahead," and assisted in the search by opening the trunk and the glove compartment. The search disclosed three checks which had previously been stolen and which were admitted into evidence at a trial at which the accused was convicted of possessing a check with intent to defraud. In upholding the search and the admission of the checks into evidence, the Supreme Court, while acknowledging that the prosecution had the burden of proving that the consent to the search was voluntarily given, rejected the contention that the prosecution was required to show that the consenting person knew he had a right to refuse his consent. Voluntariness of consent, said the court, is a question of fact to be determined from the totality of the circumstances. In the instant case, observed the court, there was no evidence of any inherently coercive tactics either in the nature of the police questioning or in the environment in which it had taken place.

---

[12] For a case holding that a search of a container within a motor vehicle was rendered lawful under the Fourth Amendment by an accused's general consent to search the vehicle, see § 9[a], infra.

§ 9. Search of accused's person or personal effects

[a] Consent to search granted by accused

In the following case, the Supreme Court held that a search of an accused's person conducted pursuant to her consent was, under the circumstances presented, valid under the Federal Constitution's Fourth Amendment.

The Supreme Court, in United States v Mendenhall (1980) 446 US 544, 64 L Ed 2d 497, 100 S Ct 1870, reh den 448 US 908, 65 L Ed 2d 1138, 100 S Ct 3051, upheld the ruling of the District Court that the accused had freely and voluntarily consented to a search of her person which had disclosed narcotics and that the search was therefore lawful under the Fourth Amendment. The court observed that (1) the accused had initially been stopped in an airport by agents of the Drug Enforcement Administration (DEA) because her conduct fit the so-called "drug courier profile"; (2) questioning by the agents revealed that her plane ticket had been issued in a different name than appeared on her driver's license; (3) the accused agreed to accompany the agents to the airport DEA office for further questioning; (4) at the office she was asked if she would consent to a search of her person and her handbag and was told that she could refuse consent to such a search; and (5) the accused agreed to the search, which was conducted in a private room by a female DEA agent who, before conducting the search, again asked the accused if she consented to the search. The court further noted that the accused was 22 years old and had an eleventh-grade education; that she had not been told that she had to go to the DEA office, but was simply asked if she would accompany the agents to the office; that the agents made no threats or show of force; that the accused had been questioned only briefly; and that her ticket and driver's license had been returned to her before she was asked to go with the agents. Especially significant, said the court, was the fact that the accused was twice told that she was free to decline to consent to the search, and only thereafter consented to it. The court concluded that the District Court's determination that the accused had consented to the search freely and voluntarily was supported by the evidence, and accordingly reversed the judgment which had set aside her conviction for possession of heroin.

In the following case, the Supreme Court held that a search of a container in an accused's car, conducted pursuant to the accused's general consent to search the car, did not violate the Fourth Amendment.[13]

In Florida v Jimeno (1991, US) 114 L Ed 2d 297, 111 S Ct 1801, the Supreme Court held that an accused's general consent to a police officer's search of his automobile included consent to look inside a closed paper bag found by the officer on the floor of the automobile, and therefore rendered the search of the bag lawful under the Fourth Amendment. The officer had observed the suspect arranging what appeared to be a drug transaction over a public telephone and had followed the suspect's car until the suspect made an illegal turn. Stopping the suspect's car, the officer told the suspect he had been stopped for the illegal turn. The officer went on to say that he believed the suspect was carrying drugs in his car, and asked for permission to search the vehicle, whereupon the suspect said he had nothing to hide and gave permission for the search. In upholding the search of the paper bag, the court stated that the standard for measuring the scope of a suspect's consent to search under the Fourth Amendment is that of objective reasonableness, or what the typical reasonable person would have understood by the exchange between the officer and the suspect. The court noted that the suspect, in granting permission, had placed no explicit limitation on the scope of search and was aware that the officer would be looking for drugs. Under the circumstances, said the court, it was objectively reasonable for the officer to conclude that the general consent to search the car included consent to search containers in the car which might have contained drugs.

---

[13] For a case upholding the search of a car pursuant to the accused's consent to search of the car, see § 8[a], supra.

In the following case, however, the Supreme Court held under the circumstances presented that a search of the accused's luggage conducted pursuant to the consent of the accused was unlawful under the Fourth Amendment.

Affirming the reversal of a conviction based on the accused's possession of marijuana found through a police search of his luggage, five Justices of the Supreme Court in Florida v Royer (1983) 460 US 491, 75 L Ed 2d 229, 103 S Ct 1319, although unable to agree on an opinion, held that the accused's consent to the search of his luggage was insufficient to justify the search under the Fourth Amendment, because the consent had been tainted by his prior illegal detention by the police. The accused had been stopped by plainclothes detectives at an airport because they believed his actions and mannerisms fit a "drug courier profile." The detectives identified themselves to the accused as policemen, and asked to see his plane ticket and driver's license. The ticket and license bore different names, and upon seeing this the detectives told the accused that they were narcotics investigators and that they had reason to suspect him of transporting narcotics. In response to the detectives' request, the accused accompanied them to a small interrogation room about 40 feet away. Without the accused's consent, the detectives retrieved his two suitcases from the airplane he had intended to board and asked him if he would consent to a search of the luggage. Without answering, the accused produced a key and unlocked one of the suitcases, which one detective then opened without seeking further consent from the accused. Drugs were found inside the suitcase. Although the accused stated he did not know the combination of the lock on the second suitcase, when asked if he objected to a detective opening it, he said "No, go ahead" and did not object when he was told the suitcase might have to be broken open. The suitcase was pried open by the detectives and marijuana was found inside. Four members of the court expressed the view that, inasmuch as there had existed adequate grounds for temporarily detaining the accused on suspicion of carrying drugs, if he had consented to a search of his luggage while he was being justifiably detained on reasonable suspicion, such consent would have rendered the search lawful. However, said the plurality, by the time the accused was told that the detectives wished to search his luggage, the encounter had escalated from a consensual inquiry in a public place to an investigatory procedure in which the accused was, as a practical matter, under arrest. The plurality concluded that because the limits of a permissible investigative stop had been exceeded, and because there was no probable cause to arrest the accused, his consent had not made lawful the search of his luggage. Concurring in the judgment, one member of the court expressed the view that not even the initial stop of the accused had been constitutionally permissible.

[b] Consent to search granted by another

Under the circumstances of the following case, a consent to a search of an accused's personal effects granted by a person other than the accused was held valid under the Federal Constitution's Fourth Amendment.

The court in Frazier v Cupp (1969) 394 US 731, 22 L Ed 2d 684, 89 S Ct 1420, held that, where the accused's duffle bag had been searched by police pursuant to consent given by the accused's cousin, the search was lawful under the Fourth Amendment, inasmuch as the accused's cousin, as a joint user of the bag, clearly had authority to consent to the search. Although the accused argued that his cousin had actual permission to use only one compartment of the bag and had no authority to consent to a search of the other compartment, the court declined to engage in what it termed "metaphysical subtleties" in judging the efficacy of the consent. The court stated that the accused, in allowing his cousin to use the bag, had assumed the risk that his cousin would allow someone else to look inside.

Consult POCKET PART in this volume for later case service

KANSAS v UTILICORP UNITED

111 L Ed 2d 169

KANSAS AND MISSOURI, ETC., Petitioners

v

UTILICORP UNITED INC.

Reported in this volume: p 169, supra.

Holding: Utility alone, and not states on behalf of utility customers, held to have standing to bring antitrust suit under § 4 of Clayton Act against natural gas suppliers allegedly overcharging utility.

BRIEFS AND APPEARANCES OF COUNSEL

Thomas J. Greenan, of Seattle, Washington, argued the cause and, with **James E. Hurt** and **Christopher Kane,** both also of Seattle, Washington, **Robert T. Stephan,** Attorney General of Kansas, **Donald D. Barry,** and **Deborah Farrar Quirk,** all of Topeka, Kansas, **William L. Webster,** Attorney General of Missouri, of Jefferson City, Missouri, and **R. Lawrence Ward, William E. Quirk, Jennifer Gille Bacon, Russell S. Jones, Jr.,** and **Thomas A. Sheehan,** all of Kansas City, Missouri, filed briefs for petitioners:

Residential consumers of natural gas should be allowed to recover illegal overcharges directly from the natural gas producers and pipelines that violated the antitrust laws where the "middlemen" utility companies were required to, and did, pass on the full amount of the overcharges to the consumers.

The indirect purchasers' claims should be recognized here for the separate reason that, unlike Illinois Brick, this case is brought by state attorneys general as parens patriae.

Floyd R. Finch, Jr., of Kansas City, Missouri, argued the cause and, with **William H. Sanders, Sr., Sally R. Burger, Katharine S. Bunn,** and **Robert K. Green,** all also of Kansas City, Missouri, and **James D. Griffin,** of Overland Park, Kansas, filed a brief for respondent:

Utilicorp's Clayton Act § 4 claims are proper because it sustained antitrust injuries inflicted by the defendants.

Federal antitrust policy supports concentrating damages in the hands of the direct purchaser to increase his incentive to act as a private attorney general.

No exception to the direct purchaser rule should be recognized in this case.

The states' belated reliance on § 4c of the Clayton Act does not bar Utilicorp's § 4 claims.

Lawrence S. Robbins, of the Department of Justice, Washington, D.C., argued the cause and, with Solicitor General **Kenneth W. Starr,** Assistant Attorney General **James F. Rill,** Deputy Solicitor General **John G. Roberts, Jr.,** Deputy Assistant Attorney General **Michael Boudin, Stephen J. Marzen, Catherine G. O'Sullivan,** and **David Seidman,** all also of the Department of Justice, Washington, D.C, and **Jay C. Shaffer,** of the Federal Trade Commission, Washington, D.C., filed a brief for the United States as amicus curiae urging affirmance:

A direct purchaser that suffers injury (and only the direct purchaser) is entitled to recover the full measure of antitrust damages even if it passed on an overcharge to its customers.

Neil F. Hartigan, Attorney General of Illinois, **Michael J. Hayes,** Deputy Attorney General, **Robert J. Ruiz,** Solicitor General, **John W. McCaffrey** and **Christine Rosso,** Senior Assistant Attorneys General, **Bernard Nash, George Kaufmann, Peter J. Kadzik,** and **Dan Schweitzer** filed a brief for the state of Illinois as amicus curiae urging reversal; **J. Joseph Curran, Jr.,** Attorney General of Maryland, and **Michael F. Brockmeyer, Ellen S. Cooper,** and **Alan M. Barr,** Assistant Attorneys General, and the following attorneys for their respective jurisdictions filed a brief for the state of Maryland et al. as amici curiae urging reversal: **Don Siegleman,** Attorney General of Alabama, **Douglas B. Baily,** Attorney General of Alaska, and **Thomas E. Wagner,** Assistant Attorney General, **Robert K. Corbin,** Attorney General of Arizona, **Alison J. Butterfield, John Steven Clark,** Attorney General of Arkansas, **John K. Van de Kamp,** Attorney General of California, **Andrea Sheridan Ordin,** Chief Assistant Attorney General, and **Sanford N. Gruskin,** Assistant Attorney General, **Duane Woodard,** Attorney General of Colorado, **Clarine Nardi Riddle,** Attorney General of Connecticut, and **Robert M. Langer** and **Steven M. Rutstein,** Assistant Attorneys General, **Charles M. Oberly, III,** Attorney General of Delaware, **Robert A. Butterworth,** Attorney General of Florida, **Jerome W. Hoffman, Neil F. Hartigan,** Attorney General of Illinois, **Michael J. Bowers,** Attorney General of Georgia, and **George P. Shingler,** Senior Assistant Attorney General, **Warren Price, III,** Attorney General of Hawaii, and **Robert A. Marks** and **Ted Gamble Clause,** Deputy Attorneys General, **James T. Jones,** Attorney General of Idaho, **Linley E. Pearson** Attorney General of Indiana, and **Donna S. Nichols,** Deputy Attorney General, **Thomas J. Miller,** Attorney General of Iowa, and **John R. Perkins,** Deputy Attorney General, **Frederic J. Cowan,** Attorney General of Kentucky, and **James M. Ringo,** Assistant Attorney General, **William J. Guste, Jr.,** Attorney General of Louisiana, and **Jesse James Marks** and **Anne F. Benoit,** Assistant Attorneys General, **James E. Teirney,** Attorney General of Maine, and **Stephen L. Wessler,** Deputy Attorney General, **James M. Shannon,** Attorney General of Massachusetts, and **George K. Weber** and **Thomas A. Alpert,** Assistant Attorneys General, **Frank J. Kelly,** Attorney General of Michigan, **Hubert H. Humphrey, III,** Attorney General of Minnesota, **Stephen P. Kilgriff,** Deputy Attorney General, and **Thomas F. Pursell,** Assistant Attorney General, **Michael C. Moore,** Attorney General of Mississippi, **Marc Racicot,** Attorney General of Montana, **Robert M. Spire,** Attorney General of Nebraska, and **Dale A. Comer,** Assistant Attorney General, **Brian McKay,** Attorney General of Nevada, **John P. Arnold,** Attorney General of New Hampshire, and **Terry L. Robertson,** Senior Assistant Attorney General, **Robert Del Tufo,** Attorney General of New Jersey, and **Laurel A. Price,** Deputy Attorney General, **Robert Abrahms,** Attorney General of New York, **O. Peter Sherwood,** Solicitor General, and **Lloyd A. Constantine,** Assistant Attorney General, **Lacy H. Thornburg,** Attorney General of North Carolina, **James C. Gulick,** Special Deputy Attorney General, and **K. D. Sturgis,** Assistant Attorney General, **Nicholas Spaeth,** Attorney General of

North Dakota, and **David W. Huey,** Assistant Attorney General, **Anthony J. Celebrezze, Jr.,** Attorney General of Ohio, **Doreen C. Johnson, Robert H. Henry,** Attorney General of Oklahoma, **Dave Frohnmayer,** Attorney General of Oregon, **Ernest S. Preate, Jr.,** Attorney General of Pennsylvania, and **Eugene F. Waye,** Chief Deputy Attorney General, and **Carl S. Hisiro,** Senior Deputy Attorney General, **James E. O'Neil,** Attorney General of Rhode Island, **T. Travis Medlock,** Attorney General of South Carolina, **Roger A. Tellinghuisen,** Attorney General of South Dakota, and **Jeffrey P. Hallem,** Assistant Attorney General, **Charles W. Burson,** Attorney General of Tennessee, and **Barry Turner,** Assistant Attorney General, **Jim Mattox,** Attorney General of Texas, **Mary F. Keller,** First Assistant Attorney General, and **Allene D. Evans** and **Donna L. Nelson,** Assistant Attorneys General, **R. Paul Van Dam,** Attorney General of Utah, **Jeffrey L. Amestoy,** Attorney General of Vermont, and **Julie Brill,** Assistant Attorney General, **Mary Sue Terry,** Attorney General of Virginia, and **Frank Seales,** Assistant Attorney General, **Kenneth O. Eikenberry,** Attorney General of Washington, and **Carol A. Smith,** Assistant Attorney General, **Roger W. Thompkins,** Attorney General of West Virginia, and **Dan Huck,** Deputy Attorney General, **Donald J. Hanaway,** Attorney General of Wisconsin, and **Kevin J. O'Connor,** Assistant Attorney General, and **Joseph B. Meyer,** Attorney General of Wyoming; **Benna Ruth Solomon, Beate Bloch, Robert L. Wald, Bruce R. Grace,** and **Richard M. Rindler** filed a brief for the National Conference of State Legislatures et al. as amici curiae urging reversal; and **Richard E. Zuckerman, H. C. Goperud, Howard B. Iwrey, David B. Jaffe, Robert S. Harrison,** and **David N. Zacks** filed a brief for Nancy Allevato et al. as amici curiae urging reversal.

Jeffrey I. Zuckerman, Anne Turilli, Daniel J. Popeo, Paul D. Kamenar, and **John C. Scully** filed a brief for the Washington Legal Foundation as amicus curiae urging affirmance.

ROBERT SAWYER, Petitioner

v

LARRY SMITH, Interim Warden

Reported in this volume: p 193, supra.

Holding: Rule of Caldwell v Mississippi, concerning state prosecutor's argument diminishing jury responsibility for death sentence, held not retroactively available to support federal habeas corpus relief.

BRIEFS AND APPEARANCES OF COUNSEL

Catherine Hancock, of New Orleans, Louisiana, argued the cause and, with **Elizabeth W. Cole,** also of New Orleans, Louisiana, filed briefs for petitioner:

Caldwell v Mississippi should be applied retroactively to give Robert Sawyer a new sentencing hearing as a remedy for his prosecutor's false and misleading statements about the nonfinality of the jury's death verdict. Under Teague v Lane, Caldwell deserves retroactive application both because it was dictated by prior Eighth Amendment law, and because it recognizes a bedrock procedural right that insures fundamental fairness in all death penalty trials.

The prosecutor violated Robert Sawyer's Eighth Amendment rights under Caldwell v Mississippi by making false and misleading closing arguments which suggested that the jury's death verdict was not final. As these arguments were never corrected, a resentencing hearing must be provided in order for a reliable verdict to be obtained.

Dorothy A. Pendergast, of Gretna, Louisiana, argued the cause and, with **Terry M. Boudreaux** and **John M. Mamoulides,** both also of Gretna, Louisiana, filed a brief for respondent:

The principle announced in Caldwell v Mississippi is a "new rule" of federal constitutional law under Teague v Lane, and cannot be applied to Robert Sawyer on collateral review since it does not come within the two narrow exceptions established by Teague.

The prosecutor's remarks to Sawyer's capital sentencing jury were not improper or misleading under Caldwell v Mississippi and the Eighth Amendment, and Sawyer is not entitled to a new sentencing hearing.

Julius L. Chambers, Richard H. Burr, George H. Kendall, and **Steven W. Hawkins** filed a brief for the NAACP Legal Defense and Education Fund, Inc. as amicus curiae urging reversal.

Kent S. Scheidegger filed a brief for the Criminal Justice Legal Foundation as amicus curiae urging affirmance.

Stanley Chauvin, Jr., Jay Topkis, Ronald J. Tabak, Eric M. Freedman, Maxine S. Pfeffer, and **Steven Arenson** filed a brief for the American Bar Association as amicus curiae; and **Randy Hertz** and **Michael Millemann** filed a brief for Stephen H. Sachs et al. as amici curiae.

NANCY BETH CRUZAN, by her Parents and Co-Guardians, LESTER L. CRUZAN, et ux., Petitioners

v

DIRECTOR, MISSOURI DEPARTMENT OF HEALTH, et al.

Reported in this volume: p 224, supra.

Holding: Missouri requirement that incompetent's wishes as to withdrawal of life-sustaining treatment be proved by clear and convincing evidence held not violative of due process.

BRIEFS AND APPEARANCES OF COUNSEL

William H. Colby, of Kansas City, Missouri, argued the cause and, with **David J. Waxse,** also of Kansas City, Missouri, **Walter E. Williams,** of Joplin, Missouri, **Edward J. Kelly, III** and **Raymond A. Bonner,** both of Washington, D.C., and **John A. Powell** and **Steven R. Shapiro,** both of New York City, filed briefs for petitioners:

The majority below erred in holding that incompetent persons lose the constitutional right to withdrawal of unwanted medical treatment, and that the state, rather than that person's family, should make decisions about appropriate treatment.

The decision below violates the equal protection clause by making artificial distinctions regarding incompetent persons.

Robert L. Presson, Assistant Attorney General of Missouri, Jefferson City, Missouri, argued the cause and, with **William L. Webster,** Attorney General, and **Robert Northcutt,** both also of Jefferson City, Missouri, filed a brief for respondents Director, Missouri Department of Health et al.:

The instant case does not present an issue concerning the extension of substantive due process or the constitutional right of privacy to the area of refusing medical treatment.

The Missouri Supreme Court's opinion below regarding the manner in which medical treatment decisions on behalf of incompetent patients should be made did not deny or infringe the petitioners' right to due process of law.

The decision of the Missouri Supreme Court does not deny to incompetent persons the equal protection of the law.

Thad C. McCanse, pro se, and **David B. Mouton,** both of Carthage, Missouri, filed a brief for respondent guardian ad litem.

Solicitor General **Kenneth W. Starr,** of the Department of Justice, Washington, D.C., argued the cause and, with Acting Assistant Attorney General **Stuart E. Schiffer,** Deputy Solicitor General **Thomas W. Merrill,** and **Brian J. Martin,** all also of the Department of Justice, Washington, D.C., filed a brief for the United States as amicus curiae urging affirmance:

The source of any substantive due process right to refuse unwanted medical treatment or procedures should be drawn from our nation's history and traditions, not from a generalized right to privacy.

Even if a currently competent adult has a qualified fundamental right to refuse life-sustaining medical treatment, that right does not extend to an incompetent patient in the circumstances of this case.

The liberty interest in refusing life-sustaining medical treatment is not "fundamental" when an attempt is made to exercise that interest on behalf of an incompetent.

The Supreme Court of Missouri applied reasonable rules in this case.

Walter R. Allan, Maureen E. Corcoran, Marcia L. Leitner, and **Benjamin H. Schatz** filed a brief for the AIDS Civil Right Project as amicus curiae urging reversal; **John H. Pickering, Kristina L. Ament,** and **Sharon E. Conaway** filed a brief for the American Academy of Neurology as amicus curiae urging reversal; **Nancy J. Bregstein, Craig Snyder, John R. Ball,** and **Lois Snyder** filed a brief for the American College of Physicians as amicus curiae urging reversal; **Keith R. Anderson** and **Anna Mastroianni Boe** filed a brief for the American Geriatrics Society as amicus curiae urging reversal; **Paul W. Armstrong, Michael F. Anthony, Lawrence E. Singer, Paul A. Hattis, Ila S. Rothschild,** and **Jeffrey M. Teske** filed a brief for the American Hospital Association as amicus curiae urging reversal; **Rex E. Lee, Carter G. Phillips, Elizabeth**

H. Esty, Mark E. Haddad, Jack R. Bierig, Kirk B. Johnson, Edward B. Hirshfeld, David Orentlicher, Terrie A. Rymer, Russell M. Pelton, Brenda A. Beswick, Douglas J. Polk, Paul G. Gebhard, Laurie R. Rockett, Henry Hart, and **Elizabeth M. Gallup** filed a brief for the American Medical Association et al. as amici curiae urging reversal; **Garth C. Grissom** and **William P. Cantwell** filed a brief for the Colorado Medical Society et al. as amici curiae urging reversal; **Henry Putzel, III, Giles R. Scofield, III,** and **George J. Annas** filed a brief for Concern for Dying as amicus curiae urging reversal; **Susan D. Reece Martyn, Henry J. Bourguignon,** and **David J. Hardy** filed a brief for the Evangelical Lutheran Church in America as amicus curiae urging reversal; **Thomas S. Martin** and **Magda Lopez** filed a brief for the General Board of Church and Society of the United Methodist Church as amicus curiae urging reversal; **Mark A. Thornhill, Peggy F. Schmitt, E. J. Holland, Jr., Charles F. Myers, John C. Shepherd,** and **Kenneth W. Bean** filed a brief for Missouri Hospitals et al. as amici curiae urging reversal; **Barbara F. Mishkin, Walter A. Smith, Jr.,** and **Ann Morgan Vickery** filed a brief for the National Hospice Organization as amicus curiae urging reversal; **Michael Gilfix, Myra Gerson Gilfix,** and **Robert K. Huffman** filed a brief for the National Academy of Elder Law Attorneys as amicus curiae urging reversal; **Stephan E. Lawton, Thomas N. Nulleit, Jr.,** and **Ellen Covner Weiss** filed a brief for the Society of Critical Care Medicine et al. as amici curiae urging reversal; **Fenella Rouse, M. Rose Gasner, Richard Wasserman,** and **Sidney Rosoff** filed a brief for the Society for the Right to Die, Inc. as amicus curiae urging reversal; **Robyn S. Shapiro, Charles H. Barr,** and **Jay A. Gold** filed a brief for Wisconsin Bioethicists et al. as amici curiae urging reversal; **Vicki Gottlich, Leslie Blair Fried,** and **Stephanie M. Edelstein** filed a brief for Barbara Burgoon et al. as amici curiae urging reversal; and **Stephen A. Wise** filed a brief for John E. McConnell et al. as amici curiae urging reversal.

David Zwiebel filed a brief for Agudath Israel of America as amicus curiae urging affirmance; **James Bopp, Jr.** and **Barry A. Bostrom** filed a brief for the American Academy of Medical Ethics as amicus curiae urging affirmance; **Edward R. Grant** and **Kent Masterson Brown** filed a brief for the Association of American Physicians and Surgeons et al. as amici curiae urging affirmance; **James Bopp, Jr., Thomas J. Marzen, Mary M. Nimz, Daniel Avila, Teresa Kealy,** and **Stanley S. Herr** filed a brief for the Association for Retarded Citizens of the United States et al. as amici curiae urging affirmance; **Calum B. Anderson, Leonard F. Zandrow, Jr.,** and **B. Deirdre Brennan** filed a brief for Catholic Lawyers Guild of the Archdiocese of Boston, Inc. et al. as amici curiae urging affirmance; **E. Michael McCann,** pro se, **Thomas L. Potter,** and **John M. Stoiber** filed a brief for the District Attorney of Milwaukee County, Wisconsin as amicus curiae urging affirmance; **David O. Danis** and **Gerard F. Hempstead** filed a brief for Doctors for Life et al. as amici curiae urging affirmance; **Robert L. Mauro** filed a brief for Families for Life et al. as amici curiae urging affirmance; **Clarke D. Forsythe, Paul Benjamin Lionton, Kevin J. Todd, Richard Campanelli,** and **H. Robert Showers** filed a brief for Focus on the Family et al. as amici curiae urging affirmance; **Thomas Patrick Monaghan** and **Jay Alan Sekulow** filed a brief for Free Speech Advocates et al. as amici curiae urging affirmance; **Jordan Lorence** and **Keith A. Fournier** filed a brief for the International Anti-Euthenasia Task Force et al. as amici curiae urging affirmance; **James H. Burnley, IV, Robert J. Cynkar, W. Patrick Donlin,** and **Carl A. Anderson** filed a brief for the Knights of Columbus as amicus curiae urging affirmance; **James Bopp, Jr.** and **Richard E. Coleson** filed a brief for the National Right to Life Committee, Inc. as amicus curiae urging affirmance; **Donald D. Campbell, Anne M. Perone,** and **Richard J. Traynor** filed a brief for the New Jersey Right to Life Committee, Inc. et al, as amici curiae urging affirmance; **John W. Whitehead, James J. Knicely, A. Eric Johnson, David E. Morris, David Llewellyn, Lynn M. Watwood, Jr., Joseph P. Secola, William B. Hollberg, Amy Dougherty, David Melton, Thomas W. Strahan, Richard Duncan, Robert R. Melnick, W. Steven Lewis, William Bonner, Russell Burke, John F. Southworth, Jr., W. Charles Bundren, Randall Trautwein,** and **Craig L. Parshall** filed a brief for the Rutherford Institute et al. as amici curiae urging affirmance; **Mark E. Chopko, Helen M. Alvare,** and **Phillip H. Harris** filed a brief for the United States Catholic Conference as amicus curiae urging affirmance; **Walter M. Weber** and **C. Peter Thomas S. Cornell** filed a brief for the Value of Life Committee, Inc. as amicus curiae urging affirmance; and **Robert L. Mauro** filed a brief for Elizabeth Sadowski et al. as amici curiae urging affirmance.

Diane Trace Warlick filed a brief for the American Nurses Association et al. as amici curiae; and **J. Jerome Mansmann, Melanie DiPietro,** and **Sandra L. Lannis** filed a brief for SSM Health Care System et al. as amici curiae.

EVERETT A. SISSON, Petitioner

v

BURTON B. RUBY et al.

Reported in this volume: p 292, supra.

Holding: Federal District Court held to have maritime jurisdiction, under 28 USCS § 1333(1), of suit to limit liability for damages resulting from fire on board yacht docked in marina on navigable waters.

BRIEFS AND APPEARANCES OF COUNSEL

Warren J. Maredel, of Chicago, Illinois, argued the cause and, with **Dennis Minichello,** also of Chicago, Illinois, filed briefs for petitioner:

There is subject matter jurisdiction in this case pursuant to the general grant of admiralty and maritime jurisdiction in Article III, § 2 of the Constitution and 28 USC § 1333 [28 USCS § 1333].

The limitation of the Liability Act, 46 USC §§ 181 et seq. [46 USCS §§ 181 et seq.], provides a source of admiralty jurisdiction separate and apart from jurisdiction under 28 USC § 1333 [28 USCS § 1333].

Robert J. Kopka, of Chicago, Illinois, argued the cause and, with **Jeffrey S. Herden,** also of Chicago, Illinois, filed a brief for respondents:

A fire which spreads from a pleasure yacht damaging a noncommercial marina and other pleasure yachts does not present a sufficient nexus to traditional maritime activity to confer federal admiralty jurisdiction.

The limitation of the Liability Act does not confer independent federal jurisdiction.

This court's decision in Richardson v Harmon should be reconsidered.

Terence S. Cox and **Dennis J. Herrera** filed a brief for American Auto, Inc. as amicus curiae urging reversal; and **Richard H. Brown, Richard W. Palmer,** and **Paul F. McGuire** filed a brief for the Maritime Law Association of the United States as amicus curiae urging reversal.

John A. Flynn filed a brief for the Hatteras Yachts Division of Genmar Industries, Inc. as amicus curiae urging affirmance.

Solicitor General **Kenneth W. Starr,** Deputy Solicitor General **David L. Shapiro,** and **Stephen L. Nightingale** filed a brief for the United States as amicus curiae.

GEORGIA, Plaintiff
v
SOUTH CAROLINA

Reported in this volume: p 309, supra.

Holding: Disputes between Georgia and South Carolina over location of their boundary along Savannah River, at river's mouth, and their lateral seaward boundary, resolved in original action.

BRIEFS AND APPEARANCES OF COUNSEL

Patricia T. Barmeyer, Senior Assistant Attorney General of Georgia, of Atlanta, Georgia, argued the cause and, with **Michael J. Bowers,** Attorney General, **H. Perry Michael,** Executive Assistant Attorney General, **William B. Hill, Jr.,** Deputy Assistant Attorney General, and **Sarah Evans Lockwood,** Special Assistant Attorney General, all also of Atlanta, Georgia, filed briefs for plaintiff.

Thomas E. McCutchen, of Columbia, South Carolina, argued the cause and, with **T. Travis Medlock,** Attorney General of South Carolina, **Robert D. Cook,** Deputy Attorney General, **Kenneth P. Woodington,** Senior Assistant Attorney General, and **Jeter E. Rhodes,** all also of Columbia, South Carolina, filed a brief for defendant.

Solicitor General **Kenneth W. Starr** filed a brief for the United States as amicus curiae; and **Douglas B. Baily,** Attorney General of Alaska, **G. Thomas Koester,** Assistant Attorney General, and **John Briscoe** filed a brief for the state of Alaska as amicus curiae.

JANE HODGSON, et al., Petitioners
v
MINNESOTA et al. (No. 88-1125)

MINNESOTA, et al., Petitioners
v
JANE HODGSON et al. (No. 88-1309)

Reported in this volume: p 344, supra.

Holding: Minnesota's two-parent notification requirement for minor's abortion, without judicial bypass provision, held to violate Federal Constitution, but such requirement with judicial bypass held valid.

Annotation: p 879, infra.

BRIEFS AND APPEARANCES OF COUNSEL

Janet Benshoof, of New York City, argued the cause and, with **Rachael N. Pine, Lynn M. Paltrow, Kathryn Kolbert, John A. Powell,** and **Ellen K. Goetz,** all also of New York City, and **Robert S. Hicks, William Z. Pentelovitch, Rebecca A. Palmer,** and **Linda Ojala,** all of Minneapolis, Minnesota, filed briefs for Jane Hodgson, M.D. et al:

The District Court's factual inquiry was constitutionally mandated and its findings were supported by the evidence.

The Solicitor General's suggestion that this court overrule Roe v Wade is inappropriate.

Common law principles defining minors' legal rights were never as restrictive as this statute and cannot be resurrected to sustain it.

The Eighth Circuit was correct in holding that Subdivision 2 of the Minnesota criminal notification statute is unconstitutional.

Minnesota's mandatory two-parent notice requirement cannot be justified as a means of protecting a parental right to know.

John R. Tunheim, Chief Deputy Attorney General of Minnesota, of St. Paul, Minnesota, argued the cause and, with **Hubert Humphrey, III,** Attorney General, **Catherine F. Haukedahl,** Solicitor General, **Kenneth E. Raschke, Jr.,** Assistant Attorney General, and **John B. Galus,** Special Assistant Attorney General, all also of St. Paul, Minnesota, filed a brief for Minnesota et al.:

The decision of the Eighth Circuit upholding the Minnesota notice/bypass statute is consistent with standards already established by this court as a matter of law.

This case presents no new "facts" which should lead this court to overrule already established constitutional standards regarding the permissible scope of parental involvement in the abortion decisions of minors.

The requirements that both parents be notified and the length of the waiting period do not render the Minnesota law invalid when both requirements can be avoided by resort to the court bypass option.

If the requirement that both parents be notified absent a judicial determination renders the Minnesota statute unconstitutional, the District Court erred in holding that requirement not severable from the remainder of the statute contrary to the express intent of the legislature.

The Court of Appeals erred in holding that Minnesota may not require preabortion notice to the parents of minors without providing an alternative court bypass procedure.

Donald N. Bersoff, Susan R. Podolsky, and **Mark D. Schnieder** filed a brief for the American Psychological Association et al. as amici curiae urging reversal; **Kenneth J. Bialkin, Peggy L. Kerr, Meyer Eisenberg, Justin J. Finger, Jeffrey P. Sinensky, Steven M. Freeman, Jill L. Kahn,** and **Livia D. Thompson** filed a brief for the Anti-Defamation League of B'Nai B'rith et al. as amici curiae urging reversal.

Clarke D. Forsythe, Leanne McCoy, and **Kent Masterson Brown** filed a brief for the Association of American Physicians and Surgeons as amicus curiae urging affirmance.

Solicitor General **Kenneth W. Starr,** Acting Assistant General **Stuart E. Schiffer,** Deputy Solicitor General **Thomas W. Merrill, Paul J. Larkin, Jr., Stephen J. Marzen,** and **Steven R. Valentine** filed a brief for the United States as amicus curiae; **William J. Guste,** Attorney General of Louisiana, **Jenifer Schaye** and **Meredith H. Lieux,** Assistant Attorneys General, and **Jo Ann P. Levert** and **Thomas A. Rayner** and the following attorneys for their respective jurisdictions filed a brief for the state of Louisiana et al. as amici curiae: **Robert K. Corbin,** Attorney General of Arizona, **William L. Webster,** Attorney General of Missouri, and **Ernest D. Preate, Jr.,** Attorney General of Pennsylvania; **Kathleen M. Sullivan, Susan R. Estrich, Barbara Jordan,** and **Estelle H. Rogers** filed a brief for 274 Organizations in Support of Roe v Wade as amicus curiae; **Joseph W. Dellapenna** filed a brief for the American Academy of Medical Ethics as amicus curiae; **Carter G. Phillips, Elizabeth H. Esty, Mark E. Haddad, Ann E. Allen, Stephan E. Lawton, Laurie R. Rockett,** and **Joel I. Klein** filed a brief for the American College of Obstetricians and Gynecologists et al. as amici curiae; **Peggy M. Coleman** filed a brief for American Family Association as amicus curiae; **Nancy J. Gannon, George W. Kock, Jr., Thomas Strahan,** and **Robert R. Melnick** filed a brief for the Catholic League for Religious and Civil Rights et al. as amici curiae; **John H. Henn** filed a brief for the Center for Population Options et al. as amici curiae; **Stephen R. Kaufmann** filed a brief for the Elliot Institute for Social Sciences Research et al. as amici curiae; **H. Robert Showers** and **Richard M. Campanelli** filed a brief for Focus on the Family et al. as amici curiae; **Kevin J. Hasson, Brendan V. Sullivan, Jr., W. Patrick Donlon,** and **Carl A. Anderson** filed a brief for the Knights of Columbus as amicus curiae; **Phillip E. Draheim, Leonard J. Pranschke,** and **Sibyl E. Bogardus** filed a brief for the Lutheran Church-Missouri Synod as amicus curiae; **James Bopp, Jr.** filed a brief for the National Right to Life Committee, Inc. as amicus curiae; **Mark E. Chopko** filed a brief for the United States Catholic Conference as amicus curiae; **James Bopp, Jr.** filed a brief for Representative Christopher H. Smith et al. as amici curiae; **Maura K.**

Quinlan and **Philip J. Murren** filed a brief for Members of the General Assembly of the Commonwealth of Pennsylvania as amicus curiae; **Hannah E. M. Lieberman** and **Pamela H. Anderson** filed a brief for 13 Individual Members of the Panel on Adolescent Pregnancy and Childbearing or the Committee on Child Development Research and Public Policy as amicus curiae; and **James Joseph Lynch, Jr.** filed a brief pro se as amicus curiae.

ANNOTATION

SUPREME COURT'S VIEWS AS TO VALIDITY, UNDER FEDERAL CONSTITUTION, OF ABORTION LAWS

by

Gary Knapp, M.B.A., J.D.

I. Preliminary Matters

§ 1. Introduction
  [a] Scope
  [b] Related matters
§ 2. Summary and comment
  [a] Generally
  [b] Practice pointers

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

1 Am Jur 2d, Abortion §§ 1.5, 9, 12, 18, 37.5; 79 Am Jur 2d, Welfare Laws § 72.6

Annotations: See the related matters listed in the annotation.

2 Federal Procedural Forms, L Ed, Appeal, Certiorari, and Review § 3:977

1 Am Jur Pl & Pr Forms (Rev), Abortion, Forms 1-3, 5, 6; 14 Am Jur Pl & Pr Forms (Rev), Infants, Forms 21-24; 19A Am Jur Pl & Pr Forms (Rev), Physicians, Surgeons, and Other Healers, Form 327

13A Am Jur Legal Forms 2d, Parent and Child §§ 191:33, 191:34, 191:74, 191:83, 191:84; 15 Am Jur Legal Forms 2d, Physicians and Surgeons §§ 202:129-202:131

1 Am Jur Proof of Facts 15, Abortion and Miscarriage; 7 Am Jur Proof of Facts 2d 579, Physician's Failure to Diagnose Pregnancy; 41 Am Jur Proof of Facts 2d 1, Trauma in Pregnancy

USCS, Constitution, Art IV, § 2, cl 1; Amendments 1, 5, 14

L Ed Digest, Abortion §§ 1-16; Constitutional Law § 526

L Ed Index, Abortion; Emancipation of Minors; Medical Care or Treatment

Index to Annotations, Abortion; Children; Medical Care and Treatment; Notice and Knowledge

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

Consult POCKET PART in this volume for later case service

II. General Principles

A. Constitutional Right to Abortion Without Governmental Interference

§ 3. Generally
§ 4. As encompassed by constitutional right of privacy

B. Authority of State to Regulate or Restrict Abortion

§ 5. Generally
§ 6. Prohibition of abortion
  [a] After fetus becomes viable—constitutionality of prohibition
  [b] —Constitutionality of statutory definition of viability
  [c] On nonresident of state; privileges and immunities clause

III. Consent to Abortion

A. Pregnant Woman's Consent

§ 7. Requirement that consent be voluntary and informed
  [a] Generally
  [b] Requirement that particular information be given to insure that consent is informed
  [c] Waiting period
§ 8. Requirement of written consent
  [a] As unconstitutionally vague
  [b] As violative of equal protection rights

B. Consent of Pregnant Woman's Spouse

§ 9. As violative of constitutional right of privacy

C. Requirement of Parental or Judicial Consent to Minor's Abortion

§ 10. As violative of constitutional rights generally
  [a] Generally
  [b] Particular requirements held unconstitutional
  [c] Particular requirements held not unconstitutional
§ 11. As violative of due process rights
  [a] Generally
  [b] Particular laws as violative of rights
§ 12. As violative of right of privacy

D. Consent of Governmental Agency

§ 13. Generally

IV. Notice of Intended Abortion

A. Requirement of Notice to Parent

§ 14. As violative of Federal Constitution generally
  [a] Particular requirements held to be unconstitutional
  [b] Particular requirements held not to be unconstitutional

§ 15. As violative of due process rights
  [a] Generally
  [b] Particular requirements held to violate rights
  [c] Particular requirements held not to violate rights
§ 16. As violative of right of privacy

B. REQUIREMENT OF NOTICE TO SPOUSE

§ 17. Generally

V. REGULATION OF ABORTION-RELATED ACTIVITIES OF PERSONS OTHER THAN PREGNANT WOMAN OR HER PARENTS OR SPOUSE

A. SPECIFYING WHO MAY PROVIDE PARTICULAR INFORMATION PRIOR TO ABORTION

§ 18. Requirement that person giving parental notification be physician who is to perform abortion
§ 19. Counseling for pregnant woman

B. REGULATION OF DECISION TO PERFORM, OR PERFORMANCE OF, ABORTION

§ 20. Requirements as to physician's decision to perform abortion as being unconstitutionally vague
§ 21. Requirement that physician's decision to perform abortion be approved by others as violative of fourteenth amendment
  [a] Approval by hospital staff abortion committee
  [b] Approval by other physicians
§ 22. Requirements with respect to determining viability
  [a] As being unconstitutional generally
  [b] As being unconstitutionally vague
§ 23. Requirement that abortion be performed by physician only
  [a] As unconstitutional generally
  [b] As violative of right to privacy
§ 24. Physician's standard of care with respect to preserving life or health
  [a] Of pregnant woman—as unconstitutionally vague
  [b] —As violative of constitutional presumption of innocence
  [c] Of fetus—as unconstitutional generally
  [d] —As unconstitutionally vague
§ 25. Prohibition of particular method of abortion
§ 26. Requiring presence of second physician during performance of abortion
  [a] When viability is possible
  [b] After viability occurs
§ 27. Prohibition of public employee involvement in performance of abortion
  [a] As violative of due process rights
  [b] As violative of equal protection rights

C. OTHER REGULATIONS

§ 28. Requirements as to disposal of fetal remains as violative of physician's due process rights
§ 29. Record keeping and reporting requirements
  [a] Held valid
  [b] Held invalid

§ 30. Prohibition of advertisements concerning abortion services as violative of first amendment rights of free speech and press

VI. Specifying Type of Facility in Which Abortion May be Performed

§ 31. Generally
§ 32. Requirement that abortions be performed in hospital only
§ 33. Requirement that abortions be performed in either hospital or licensed clinic
§ 34. Prohibition of use of public facility for performance of abortions
  [a] As violative of due process rights
  [b] As violative of equal protection rights

VII. Public Funding

§ 35. Generally
§ 36. Particular state or local laws denying public funding as violative of equal protection rights
§ 37. Hyde Amendment denying federal funding under Medicaid program
  [a] As unconstitutionally vague
  [b] As violative of First Amendment's establishment of religion clause
  [c] As violative of Fifth Amendment's equal protection guarantees
  [d] As violative of right to liberty under Fifth Amendment's due process clause
§ 38. Federal regulations limiting abortion-related activities of Title X recipients
  [a] As violative of First Amendment's free speech clause
  [b] As violative of Fifth Amendment's due process clause

INDEX

Abuse by parent, §§ 11[b], 15[b, c]
Adoption agencies, § 7[b]
Advertisements, § 30
Agency of government, consent of, § 13
Age of fetus, §§ 3, 6[a, b], 7[b], 22[a], 29[b]
Age of woman, § 29
Alternatives to abortion, § 7[b]
American Osteopathic Association, hospitals accredited by, § 32
Amniocentesis, saline, § 25
Approval of physician's decision to perform abortion, § 21
Attorneys, court-appointed counsel, § 14[b]
Best interests of minor, §§ 10[b, c], 11[b], 14[b], 15[c]
Burden of proof, necessity to preserve life or health, § 24[b]
Burial of embryo, § 28
Bypass procedure, parental notification or consent, §§ 11, 14[b]-16
Certification of consent, § 8[a]
Comment, § 2
Committee, approval of physician's decision to perform abortion, § 21[a]
Compelling state interest, §§ 3-4, 6[a], 26[b], 33
Confidentiality, §§ 14[b], 29
Consent to abortion, §§ 7-13
Consultation with other physicians, § 21[b]
Copying of records, § 29[b]
Cost, hospital vs. clinic, § 32
Counseling or providing information, §§ 7, 19, 29, 38
Court-appointed counsel, § 14[b]
Date of last menstrual period, reporting requirements, § 29[b]
Determination of viability, §§ 3-6[b], 22, 24[c, d], 26, 29[b]
Dilation and evacuation procedure, § 32
Disposal of fetal remains, § 28
Divorced parent, parental notification, §§ 15[b], 16
Doctor-patient relationship, § 38
Due process, §§ 3-5, 7, 11, 15, 17, 22[b], 24[a, d], 27-29, 34[a], 37[d], 38[b]
Early stage of pregnancy, §§ 3, 4, 8[a], 32
Emotional consequences or complications, §§ 7[a], 14[b]
Employee of hospital, participation in abortion, §§ 21[a], 27[a]
Equal protection, §§ 8[b], 27[b], 34[b], 36, 37[c]
Establishment of religion, § 37[b]
Family integrity, § 14[b]

Family planning projects receiving Title X funds, § 38
Father, support from, § 7[b]
Fetal weight, §§ 3, 6[a], 22[a], 29[a]
Fifth Amendment, §§ 24[b], 37[c, d], 38[b]
First Amendment, §§ 30, 37[b], 38[a]
First trimester, §§ 3, 4, 8[a], 32
Fourteenth Amendment, §§ 3-8, 11, 15, 17, 21, 27[a], 29, 32, 34[a], 36
Freedom of press, § 30
Freedom of speech, §§ 30, 38[a]
Funding of abortions, public, §§ 27[a], 35-38
Gestational age of fetus, §§ 3, 6[a, b], 7[b], 22[a], 29
Governmental agency, consent of, § 13
Government employee involvement in performance of abortion, § 27
Guardian or parent, consent or notification, §§ 10-12, 14-16, 18
Harassment, § 29[b]
Health and Human Services Department, regulations regarding Title X projects, § 38
Health or life of fetus, §§ 3, 5, 24[c, d], 26[b]
Hospital, facility for performing abortions, §§ 32, 33
Hospital employees, participation in abortion, §§ 21[a], 27[a]
Hospital staff abortion committee, § 21[a]
Humane disposal of fetal remains, § 28
Husband, consent of, § 9
Hyde Amendment, § 37
Identification of physician performing abortion, § 29
Independent examinations by other physicians, § 21[b]
Indigents, public funding of abortions, §§ 35-38
Information and counseling, §§ 7, 19, 29, 38
Informed consent, §§ 7, 11[b], 17
Inspection of records, § 29[b]
Introduction to annotation, § 1
Joint Commission on Accreditation of Hospitals, § 32
Judicial or parental consent, §§ 10-12
Last menstrual period, reporting requirements, § 29[b]
Licenses and licensing, §§ 23[a], 31, 33
Life or health of fetus, §§ 3, 5, 24[c, d], 26[b]
Life-support systems, definition of viability, § 6[b]
Lung maturity, determination of viability, § 22[a]
Mail, notice to parents by, § 18
Manner of performing abortion, §§ 24[c, d], 25, 29[a], 32
Marital status, reporting requirements, § 29[b]
Maturity of minor, §§ 10[b, c], 11[b], 14, 15[c]
Medicaid, §§ 13, 36, 37
Medical care, right to receive, § 21[a]
Medical consequences of abortion, seriousness and duration of, § 14[b]
Medical emergency, statutory definition, §§ 7[b, c], 11[b]
Menstrual period, reporting requirements, § 29[b]
Mental health of woman, § 24[a]
Method or technique of abortion, §§ 24[c, d], 25, 29[a], 32
Minors, parental notification or consent, §§ 10-12, 14-16
Mortality rate, abortion vs. normal childbirth, §§ 4, 23, 25
Neglect by parent, § 15[b]
Newspaper advertisements, § 30
Noncustodial parent, notification requirements, §§ 15[b], 16
Nonphysicians, performance of abortions by, § 23
Nonresident of state, abortion on, § 6[c]
Notice of intended abortion, §§ 11[b], 14-17
Other persons, regulation of abortion-related activities of, §§ 18-30
Other physicians, approval of physician's decision by, § 21[b]
Outpatient facilities, § 32
Parental notification, §§ 11[b], 14-16, 18
Parental or judicial consent, §§ 10-12
Pathology report, § 29[a]
Payment method, reporting requirements, § 29[b]
Performance or decision to perform abortion, regulation of, §§ 20-27
Personal liberty, § 4
Persons other than pregnant woman or parents or spouse, regulation of activities of, §§ 18-30
"Person," unborn as, § 4
Physician, requirement that abortion or abortion counseling be provided by, §§ 19, 23
Physiological injury, threat of, §§ 27[b], 34[b]
Practice, physician's right to, § 21
Practice pointers, § 2[b]
Preliminary matters, §§ 1, 2
Press, freedom of, § 30
Presumption of innocence, § 24[b]
Prior pregnancies, reporting requirements, § 29
Privacy, right of, §§ 4, 9, 12, 16, 17, 23[b]
Private health care organizations receiving Title X funds, § 38
Privileges and immunities clause, § 6[c]
Prohibition of abortion, § 6
Prostaglandin injection, § 25
Psychiatric necessity, § 36
Psychological effects or consequences of abortion, §§ 7[a], 14[b]
Psychological health of mother, § 24[a]
Public employee, prohibition of involvement in abortion, § 27
Public facility, prohibition of use for abortions, § 34
Public funding, §§ 27[a], 35-38
Public Health Service Act, Title X, § 38
Qualifications of persons performing abortions, § 23

Recordkeeping requirements, § 29
Referrals, §§ 29, 38
Related matters, § 1[b]
Religion, establishment of, § 37[b]
Remains, fetal, disposal of, § 28
Reporting requirements, § 29
Residency, §§ 6[c], 29[b]
Saline amniocentesis, § 25
Sanitary disposal of fetal remains, § 28
Scienter requirement, Hyde Amendment, § 37[a]
Scope of annotation, § 1[a]
Second physician, presence during abortion, § 26
Second-trimester abortions, §§ 5, 32, 33
Social services department, consent to abortion, § 13
Speech, freedom of, §§ 30, 38[a]
Spousal consent requirement, § 9
Spousal notice requirement, §§ 17, 29[b]
Stage of pregnancy, significance of, §§ 3-6[b], 22, 23[b], 26, 31, 32
Standard of care of physician, preserving life or health, § 24
State authority to regulate or restrict abortion, generally, §§ 5, 6
Statutory definition of viability, § 6[b]
Summary and comment, § 2
Support from father, required information, § 7[b]
Technique or method of abortion, §§ 24[c, d], 25, 29[a], 32
Tissue report, requirement of filing, § 29[a]
Title X recipients, limitation on activities of, § 38
Two-parent notification requirement, §§ 15[b], 16
Type of abortion, §§ 24[c, d], 25, 29[a], 32
Type of facility in which abortion performed, §§ 31-34
Vagueness, §§ 8[a], 20, 22[b], 24[a, d], 37[a]
Veto power over abortion decision, §§ 9, 10[b], 11[a], 12, 14[b]
Viability, §§ 3-6[b], 22, 24[c, d], 26, 29[b]
Waiting periods, §§ 7[c], 14[b], 17
Weeks of gestation, determining viability, §§ 3, 6[a, b], 22[a]
Weight of fetus, §§ 3, 6[a], 22[a], 29[a]
Welfare regulations limiting Medicaid benefits for abortions, § 36
Written consent, §§ 8, 9, 12

I. Preliminary Matters

§ 1. Introduction

[a] Scope

This annotation[1] collects and analyzes the cases in which the United States Supreme Court has determined[2] whether, as a matter of federal constitutional law,[3] abortion[4] laws[5] are valid.

[b] Related matters

Supreme Court's views as to meaning of term "person," as used in statutory or constitutional provision. 56 L Ed 2d 895.

---

[1] The annotation supersedes the annotation at 35 L Ed 2d 735, which superseded the annotation at 28 L Ed 2d 1053.

[2] Dealing solely with cases in which the Supreme Court has purported to determine federal constitutional issues as to the validity of abortion laws, the annotation does not discuss cases in which such issues were merely presented without being determined.

[3] For purposes of this annotation, if a particular issue involving the constitutionality of an abortion law is the type of issue which could arise either under the Federal Constitution or under a state constitution, and if the court, in discussing its decision with respect to such an issue, does not specify whether the decision is based upon the Federal Constitution or upon a state constitution, it is assumed, in the absence of any indication by the court to the contrary, that the decision is based upon the Federal Constitution.

[4] This annotation is concerned solely with laws expressly dealing with the intentional termination of pregnancy before full term, which termination is commonly referred to as abortion. This annotation is not, however, concerned with laws dealing generally with contraception or birth control, without dealing specifically with abortion. Moreover, even if a contraception or birth control law consists in part of a reference to abortion, but if the Supreme Court determines the constitutionality of the law only insofar as it relates to contraception or birth control, without discussing that part of the law referring to abortion, such a case is not included herein.

[5] For purposes of this annotation, the term "laws" includes municipal ordinances and state and federal statutes, as well as municipal, state, and federal administrative actions or policies.

Supreme Court's views as to validity of laws restricting or prohibiting sale or distribution to minors of particular types of goods or services otherwise available to adults. 52 L Ed 2d 892.

Supreme Court's views as to concept of "liberty" under due process clauses of Fifth and Fourteenth Amendments. 47 L Ed 2d 975.

Indefiniteness of language as affecting validity of criminal legislation or judicial definition of common-law crime—Supreme Court cases. 96 L Ed 374, 16 L Ed 2d 1231.

Constitutional right of prisoners to abortion services and facilities—federal cases. 90 ALR Fed 683.

Medical practitioner's liability for treatment given child without parent's consent. 67 ALR4th 511.

Requisites and conditions of judicial consent to minor's abortion. 23 ALR4th 1061.

Validity of state statutes and regulations limiting or restricting public funding for abortions sought by indigent women. 20 ALR4th 1166.

Right to maintain action or to recover damages for death of unborn child. 84 ALR3d 411.

Malpractice: physician's duty to inform patient of nature and hazards of treatment in pregnancy and childbirth cases under the doctrine of informed consent. 69 ALR3d 1250.

Woman's right to have abortion without consent of, or against objections of, child's father. 62 ALR3d 1097.

Right of minor to have abortion performed without parental consent. 42 ALR3d 1406.

Homicide based on killing of unborn child. 40 ALR3d 444.

Right of action for injury to or death of woman who consented to illegal abortion. 36 ALR3d 630.

Woman upon whom abortion is committed or attempted as accomplice for purposes of rule requiring corroboration of accomplice testimony. 34 ALR3d 858.

Pregnancy as element of abortion or homicide based thereon. 46 ALR2d 1393.

Necessity, to warrant conviction of abortion, that fetus be living at time of commission of acts. 16 ALR2d 949.

Admissibility, in prosecution based on abortion, of evidence of commission of similar crimes by accused. 15 ALR2d 1080.

§ 2. Summary and comment

[a] Generally

On the basis of decisions by the United States Supreme Court, it has been established that during the early stage of pregnancy, a woman has a federal constitutional right to have an abortion without governmental interference (§ 3, infra). In some Supreme Court decisions, the court has specified that a woman's right to procure an abortion during the early stage of pregnancy without governmental interference is encompassed by the constitutional right of privacy (§ 4, infra). In the leading case holding that the right of privacy encompasses the right to have an abortion, the Supreme Court in Roe v Wade (1973) 410 US 113, 35 L Ed 2d 147, 93 S Ct 705, reh den 410 US 959, 35 L Ed 2d 694, 93 S Ct 1409, based this holding concerning the right of privacy on the Federal Constitution's Fourteenth Amendment provision that no state shall deprive any person of liberty without due process of law. Indicating that because the constitutional right of privacy is fundamental, a law regulating or prohibiting the performance of abortions can be justified only by a compelling state interest, the Supreme Court determined that during the early stage of pregnancy, a physician's decision, in consultation with a pregnant woman, that the woman's pregnancy should be terminated by means of an abortion can be effectuated without any state interference, because a state's interest in regulating the abortion procedure in ways reasonably related to promoting a pregnant woman's health has not yet become compelling. Moreover, the court indicated that with respect to regulation related to a state's interest in potential life, the compelling point is not reached until a fetus becomes viable, and the court noted that the word "person," as used in the Fourteenth Amendment, does not include the unborn (§ 4, infra). However, the court has noted, in Akron v Akron Center for Reproductive Health, Inc. (1983) 462 US 416, 76 L Ed 2d 687, 103 S Ct 2481, that minor regulations that do not significantly affect a woman's right to procure an abortion by interfering with such matters as physician-patient consultation or the woman's choice between abortion and childbirth may be permissible during the early stage of pregnancy where justified by important state health objectives (§ 4, infra).

The Supreme Court has concluded that, despite existence of a woman's constitutional right to have an abortion during the early stages of pregnancy without governmental interference, a state has some general authority to regulate or restrict abortion (§ 5, infra), and the court, indicating that state regulation protective of fetal life after viability has both logical and biological justifications, (1) has held that after a fetus becomes viable, a state may not only regulate abortion, but may even prohibit abortion except where necessary to preserve the life or health of the pregnant woman, and (2) has noted that viability is the point at which medical judgment indicates the reasonable potential for survival outside the womb (§ 6[a], infra). The definition of fetal viability—under a state statute generally prohibiting the abortion of a viable fetus—as the stage of fetal development at which the life of the fetus may be continued indefinitely outside the womb by natural or artificial life-support systems has been held by the Supreme Court not to be unconstitutional (§ 6[b], infra). The Supreme Court has relied on the privileges and immunities clause of Article IV, § 2 of the Constitution in holding that a state statutory provision prohibiting nonresidents of the state from obtaining abortions in the state was unconstitutional (§ 6[c], infra).

It has been held by the Supreme Court that the Constitution does not prevent a state from imposing regulations intended to insure that the consent of a woman to have an abortion is voluntary and informed (§ 7[a], infra); and the Supreme Court has held that a law requiring, for a woman to be capable of giving her informed consent to have an abortion, that she be given certain information concerning the decision whether to have an abortion did not violate the Fourteenth Amendment's due process clause (§ 7[b], infra). Moreover, the court has determined that the inclusion, in the informed consent provision of a state abortion statute, of a general requirement that at least 24 hours before undergoing an abortion, a woman be provided with particular information related to the decision whether to have an abortion did not violate the due process clause (§ 7[c], infra). A state statutory requirement of a woman's informed written consent to have an abortion has been held by the Supreme Court not to be unconstitutionally vague, where the court has noted that a requirement of a patient's prior written consent for surgery generally would not be unconstitutional, and that the word "informed" meant the giving of information to the patient as to just what would be done and as to the consequences of what would be done (§ 8[a], infra). The Supreme Court has also held that a state administrative regulation's requirement of a pregnant woman's written consent to an abortion did not violate the equal protection clause of the Fourteenth Amendment, although the state imposed no similar requirement concerning childbirth or ongoing pregnancy (§ 8[b], infra).

It has been held by the Supreme Court, relying on the constitutional right of privacy, that a state statutory provision generally requiring the prior written consent of a pregnant woman's spouse to the woman's abortion during the first 12 weeks of pregnancy was unconstitutional, where the court noted that a state cannot delegate to a pregnant woman's spouse a veto power that the state itself is prohibited from exercising (§ 9, infra).

While indicating that a statutory distinction making parental[6] or judicial consent requirements concerning minors' abortions more restrictive than such requirements concerning minors' other medical procedures is not necessarily unconstitutional, and that the constitutionality of such a distinction depends on its degree and justification (§ 10[a], infra), the Supreme Court has found certain laws requiring parental or judicial consent to a minor's abortion to be unconstitutional, where the laws failed to allow a pregnant minor to make an abortion decision herself if she showed that she was mature enough to do so (§ 10[b], infra), but the Supreme Court has held that state statutory provisions generally requiring parental or judicial consent to a minor's abortion were not unconstitutional, where the statute provided that a court denying a minor's petition for majority rights for the purpose of giving her own consent to an abortion had to set forth the grounds for denial (§ 10[c], infra). The Supreme Court (1) has said that, under the due process provisions of the Fourteenth Amendment, a state that requires parental consent for a minor's abortion must provide a procedure by which a minor can bypass the parental consent requirement (§ 11[a], infra), and (2) has held that the due process provisions of the Fourteenth Amendment were not violated by states' parental consent statutes that provided a judicial procedure under which a pregnant minor seeking an abortion could bypass the parental consent requirement (§ 11[b], infra). Relying on a minor's constitutional right of privacy, the Supreme Court, referring particularly to competent minors mature enough to have become pregnant, has held unconstitutional a state statutory requirement that an unmarried minor seeking to have an abortion during the first 12 weeks of pregnancy receive parental consent if the abortion was not necessary to preserve the minor's life (§ 12, infra).

---

[6] For purposes of this annotation, the term "parental consent" refers to the consent of a parent, guardian, or the like.

The Supreme Court has held that a requirement, under a state regulation authorizing the payment of state Medicaid benefits for medically necessary first-trimester abortions, of prior consent by the state's department of social services to such Medicaid-funded abortions was not unconstitutional, where the court noted that medical procedures for which the regulation did not impose a similar requirement did not involve the termination of a potential human life (§ 13, infra).

In addition to having to determine the constitutionality of abortion laws' parental consent requirements, the Supreme Court also has been called upon to determine the constitutionality of the provisions of laws requiring parental notification[7] before a minor undergoes an abortion. The Supreme Court has held that, once a mature minor has petitioned for judicial approval to obtain an abortion, it would be unconstitutional to require, under a state statute, that her parents be notified of her request (§ 14[a], infra), but the Supreme Court has held not to be unconstitutional a state statute containing a procedure by which a mature minor could judicially bypass the statute's parental notification requirement, and a state statute, as applied to an unemancipated minor making no claim as to her maturity, that apparently offered no alternative to parental notification (§ 14[b], infra). As to the due process provisions of the Fourteenth Amendment, the Supreme Court has determined that, if a procedure for bypassing a statutory parental consent requirement for a minor's abortion satisfies those constitutional provisions with respect to parental consent, the procedure will also satisfy those constitutional provisions with respect to a statutory parental notification requirement (§ 15[a], infra). The Supreme Court has held that, in the absence of a procedure allowing judicial bypass of a particular state statute's general requirement that both of an unemancipated minor's parents be notified before the performance of an abortion on the minor, the statute's parental notice requirement violated the Fourteenth Amendment's due process clause, where the court determined that the two-parent notice requirement did not reasonably further any legitimate state interest (§ 15[b], infra). However, the Supreme Court has held that the Fourteenth Amendment's due process provisions were not violated by a state statute that required parental notification before the performance of an abortion on an unmarried, unemancipated minor but contained a procedure under which the notification requirement could be judicially bypassed, where the bypass procedure was expeditious and allowed a minor to show that she had the maturity and information to decide to have an abortion without parental notification or that, even if she could not make such a decision, an abortion would be in her best interests (§ 15[c], infra). Also, the Supreme Court has relied on a pregnant minor's constitutional right of privacy in holding that a state statutory two-parent notification requirement with respect to an unemancipated minor seeking an abortion was unconstitutional (§ 16, infra). Moreover, the Supreme Court has held that a woman's rights under the due process clause of the Fourteenth Amendment were violated by a state abortion statute's provision that, with certain exceptions, prohibited a physician from performing an abortion on a married woman without receiving a signed statement from the woman that she had notified her spouse that she was about to undergo an abortion (§ 17, infra).

---

[7] For purposes of this annotation, the term "parental notification" refers to notification of a parent, guardian, or the like.

Much of the Supreme Court's analysis with respect to the constitutionality of abortion laws has involved provisions of laws regulating physicians, other health professionals, or other people who were not pregnant women or the parents or spouses of pregnant women. For example, the Supreme Court has been called upon to determine the constitutionality of laws specifying who may provide particular information to a pregnant woman who is considering an abortion. The Supreme Court has held, with respect to counseling offered to a pregnant woman concerning her decision whether to have an abortion, that the Constitution allows a state to establish reasonable minimum qualifications for those people who perform the primary counseling function, but that a provision of a city ordinance requiring that a physician provide, to a woman seeking an abortion, particular information concerning her abortion decision was unconstitutional, because a state may not insist that only a physician is competent to provide information and counseling relevant to the abortion decision (§ 19, infra). With respect to parental notification that a minor is seeking to have an abortion, the Supreme Court has determined that a state statute was not rendered unconstitutional by the statute's requirement that the physician who was to perform the abortion was to be the person providing such notification (§ 18, infra).

A statute making it a crime for a physician to perform an abortion except when, based on the physician's "best clinical" judgment, an abortion was "necessary" has been determined by the Supreme Court not to be unconstitutionally vague, where the court noted that whether an abortion was necessary was a professional judgment that a physician would be called upon to make routinely (§ 20, infra). Holding that statutory requirements that a physician's decision to perform an abortion be approved by others violated the Fourteenth Amendment, the Supreme Court, concluding that a requirement that a physician's decision to perform an abortion be approved by a hospital staff abortion committee served the interests of neither hospitals nor the state, has referred to the lack of evidence of any other surgical procedure that was subject to committee approval as a matter of state criminal law (§ 21[a], infra), and the Supreme Court has stated that a requirement that a physician's decision to perform an abortion be confirmed by independent examinations of the patient by two other licensed physicians had no rational connection with a patient's needs and unduly infringed on a physician's right to practice (§ 21[b], infra). As to laws related to a determination whether a fetus that was intended to be aborted was viable, the Supreme Court has held that state statutory provisions requiring that before aborting a fetus which a physician believed to be of 20 or more weeks' gestational age, the physician had to determine whether the fetus was viable and make this determination in a particular manner were not unconstitutional (§ 22[a], infra), while the Supreme Court has held that a state statute's provision, for violation of which the statute imposed civil and criminal sanctions, which required every person performing or inducing an abortion to make a prior determination, based on the person's experience, judgment, or professional competence, that the fetus was not viable, was ambiguous and was unconstitutionally vague (§ 22[b], infra).

It has been held by the Supreme Court, referring to a state's interest in insuring the safety of the abortion procedure, that it was constitutionally permissible for a state to allow only physicians to perform abortions in the state (§ 23[a], infra), and it also has been held by the Supreme Court that, as applied to the performance of abortions by nonphysicians, a state statute that made criminal any person's attempt at abortion that was not necessary to preserve the life of the pregnant woman or her fetus was not unconstitutional, where the court noted that, even during the early stages of pregnancy of pregnancy, prosecutions for abortions conducted by nonphysicians infringe upon no realm of personal privacy secured by the Constitution against state interference (§ 23[b], infra). A statute making it unlawful to perform any abortion not necessary to preserve a pregnant woman's life or health has been held by the Supreme Court not to be unconstitutionally vague, where the court determined that construing the statute to permit abortions for physical or mental health reasons would accord with the modern understanding of the word "health" (§ 24[a], infra); and the Supreme Court concluded that the statute would be construed to require proof that an abortion did not fall within the statutory exception for the preservation of a pregnant woman's life or health, and that, as so construed, the statute was not subject to challenge as violating the constitutional presumption of innocence (§ 24[b], infra). The Supreme Court has held that a state statute's provision imposing on physicians a particular standard of care with respect to preserving the life or health of an aborted fetus was unconstitutional, where a statute failed to specify that the duty of care need be taken only after the stage of viability had been reached, and where a statute was not susceptible to a construction that did not require a pregnant woman to bear an increased medical risk to save her viable fetus (§ 24[c], infra). As to state statutory provisions requiring that every person performing or inducing an abortion, if determining that the fetus "is viable or . . . may be viable," exercise a particular standard of care to preserve the life and health of the fetus, the Supreme Court has indicated that the statute conditioned potential criminal liability on confusing and ambiguous criteria and was unconstitutionally vague (§ 24[d], infra). Moreover, the Supreme Court, concluding that a state statute's outright proscription of the use of saline amniocentesis as an abortion method after the first 12 weeks of pregnancy was unreasonable or arbitrary, has held that such a proscription was unconstitutional, where it was had not been shown that a safer abortion method was available in the state (§ 25, infra).

Certain state statutes have required that, in addition to the physician performing an abortion, a second physician be present during the performance of the abortion. A statute imposing such a requirement whenever the performing physician determined that there was a possibility that the fetus that was to be aborted would be viable has been held by the Supreme Court to be unconstitutional, where the statute contained no express exception for medical emergencies and evinced no intent to protect a pregnant woman whose life might be at risk (§ 26[a], infra), while a statute imposing such a requirement with respect to only an abortion performed on a viable fetus was held not to be unconstitutional, where the Supreme Court indicated that the requirement was justified by the state's compelling interest in preserving life (§ 26[b], infra). The Supreme Court has been called upon to determine the constitutionality of laws prohibiting public employee involvement in the performance of, or the assistance in the performance of, abortion; the court, pointing out that a state statute's general prohibition against such involvement by public employees placed no governmental obstacle in the path of a woman choosing to have an abortion, has held that such a prohibition did not violate the Fourteenth Amendment's due process provisions (§ 27[a], infra), and the court has concluded that a city's general prohibition of hospital staffs' performance of abortions in city-owned hospitals did not violate indigent women's equal protection rights under the Constitution (§ 27[b], infra).

Holding that the level of uncertainty as to the purpose of a city ordinance's requirement that any physician who performed an abortion had to insure that the fetal remains were disposed of in a humane and sanitary manner was fatal where criminal liability was imposed for violation of the requirement, the Supreme Court has concluded that the requirement violated the constitutional due process guarantees by failing to give a physician fair notice that the physician's contemplated conduct was forbidden (§ 28, infra). With respect to record keeping and reporting requirements imposed by a state statute concerning the performance of abortions, the court, on the basis of the particular requirements at issue in each case, has determined that certain such requirements were not unconstitutional (§ 29[a], infra), but also has held that certain such requirements were unconstitutional (§ 29[b], infra). With respect to a state criminal statute that prohibited the sale or circulation of any publication to encourage abortion, the Supreme Court has held that, as applied to a newspaper editor who was prosecuted under the statute for publishing an advertisement by an out-of-state organization that offered services relating to obtaining legal abortions in the state in which the organization was located, the statute infringed on the First Amendment free speech and free press rights of the newspaper editor, where the court said that the advertisement, viewed in its entirety, conveyed information of potential interest and value to a diverse audience (§ 30, infra).

It has been determined by the Supreme Court, in light of a state's legitimate interest in insuring maximum safety for a woman who has an abortion, that it is not unconstitutional for a state to impose certain requirements, including licensing requirements, with respect to the facility in which an abortion may be performed (§ 31, infra); and the Supreme Court, in accordance with this principle, has held that a requirement, under a state statute, that second-trimester abortions be performed only in hospitals licensed by the state was not unconstitutional where, in addition to including full service hospitals, the term "hospital" in the statute included outpatient surgical hospitals or clinics that had been licensed as hospitals by the state (§ 33, infra). However, laws providing that any abortion subsequent to a specified stage of pregnancy had to be performed in a hospital have been held by the Supreme Court to be unconstitutional, because the laws unreasonably infringed upon a woman's constitutional right to have an abortion; more specifically, the court has held that a state statutory requirement that an abortion be performed only in a hospital accredited by the Joint Commission on Accreditation of Hospital violated the Fourteenth Amendment, because the requirement was not based on differences that were reasonably related to the statutory purpose of protecting abortion patients, given (1) that a mass of data had been presented purporting to demonstrate that some facilities other than hospitals were entirely adequate to perform abortions, and (2) that the state had not presented persuasive data to show that only hospitals met the state's interest in protecting abortion patients (§ 32, infra). With regard to laws generally prohibiting the use of public facilities for the performance of abortions, the Supreme Court has concluded that a state statute imposing such a prohibition did not violate the Fourteenth Amendment's due process clause, where the prohibition left a pregnant woman with the same choices as if the state had chosen not to operate any public hospitals (§ 34[a], infra), and that a city's imposition of such a prohibition concerning city-owned hospitals did not violate indigent women's equal protection rights under the Constitution (§ 34[b], infra).

It has been concluded by the Supreme Court that the Constitution requires neither states nor the federal government to provide any funding for abortions (§ 35, infra). In accordance with this principle, the Supreme Court has held that particular state or local prohibitions against the provision of public funding for abortions did not violate the rights of indigent women under the equal protection clause of the Constitution's Fourteenth Amendment (§ 36, infra). Beginning in 1976, Congress, either by amendment to the annual appropriations bill for the Department of Health and Human Services (formerly known as the Department of Health, Education, and Welfare) or by joint resolution, has prohibited the use of any federal funds to reimburse the cost of abortions under the Social Security Act's Medicaid program (42 USCS §§ 1396 et seq.) except under certain specified circumstances. These congressional prohibitions, which have varied somewhat from year to year, are known as the Hyde Amendment.[8] The Supreme Court has analyzed the Hyde Amendment with respect to several constitutional guarantees. The court has held that (1) the Hyde Amendment was not unconstitutionally vague, despite the variance in scope under its different versions, given that the Hyde Amendment's exceptions were set out in terms that the ordinary person exercising ordinary common sense could sufficiently understand and comply with without a sacrifice to the public interest (§ 37[a], infra); (2) the facts that the funding restrictions in the Hyde Amendment accorded with the religious tenets of the Roman Catholic Church did not place the Hyde Amendment in violation of the proscription, under the Federal Constitution's First Amendment, against laws respecting an establishment of religion (§ 37[b], infra); (3) in light of the facts that poverty, standing alone, was not a constitutionally suspect classification, and that the Hyde Amendment was facially neutral as to age, the Hyde Amendment did not violate the equal protection guarantees of the Federal Constitution's Fifth Amendment (§ 37[c], infra); and (4) given that the Hyde Amendment placed no governmental obstacle in the path of a woman choosing to terminate her pregnancy, the Hyde Amendment did not violate indigent women's right to liberty existing under the due process clause of the Federal Constitution's Fifth Amendment (§ 37[d], infra). Moreover, with respect to family planning projects receiving funds under Title X of the Public Health Service Act (42 USCS §§ 300—300a-41), the court has held that Department of Health and Human Services regulations limiting the ability of the projects to engage in abortion-related activities do not violate the First Amendment's free speech clause (§ 38[a], infra) or the Fifth Amendment's due process clause (§ 38[b], infra).

---

[8] Harris v McRae (1980) 448 US 297, 65 L Ed 2d 784, 100 S Ct 2671, reh den 448 US 917, 65 L Ed 2d 1180, 101 S Ct 39.

[b] Practice pointers

When an attorney is representing a client who seeks to challenge the constitutionality of an abortion law, the attorney must often be prepared to establish that the client meets certain threshold requirements which have to be satisfied before the court will consider the merits of any constitutional issues. Such threshold requirements have frequently been stated in terms of "standing" or "justiciable controversy." Where the client is a woman who seeks to invalidate an abortion law because it might prevent her from obtaining a desired abortion, the attorney may be able to readily satisfy these threshold requirements by showing that the client is pregnant, and that even if the pregnancy terminates pending the litigation, the case will not be moot.[9] If, however, the woman is not and has never been pregnant, but alleges that she might become pregnant because of possible failure of contraceptive measures and that at such time she might want an abortion which might then be contrary to the law, the attorney faces a substantial risk that the allegation of such an indirect, future injury will be held not sufficient to present a justiciable controversy[10]

Counsel representing a woman seeking to challenge an abortion law on the basis of an assertion that the law violates the woman's First Amendment right to the free exercise of religion are advised to determine whether the woman is able to allege that she sought an abortion under compulsion of religious beliefs, because failure to make such an allegation may deprive the woman of standing to challenge the abortion law under the First Amendment's free exercise clause.[11]

Where an attorney's client is a licensed physician who seeks to invalidate an abortion law in order to insure that the physician will not be punished for performing abortions prohibited by the law, the attorney may find it advisable to contend that, even if the physician has not yet been prosecuted or threatened with prosecution under the law, the physician has standing to challenge the law and presents a justiciable controversy because the physician is asserting a sufficiently direct threat of personal detriment and should not be required to await and undergo a criminal prosecution as the sole means of seeking relief from the law.[12] If, however, a prosecution against the physician for violating the abortion law is pending in the state courts, any attempt by the attorney to have a federal court invalidate the abortion law is likely to meet with a ruling that the physician cannot challenge the abortion law in the federal court unless there is an allegation of either (1) a substantial and immediate threat to a federally protected right that cannot be asserted in the physician's defense against the state prosecution, or (2) harassment or bad-faith prosecution.[13]

---

[9] See, for example, Roe v Wade (1973) 410 US 113, 35 L Ed 2d 147, 93 S Ct 705, reh den 410 US 959, 35 L Ed 2d 694, 93 S Ct 1409; and Doe v Bolton (1973) 410 US 179, 35 L Ed 2d 201, 93 S Ct 739, reh den 410 US 959, 35 L Ed 2d 694, 93 S Ct 1410.

[10] See, for example, Roe v Wade (1973) 410 US 113, 35 L Ed 2d 147, 93 S Ct 705, reh den 410 US 959, 35 L Ed 2d 694, 93 S Ct 1409.

[11] For example, see Harris v McRae (1980) 448 US 297, 65 L Ed 2d 784, 100 S Ct 2671, reh den 448 US 917, 65 L Ed 2d 1180, 101 S Ct 39.

Counsel representing a physician seeking to challenge an abortion law may find it possible to establish that the physician has standing to challenge the law, regardless of the issue of criminal prosecution under the law, where it can be shown that the law subjects the physician to some direct measurable injury.[14]

An attorney representing a client who is challenging the validity of an abortion law should consider claiming that the law violates a state constitution, as well as the Federal Constitution. This may allow the law to be held invalid, even if it is held not to violate the Federal Constitution.[15]

Counsel for a party seeking to have an abortion law declared unconstitutional are advised to pursue the claim of unconstitutionality on appeal even if the appeal is from only a judgment concerning whether to issue a preliminary injunction against the enforcement of the law. Under such circumstances, counsel may be able to have the appellate court issue a judgment as to the constitutionality of the law, rather than merely determining whether the lower court abused its discretion in finding the presence or absence of irreparable harm and in finding the probability that the party seeking the injunction will succeed on the merits, which determinations constitute a more typical scope of review concerning a preliminary injunction decision.[16]

Counsel representing a party seeking to uphold the constitutionality of an abortion law may be able to argue successfully that the portions of the law not held by a court to be unconstitutional should be severed from the law's unconstitutional portions, where, by severing the portions not held to be unconstitutional, those portions of the law might be allowed to remain in effect.[17]

---

[12] See, for example, Doe v Bolton (1973) 410 US 179, 35 L Ed 2d 201, 93 S Ct 739, reh den 410 US 959, 35 L Ed 2d 694, 93 S Ct 1410.

[13] See, for example, Roe v Wade (1973) 410 US 113, 35 L Ed 2d 147, 93 S Ct 705, reh den 410 US 959, 35 L Ed 2d 694, 93 S Ct 1409.

[14] See, for example, Colautti v Franklin (1979) 439 US 379, 58 L Ed 2d 596, 99 S Ct 675; and Singleton v Wulff (1976) 428 US 106, 49 L Ed 2d 826, 96 S Ct 2868.

[15] See, for example, Webster v Reproductive Health Services (1989) 492 US 490, 106 L Ed 2d 410, 109 S Ct 3040.

[16] For example, see Thornburgh v American College of Obstetricians & Gynecologists (1986) 476 US 747, 90 L Ed 2d 779, 106 S Ct 2169, ovrld on other grounds by Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791.

An attorney representing a minor who is seeking to obtain an abortion without parental consent by proving circumstances under which a statute, which generally requires parental consent for a minor's abortion, allows the parental consent requirement to be bypassed is advised to be prepared to meet the burden of proof requiring clear and convincing evidence that the circumstances under which the statute allows an abortion without parental consent are present, because the Supreme Court has held that the imposition of this heightened standard of proof upon a minor under such a statute will not necessarily violate the due process clause of the Fourteenth Amendment.[18]

II. General Principles

A. Constitutional Right to Abortion Without Governmental Interference

§ 3. Generally

The following decisions of the Supreme Court support the rule that, during the early stage of pregnancy, a woman has a general constitutional right to have an abortion without governmental interference: Connecticut v Menillo (1975) 423 US 9, 46 L Ed 2d 152, 96 S Ct 170; Planned Parenthood of Cent. Missouri v Danforth (1976) 428 US 52, 49 L Ed 2d 788, 96 S Ct 2831; Maher v Roe (1977) 432 US 464, 53 L Ed 2d 484, 97 S Ct 2376; Colautti v Franklin (1979) 439 US 379, 58 L Ed 2d 596, 99 S Ct 675, infra; Williams v Zbaraz (1979) 442 US 1309, 60 L Ed 2d 1033, 99 S Ct 2095 (Stevens, J., as Circuit Justice); Bellotti v Baird (1979) 443 US 622, 61 L Ed 2d 797, 99 S Ct 3035, reh den 444 US 887, 62 L Ed 2d 121, 100 S Ct 185; Harris v McRae (1980) 448 US 297, 65 L Ed 2d 784, 100 S Ct 2671, reh den 448 US 917, 65 L Ed 2d 1180, 101 S Ct 39; Williams v Zbaraz (1980) 448 US 358, 65 L Ed 2d 831, 100 S Ct 2694, reh den 448 US 917, 65 L Ed 2d 1180, 101 S Ct 38 and reh den 448 US 917, 65 L Ed 2d 1180, 101 S Ct 39 and reh den 448 US 917, 65 L Ed 2d 1180, 101 S Ct 39; Planned Parenthood Assn. v Ashcroft (1983) 462 US 476, 76 L Ed 2d 733, 103 S Ct 2517; and Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791.

In Colautti v Franklin (1979) 439 US 379, 58 L Ed 2d 596, 99 S Ct 675, the court said that because, for both logical and biological reasons, a state's interest in the potential life of a fetus does not become compelling until the fetus becomes viable, a state may not, prior to viability, seek to further this interest by directly restricting a woman's decision whether to terminate her pregnancy. The court added that because this point may differ with each pregnancy, neither legislatures nor courts may proclaim one of the elements entering into the ascertainment of viability—be it weeks of gestation, fetal weight, or any other single factor—as the single determinant of when a state has a compelling interest in the life or health of the fetus.

---

[17] For example, see Akron v Akron Center for Reproductive Health, Inc. (1983) 462 US 416, 76 L Ed 2d 687, 103 S Ct 2481, ovrld on other grounds by Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791, and Planned Parenthood of Cent. Missouri v Danforth (1976) 428 US 52, 49 L Ed 2d 788, 96 S Ct 2831, wherein, although severance arguments with respect to specific provisions of specific abortion statutes were unsuccessful, the Supreme Court did not indicate that such an argument would be unsuccessful with respect to all abortion statutes under all circumstances.

[18] Ohio v Akron Center for Reproductive Health (1990) 497 US 502, 111 L Ed 2d 405, 110 S Ct 2972.

It was held in Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791, that under the Fourteenth Amendment's due process clause, a woman has a protected liberty to choose to have an abortion before fetal viability and to obtain an abortion without undue interference from the state, because before viability, a state's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to a woman's effective right to elect the procedure. The court said that neither the Bill of Rights nor the specific practices of the states at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects, and that the liberty protected under the Fourteenth Amendment is a rational continuum which, broadly speaking, includes freedom from all substantial arbitrary impositions and purposeless restraints. A person's most basic decisions about parenthood and bodily integrity are personal decisions that are protected by the Fourteenth Amendment, the court said.

§ 4. As encompassed by constitutional right of privacy

The following Supreme Court decisions support the rule that the constitutional right of privacy encompasses a woman's right to have an abortion during the early stage of pregnancy without governmental interference: Roe v Wade (1973) 410 US 113, 35 L Ed 2d 147, 93 S Ct 705, reh den 410 US 959, 35 L Ed 2d 694, 93 S Ct 1409, infra; Doe v Bolton (1973) 410 US 179, 35 L Ed 2d 201, 93 S Ct 739, reh den 410 US 959, 35 L Ed 2d 694, 93 S Ct 1410 (adhering to Roe v Wade, infra); Corkey v Edwards (1973) 410 US 950, 35 L Ed 2d 682, 93 S Ct 1411 (vacating and remanding for reconsideration in light of Roe v Wade, infra); Thompson v Texas (1973) 410 US 950, 35 L Ed 2d 682, 93 S Ct 1411 (vacating and remanding for reconsideration in light of Roe v Wade, infra); Crossen v Atty. Gen. (1973) 410 US 950, 35 L Ed 2d 683, 93 S Ct 1413 (vacating and remanding for reconsideration in light of Roe v Wade, infra); Munson v South Dakota (1973) 410 US 950, 35 L Ed 2d 683, 93 S Ct 1416 (vacating and remanding for reconsideration in light of Roe v Wade, infra); Rosen v Louisiana State Board of Medical Examiners (1973) 412 US 902, 36 L Ed 2d 966, 93 S Ct 2285 (vacating and remanding for reconsideration in light of Roe v Wade, infra); Akron v Akron Center for Reproductive Health, Inc. (1983) 462 US 416, 76 L Ed 2d 687, 103 S Ct 2481 (ovrld on other grounds by Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791), infra; Thornburgh v American College of Obstetricians & Gynecologists (1986) 476 US 747, 90 L Ed 2d 779, 106 S Ct 2169 (ovrld on other grounds by Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791); and Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791.

In Roe v Wade (1973) 410 US 113,

35 L Ed 2d 147, 93 S Ct 705, reh den 410 US 959, 35 L Ed 2d 694, 93 S Ct 1409, where the plaintiffs were seeking injunctive and declaratory relief against the enforcement of a Texas statute making it a crime to procure an abortion except for the purpose of saving the life of the mother, it was held that the constitutional right of privacy, founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, is broad enough to encompass a woman's decision whether to terminate her pregnancy, and that a state criminal abortion statute of the type involved in the present case, excepting from criminality only a lifesaving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, was violative of the due process clause of the Fourteenth Amendment. Noting that the right of privacy is a fundamental right, and that regulation limiting such a right can be justified only by a compelling state interest, the court stated that, with respect to regulation related to a state's important and legitimate interest in potential life, the compelling point is not reached until a fetus becomes viable, because viability is the point at which a fetus presumably is capable of meaningful life outside the womb. In connection with the conclusion that the compelling point, with respect to potential life, is at viability, the court noted that the word "person," as used in the Fourteenth Amendment, does not include the unborn. It was held that the challenged Texas legislation, by restricting legal abortions to those procured or attempted by medical advice for the purpose of saving the life of the pregnant woman, swept too broadly; that the statute made no distinction between abortions performed early in pregnancy and those performed later; that the statute limited to a single reason, saving the pregnant woman's life, the legal justification for the procedure; and that the statute therefore could not survive the constitutional attack made upon it in the present case.

Although observing that a state has an interest in insuring that an abortion is as safe for the pregnant woman as is normal childbirth at term, in Akron v Akron Center for Reproductive Health, Inc. (1983) 462 US 416, 76 L Ed 2d 687, 103 S Ct 2481, ovrld on other grounds by Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791, the court reaffirmed the holding in Roe v Wade, supra, that the right of privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to terminate her pregnancy. The court, although indicating that a state may not justify its regulation of abortions by adopting only one theory of when life begins, noted that even during the earliest stage of pregnancy, minor regulations that do not significantly affect a woman's exercise of her right to obtain an abortion by interfering with such matters as physician-patient consultation or the woman's choice between abortion and childbirth may be permissible where justified by important state health objectives.

B. Authority of State to Regulate or Restrict Abortion

§ 5. Generally

The Supreme Court has determined that, despite existence of a woman's constitutional right to have an abortion during the early stages of pregnancy without governmental interference, a state has some general authority to regulate or restrict abortion.

In Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791, the court, observing that a state has legitimate interests from the outset of pregnancy in protecting the health of the pregnant woman and the life of the fetus that may become a child, held that a state has the power, under the due process clause of the Fourteenth Amendment, to restrict abortion after fetal viability, if the law containing the restriction contains exceptions for pregnancies that endanger a woman's life or health. The court said that the due process clause allows a state to enact laws to provide a reasonable framework for a woman to decide whether to terminate her pregnancy.

Also indicating that a state has some general authority to regulate or restrict abortion are Roe v Wade (1973) 410 US 113, 35 L Ed 2d 147, 93 S Ct 705, reh den 410 US 959, 35 L Ed 2d 694, 93 S Ct 1409; Akron v Akron Center for Reproductive Health, Inc. (1983) 462 US 416, 76 L Ed 2d 687, 103 S Ct 2481, ovrld on other grounds by Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791; and Simopoulos v Virginia (1983) 462 US 506, 76 L Ed 2d 755, 103 S Ct 2532.

> ☆COMMENT: In Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791, supra, the Supreme Court rejected the trimester framework that the court established and applied in Roe v Wade, and applied in such later cases as Akron v Akron Center for Reproductive Health, Inc. and Simopoulos v Virginia, to determine the constitutionality of state regulation of abortion—under which framework (1) almost no regulation was permitted during the first trimester of pregnancy, (2) regulations designed to protect a pregnant woman's health, but not to further a state's interest in potential life, were permitted during the second trimester, and (3) during the third trimester, when the fetus was viable, prohibition of abortion was permitted provided that the life or health of the mother was not at stake—where three Justices of the Supreme Court adhered to the essential holding of Roe v Wade, but expressed the view that the trimester framework was not part of the essential holding and was too rigid in prohibiting all previability regulation aimed at the protection of fetal life, and where four Justices expressed the view that Roe v Wade was wrongly decided and should be overruled.

§ 6. Prohibition of abortion

[a] After fetus becomes viable—constitutionality of prohibition

It has been held by the Supreme Court that, under the Constitution, a state may prohibit the abortion of a viable fetus except when abortion is necessary to preserve the life or health of a pregnant woman.

Noting that state regulation protective of fetal life after viability has both logical and biological justifications, the court in Roe v Wade (1973) 410 US 113, 35 L Ed 2d 147, 93 S Ct 705, reh den 410 US 959, 35 L Ed 2d 694, 93 S Ct 1409, concluded that, despite a pregnant woman's constitutional right to have an abortion (supra § 4), a state may go so far as to proscribe the abortion of a viable fetus except when abortion is necessary to preserve the life or health of the pregnant woman. With respect to regulations protecting fetal health, the court concluded that a state's interest in potential life becomes compelling at viability, because viability is the point at which a fetus presumably is capable of meaningful life outside the womb.

In Colautti v Franklin (1979) 439 US 379, 58 L Ed 2d 596, 99 S Ct 675, the court held that after a fetus becomes viable, a state, if it chooses, may regulate or even prohibit abortion except where abortion is necessary, in appropriate medical judgment, to preserve the life or health of the pregnant woman. Viability is reached when, in the judgment of the attending physician on the particular facts of the case before the physician, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support, the court said, and the court indicated that because this point may differ with each pregnancy, neither legislatures nor courts may proclaim gestational weeks, fetal weight, or any other factor as the single determinant of when a state's interest in the life and health of a fetus becomes compelling, so as to justify regulations to protect that interest.

In Akron v Akron Center for Reproductive Health, Inc. (1983) 462 US 416, 76 L Ed 2d 687, 103 S Ct 2481, ovrld on other grounds by Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791, the court said that at the point of fetal viability a state's interest in protecting the potential life of the fetus is so important that a state may proscribe all abortions except those necessary to preserve the life or health of the pregnant woman. The court pointed out that, although a state has an important and legitimate interest in protecting the potentiality of human life throughout the course of pregnancy, the interest becomes compelling only at viability, the point at which the fetus has the capability of meaningful life outside the womb.

See Anders v Floyd, 440 US 445, 59 L Ed 2d 442, 99 S Ct 1200, reh den 441 US 928, 60 L Ed 2d 403, 99 S Ct 2043, in which the Supreme Court (1) vacated a Federal District Court judgment enjoining a state prosecution of a physician for criminal abortion and murder in connection with the abortion of a 25-week-old fetus, and (2) remanded the case to the District Court for further consideration in light of the Supreme Court's decision in Colautti v Franklin, supra—which decision was issued subsequent to the District Court's decision in the case at hand—that the concept of viability refers to potential, rather than actual, survival of a fetus outside the womb. The Supreme Court said that the District Court might have applied an erroneous concept of viability in concluding that there was no possibility of obtaining a constitutionally binding conviction of the physician.

[b] —Constitutionality of statutory definition of viability

The Supreme Court has held that a state statutory definition of fetal viability as being the stage of fetal development at which the life of the fetus may be continued indefinitely outside the womb by natural or artificial life-support systems was not unconstitutional, where the statute generally prohibited the abortion of a viable fetus.

In Planned Parenthood of Cent.

Missouri v Danforth (1976) 428 US 52, 49 L Ed 2d 788, 96 S Ct 2831, the court indicated that a state statute's provision defining viability as the stage of fetal development at which the life of the fetus may be continued indefinitely outside the womb by natural or artificial life-support systems, did not circumvent the constitutional limitations on state regulation of abortion. Affirming the portion of a judgment that had held the viability definition to be valid, the court said that, even when read in conjunction with another provision of the statute proscribing an abortion not necessary to preserve the life or health of the pregnant woman unless the attending physician first certified with reasonable medical certainty that the fetus was not viable, the statutory definition of viability reflected an attempt by the state legislature to comply with the Supreme Court's observations and discussion in Roe v Wade (1973) 410 US 113, 35 L Ed 2d 147, 93 S Ct 705, reh den 410 US 959, 35 L Ed 2d 694, 93 S Ct 1409, supra § 6[a], relating to viability. The court observed that it is not the proper function of legislatures or courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. Commenting that the time when viability is achieved may vary with each pregnancy, the court said that the determination of whether a particular fetus is viable must be a made by the responsible attending physician, and that the statutory definition of viability merely reflected this fact. Therefore, the court rejected the contention that an abortion statute had to fix a specified number of weeks of pregnancy as the point of viability.

[c] On nonresident of state; privileges and immunities clause

Relying upon the privileges and immunities clause of Article IV, § 2 of the Constitution, the Supreme Court has held that the Constitution was violated by state legislation precluding nonresidents from obtaining abortions in the state.

Invalidating a residency requirement contained in a state abortion statute, in Doe v Bolton (1973) 410 US 179, 35 L Ed 2d 201, 93 S Ct 739, reh den 410 US 959, 35 L Ed 2d 694, 93 S Ct 1410, the court, emphasizing that the privileges and immunities clause of Article IV, § 2 protects persons who enter a state seeking the medical services that are available there, held that the residency requirement, which required that a woman seeking an abortion certify in writing that she was a bona fide legal resident of the state, was unconstitutional. It was noted that the residency requirement was not based on any policy of preserving state-supported facilities for state residents, because the statutory bar was also applicable to private hospitals and to privately retained physicians; that there was no intimation that state facilities were utilized to capacity in caring for state residents; and that upholding the residency requirement would mean that a state could limit to its own residents the general medical care available within its borders, a result that the court said it could not approve.

III. Consent to Abortion

A. Pregnant Woman's Consent

§ 7. Requirement that consent be voluntary and informed

[a] Generally

The Supreme Court has indicated, in the following cases, that a state may impose regulations intended to insure that informed consent has been given by a woman who is to have an abortion.

In Akron v Akron Center for Reproductive Health, Inc. (1983) 462 US 416, 76 L Ed 2d 687, 103 S Ct 2481, ovrld on other grounds by Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791, the court said that the constitutional validity of a state's requirement that a pregnant woman give her informed consent to have an abortion rests on the state's interest in protecting the health of the pregnant woman, and that, because the decision to have an abortion has implications far broader than those associated with most other kinds of medical treatment, the state legitimately may seek to insure that the decision has been made in light of all attendant circumstances—psychological and emotional as well as physical—that might be relevant to the wellbeing of the pregnant woman.

The court in Thornburgh v American College of Obstetricians & Gynecologists (1986) 476 US 747, 90 L Ed 2d 779, 106 S Ct 2169, ovrld on other grounds by Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791, stated that as a general proposition, a requirement that a pregnant woman give what is truly a voluntary and informed consent to have an abortion is not unconstitutional.

The court held in Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791, that under the Fourteenth Amendment's due process clause, a state may take steps to insure that a woman's decision whether to have an abortion is thoughtful and informed. The court said that a state is free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning as does a decision whether to terminate a pregnancy, and that the Constitution does not forbid a state from expressing a preference for normal childbirth rather than for abortion.[19]

[b] Requirement that particular information be given to insure that consent is informed

The Supreme Court has held that a law requiring, for a woman to be able to give her informed consent to have an abortion, that she be given particular information, with respect to the decision whether to have an abortion, did not violate the Fourteenth Amendment's due process clause.

The court in Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791, held that a state abortion statute's informed consent provision —which required that except in a medical emergency, (1) a physician inform the woman of the nature of the abortion procedure, the health risks of the abortion and of childbirth, and the probable gestational age of the unborn child, (2) the physician or a qualified nonphysician inform the woman of the availability of printed materials published by the state describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provided adoption and other services as alternatives to abortion, and (3) the woman certify in writing that she had been informed of the availability of these materials, and that if she had chosen to view the materials, she had been provided with them—did not violate the due process clause of the Federal Constitution's Fourteenth Amendment. Although the seven Justices of the Supreme Court who agreed to this holding were unable to agree on an opinion, three of the Justices expressed the view that the informed consent provision did not place an undue burden upon a woman's right to decide whether to terminate a pregnancy, and the other four Justices expressed the view that the provision was rationally related to the state's interest in assuring that a woman's consent to an abortion be fully informed. The Supreme Court said that the statute's definition of a medical emergency as being a pregnant woman's medical condition that, on the basis of a physician's good-faith clinical judgment, necessitated an immediate abortion, to avert the woman's death or to avert a serious risk of substantial and irreversible impairment of a major bodily function, did not violate the due process clause, where, as construed by a Federal Court of Appeals, the medical emergency definition imposed no undue burden on a woman's abortion rights.[20]

---

[19] **19.** Akron v Akron Center for Reproductive Health, Inc. and Thornburgh v American College of Obstetricians & Gynecologists, supra, held that the Constitution does not allow a state to require delivery to a pregnant woman of information designed to influence the woman's informed choice between abortion or childbirth. With respect to this holding, these two cases were overruled by Planned Parenthood of Southeastern Pennsylvania v Casey, supra.

[c] Waiting period

The inclusion, in the informed consent provision of a state abortion statute, of a general requirement that at least 24 hours before undergoing an abortion, a woman be provided with certain information, has been held by the Supreme Court not to violate the due process clause of the Fourteenth Amendment.

In Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791, the court held that the 24-hour waiting period contained in a state abortion statute's informed consent provision—which required that except in a medical emergency, at least 24 hours before a woman underwent an abortion, she be provided with certain information—did not violate the due process clause of the Federal Constitution's Fourteenth Amendment. Although the seven Justices of the Supreme Court who agreed to this holding were unable to agree on an opinion, (1) three of the Justices expressed the view that the informed consent provision and the requirement of a 24-hour waiting period did not place an undue burden upon a woman's right to decide whether to terminate a pregnancy, and (2) the other four Justices expressed the view that the 24-hour waiting period reasonably furthered the state's legitimate interest in assuring that a woman's consent to an abortion be fully informed. The Supreme Court said that the statute's definition of a medical emergency as being a pregnant woman's medical condition that, on the basis of a physician's good faith clinical judgment, necessitated an immediate abortion, to avert the woman's death or to avert a serious risk of substantial and irreversible impairment of a major bodily function, did not violate the due process clause, where, as construed by a Federal Court of Appeals, the medical emergency definition imposed no undue burden on a woman's abortion rights.[21]

---

[20] In Planned Parenthood of Southeastern Pennsylvania v Casey, supra, the court overruled Akron v Akron Center for Reproductive Health, Inc. (1983) 462 US 416, 76 L Ed 2d 687, 103 S Ct 2481, ovrld on other grounds by Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791, and Thornburgh v American College of Obstetricians & Gynecologists (1986) 476 US 747, 90 L Ed 2d 779, 106 S Ct 2169, ovrld on other grounds by Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791, to the extent that those two cases held particular informed consent provisions of abortion laws to be unconstitutional based on the provisions' injection of a governmental view discouraging abortion into a woman's abortion decision.

§ 8. Requirement of written consent

[a] As unconstitutionally vague

The Supreme Court, stating that because a requirement of a patient's prior written consent for surgery generally would not be unconstitutional, there was no constitutional defect in requiring such consent for only some types of surgery, such as abortions, has determined that a state statute's requirement of a pregnant woman's informed written consent for abortions was not unconstitutionally vague.

Affirming a judgment upholding the validity of a state statutory provision requiring a pregnant woman's written consent to an abortion, the court, in Planned Parenthood of Cent. Missouri v Danforth (1976) 428 US 52, 49 L Ed 2d 788, 96 S Ct 2831, rejected the contentions that the consent requirement imposed an extra layer and burden of regulation on the abortion decision and was overbroad and vague, and the court held that the provision was not unconstitutional. The statute required that a woman, prior to submitting to an abortion during the first 12 weeks of pregnancy, had to certify, in writing, her consent to the procedure and had to certify that her consent was informed and freely given and was not the result of coercion. It was desirable and imperative that the important and often stressful decision to abort be made with full knowledge of the nature and consequences of the decision, the court said, and the court added that it was the pregnant woman who was primarily concerned and aware of the decision and its significance. The court said that, considering that the court could not say that a state's requirement of prior written consent for any surgery would be unconstitutional, the court could see no constitutional defect in requiring such consent only for some types of surgery, such as abortions. Observing that the vagueness argument centered on the word "informed," the court determined that the word meant the giving of information to the patient as to just what would be done and as to the consequences of what would be done. To ascribe more meaning that this to the word might well confine the attending physician in an undesirable and uncomfortable straitjacket in the practice of the physician's profession, the court said.

---

[21] The holding in Akron v Akron Center for Reproductive Health, Inc. (1983) 462 US 416, 76 L Ed 2d 687, 103 S Ct 2481, ovrld on other grounds by Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791, that the provision of a city ordinance requiring a 24-hour waiting period between the time a pregnant woman signed a form consenting to an abortion and the time the abortion was performed was unconstitutional, was overruled by Planned Parenthood of Southeastern Pennsylvania v Casey, supra.

[b] As violative of equal protection rights

It has been held by the Supreme Court that a state's requirement that, prior to obtaining an abortion, a woman make a prior written request for an abortion was not invalid under the equal protection clause of the Fourteenth Amendment, even though the state imposed no similar requirement with regard to ongoing pregnancy or to childbirth.

In Maher v Roe (1977) 432 US 464, 53 L Ed 2d 484, 97 S Ct 2376, the court, reversing a judgment invalidating the requirement—under a state administrative agency regulation that limited state Medicaid benefits for first-trimester abortions to those that were medically necessary but generally subsidized the medical expenses of the needy incident to pregnancy and childbirth—that a pregnant woman make a prior written request for an abortion, held that the requirement of such a prior written request was not invalid under the equal protection clause of the Fourteenth Amendment, even though no similar requirement was imposed with regard to medical treatment during childbirth or ongoing pregnancy. The court indicated that requiring a woman's written consent to an abortion did not impose a constitutionally impermissible burden. (As to the constitutionality of the denial, under particular state or local laws, of public funding for abortions, see § 36, infra.)

B. Consent of Pregnant Woman's Spouse

§ 9. As violative of constitutional right of privacy

Relying on the constitutional right of privacy, the Supreme Court, noting that a state could not delegate to a pregnant woman's spouse a veto power that the state itself was prohibited from exercising, has held that a state's general requirement of prior written consent of the spouse to the woman's abortion during the first 12 weeks of pregnancy was unconstitutional.

A state statutory provision requiring, with respect to an abortion that was to be performed during the first 12 weeks of pregnancy and was not necessary to preserve a pregnant's woman's life, the prior written consent of the woman's spouse, was held by the court, relying on the right of privacy, to be unconstitutional, in Planned Parenthood of Cent. Missouri v Danforth (1976) 428 US 52, 49 L Ed 2d 788, 96 S Ct 2831. The court indicated that a state cannot delegate to a spouse a veto power which the state itself is prohibited from exercising. Therefore, the court reversed a judgment holding that the spousal consent requirement was valid, even though the court acknowledged (1) the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying, (2) the importance of the marital relationship in American society, and (3) the profound physical, mental, and possibly deleterious effects that the decision whether to undergo an abortion may have on any marriage. The court said that the spousal consent provision granted a husband the right to prevent unilaterally, and for whatever reason, the effectuation of his wife's and her physician's decision to terminate her pregnancy, and that the provision not only might discourage the consultation normally expected to precede a major decision affecting the marital couple, but, more importantly, imposed an absolute obstacle to a woman's decision that was constitutionally protected from such interference. The court noted that the constitutional right of privacy gives an individual, married or single, the right to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear a child. Concluding that, although a woman who, with the approval of her physician but without the approval of her husband, decides to terminate her pregnancy could be said to act unilaterally, the view of only one of the two marriage partners can prevail when the partners disagree about this decision, and inasmuch as it is the woman who physically bears the child and is the more directly and immediately affected by the pregnancy, the balance between a husband and wife weighs in favor of the wife with respect to choosing to terminate pregnancy.

C. Requirement of Parental or Judicial Consent to Minor's Abortion

§ 10. As violative of constitutional rights generally

[a] Generally

The Supreme Court, indicating that not all statutory distinctions making parental[22] or judicial consent requirements with respect to minors' abortions more restrictive than such consent requirements with respect to other medical procedures for minors are forbidden, said that the constitutionality of such a distinction will depend on its degree and justification.

In Bellotti v Baird, 428 US 132, 49 L Ed 2d 844, 96 S Ct 2857, the Supreme Court, vacating a Federal District Court judgment enjoining the operation of a state statute that required parental or judicial consent for an unmarried woman under 18 years of age to obtain an abortion, held that the District Court should have abstained from determining the constitutionality of the statute pending state court construction of the statute, but the Supreme Court, referring to an allegedly impermissible statutory distinction between the consent requirements applicable to minors with respect to abortion and the more liberal consent procedures applicable to other medical procedures for minors, said that not all distinctions between abortion and other procedures are constitutionally forbidden. The constitutionality of such a distinction will depend on the distinction's degree and justification, the court said.

[b] Particular requirements held unconstitutional

Particular provisions of a law requiring parental or judicial consent to a minor's abortion have been held by the Supreme Court to be unconstitutional in the following cases.

It was held by the court in Bellotti v Baird, 443 US 622, 61 L Ed 2d 797, 99 S Ct 3035, reh den 444 US 887, 62 L Ed 2d 121, 100 S Ct 185, that a state statute requiring the consent of both parents of an unmarried woman under the age of 18 in order for the woman to obtain an abortion, but providing that the daughter could obtain an abortion by court order upon a showing of good cause if one or both parents refused to consent, was unconstitutional, as construed by the state's highest court in response to certified questions from the United States Supreme Court. The state court had determined that the statute required that (1) except when a parent was unavailable or the need for an abortion constituted an emergency requiring immediate action, a minor seeking an abortion could not obtain judicial consent without first seeking the consent of both parents; (2) unless a parent was unavailable, the parent had to be notified of any judicial proceedings brought by a minor under the statute; and (3) even if a judge found that a minor had made an informed and reasonable decision to have an abortion, the judge was entitled to withhold judicial consent based on a finding that the minor's best interests would not be served by an abortion. Of the eight United States Supreme Court Justices who agreed that the statute was unconstitutional, four Justices expressed the view that the statute, as construed by the state court, unduly burdened the right to seek an abortion, because the statute permitted the withholding of judicial authorization for an abortion for a minor who had been found to be mature and fully competent to decide to have an abortion, and because the statute required parental consultation or notification in every instance, without affording a pregnant minor an opportunity to receive an independent judicial determination that she was mature enough to consent to an abortion or that an abortion would be in her best interests. The other four Justices who agreed that the statute was unconstitutional expressed the view that the statute infringed upon the constitutional right to have an abortion, because under the statute as construed by the state court, a minor's decision to exercise that right was in every instance subject to an absolute third-party veto, no matter how mature and capable of informed decision-making the minor was.

---

[22] For purposes of this annotation, the term "parental consent" refers to the consent of a parent, guardian, or the like.

The court, in Akron v Akron Center for Reproductive Health, Inc. (1983) 462 US 416, 76 L Ed 2d 687, 103 S Ct 2481, ovrld on other grounds by Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791, affirmed a judgment holding unconstitutional the provision of a city ordinance prohibiting the performance of an abortion on a minor pregnant woman under the age of 15 years without either (1) the informed written consent of one of the minor's parents or her legal guardian, or (2) the minor's obtaining of an order from a court having jurisdiction over the minor that the abortion be performed or induced. The court said that the ordinance, which offered no alternative procedure whereby a pregnant minor could demonstrate that she was sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests—which alternative procedure, the court said, was required by Bellotti v Baird (1979) 443 US 622, 61 L Ed 2d 797, 99 S Ct 3035, reh den 444 US 887, 62 L Ed 2d 121, 100 S Ct 185, supra—was reasonably susceptible of being construed to create an opportunity for case-by-case evaluations of the maturity of pregnant minors, where the state statute governing juvenile proceedings neither mentioned minors' abortions nor suggested that a state juvenile court had authority to inquire into a minor's maturity or emancipation. The Supreme Court said that the city could not make a blanket determination that all pregnant minors under the age of 15 years were too immature to decide to have an abortion, or that an abortion never may be in a minor's best interest without parental approval.

[c] Particular requirements held not unconstitutional

The Supreme Court has held that particular state statutory provisions requiring parental or judicial consent to a minor's abortion were not unconstitutional.

In Planned Parenthood Assn. v Ashcroft (1983) 462 US 476, 76 L Ed 2d 733, 103 S Ct 2517, the court affirmed the portion of a Federal Court of Appeals judgment holding that a state statute—which prohibited the performance of an abortion on a woman under the age of 18 years unless (1) if the minor was unemancipated, the informed written consent of the minor and one parent or guardian had been secured, (2) the minor was emancipated and had been granted the right to consent by court order, or (3) a court, finding an abortion to be in the minor's best interest, had given judicial consent for the abortion—was not unconstitutional. The five Justices who joined in this holding were unable to agree on an opinion, where (1) two of the Justices were of the opinion that the Court of Appeals' interpretation of the statute as not permitting a juvenile court to deny a pregnant minor's petition for majority rights for the purpose of consenting to an abortion unless the juvenile court first found that the minor was not mature enough to make her own decision was correct and avoided any constitutional infirmities, and (2) the other three Justices were of the opinion that the statute's parental consent provision was valid because it imposed no undue burden on any right that a minor might have to undergo an abortion. The statute provided that if a court denied such a petition for majority rights, the court had to set forth the grounds for denial.

§ 11. As violative of due process rights

[a] Generally

The Supreme Court has indicated that under the due process provisions of the Fourteenth Amendment, a state must provide some sort of bypass procedure if the state elects to require parental consent for a minor's abortion.

In Ohio v Akron Center for Reproductive Health (1990) 497 US 502, 111 L Ed 2d 405, 110 S Ct 2972, the court indicated that under the due process provisions of the Fourteenth Amendment, a state that elects to require parental consent for a minor's abortion must provide some sort of procedure for bypassing the parental consent requirement, in order to prevent another person from having an absolute veto power over a minor's decision to have an abortion.

[b] Particular laws as violative of rights

The Supreme Court has held that the due process provisions of the Fourteenth Amendment were not violated by state statutes that required, prior to the performance of an abortion on an unemancipated minor under the age of 18 years, that parental consent to the abortion be obtained, where the statutes provided a judicial procedure for bypassing parental consent.

In Ohio v Akron Center for Reproductive Health (1990) 497 US 502, 111 L Ed 2d 405, 110 S Ct 2972, the court held that a state abortion statute that prohibited the performance of an abortion on an unmarried, unemancipated minor absent either parental notice, parental consent, a judicial bypass procedure, or certain judicial inaction with respect to the minor's complaint seeking the right to have an abortion, satisfied the Fourteenth Amendment's minimum due process requirements with respect to parental consent, where the statute authorized the performance of an abortion on a minor if one of her parents, or her guardian or custodian, had consented in writing to the abortion. The statute allowed the parental consent requirement to be bypassed (1) if a minor (a) filed a complaint stating that she desired an abortion without parental notification, and (b) proved that either she was sufficiently mature and informed to intelligently decide whether to have an abortion without parental notification, that one of her parents had abused her, or that notice was not in her best interests, or (2) if certain judicial inaction, such as a juvenile court's failure to hold a hearing within 5 business days after the minor filed her complaint or an appellate court's failure to issue a decision within 5 days after docketing an appeal in the case, had constructively authorized the minor to consent to have an abortion. The court said that the statute provided due process with respect to parental consent, because the bypass procedure was expeditious and insured a pregnant minor's anonymity and allowed her to show (1) that she had the maturity and information to decide to have an abortion without regard to her parents' wishes, or (2) that even if she could not make the decision alone, an abortion would be in her best interests. The court, reversing a judgment holding that the statute was constitutionally defective, said that the statute's pleading scheme, under which a minor seeking an abortion without parental consent had to choose among three pleading forms, one alleging maturity only, one alleging best interests only, and the one alleging both, was simple and straightforward.

A state abortion statute's parental consent provision was held not to violate the due process clause of the Federal Constitution's Fourteenth Amendment in Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791, where the provision stated that except in a medical emergency, an unemancipated woman under 18 years of age could not obtain an abortion unless (1) she and one of her parents or guardians provided informed consent, or (2) if neither a parent nor a guardian provided consent, a court authorized the performance of an abortion upon a determination that (a) the woman was mature and capable of giving informed consent and had done so, or (b) an abortion would be in her best interest. Noting that the Supreme Court previously had upheld such a parental consent requirement provided that there was an adequate judicial bypass procedure, the Supreme Court said that the statute's definition of a medical emergency as being a pregnant woman's medical condition that, on the basis of a physician's good faith clinical judgment, necessitated an immediate abortion to avert the woman's death or to avert a serious risk of substantial and irreversible impairment of a major bodily function did not violate the due process clause, where, as construed by a Federal Court of Appeals, the medical emergency definition imposed no undue burden on a woman's abortion rights.

§ 12. As violative of right of privacy

Relying on a pregnant minor's constitutional right of privacy, the Supreme Court has determined that a particular state statutory provision requiring parental consent to the performance of an abortion on a minor was unconstitutional.

In Planned Parenthood of Cent.

Missouri v Danforth (1976) 428 US 52, 49 L Ed 2d 788, 96 S Ct 2831, the court, relying on a minor's constitutional right of privacy, held unconstitutional a state statutory requirement that prior to the performance of an abortion, on an unmarried woman under the age of 18 years, during the first 12 weeks of pregnancy, the written consent of one parent or person in loco parentis be acquired for an abortion not necessary to preserve the life of the pregnant woman. Therefore, the court reversed a judgment holding that the parental consent requirement was valid. A state does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of a physician and the physician's patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent, the court said, although the court acknowledged that a state has somewhat broader authority to regulate the activities of children than a state has to regulate the activities of adults. Any independent interest that a parent may have in the termination of a minor daughter's pregnancy is no more weighty than the right of privacy of a competent minor mature enough to have become pregnant, the court observed. The court, noting that its holding that the parental consent provision was invalid did not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy, concluded that the fault with the provision was that it imposed a special consent requirement, exercisable by a person other than the pregnant woman and her physician, as a prerequisite to a minor's termination of her pregnancy and did so without a sufficient justification for the restriction.

D. Consent of Governmental Agency

§ 13. Generally

The Supreme Court has indicated that a requirement, under a state administrative agency regulation authorizing the payment of state Medicaid benefits for medically necessary first-trimester abortions, of prior consent by the agency to such Medicaid-funded abortions was not unconstitutional.

In Maher v Roe (1977) 432 US 464, 53 L Ed 2d 484, 97 S Ct 2376, the court, reversing a judgment invalidating the requirement, under a state department of social services regulation, that the department's consent to a medically necessary first-trimester abortion that was to be paid for by state Medicaid benefits be obtained before the abortion was performed, determined that the requirement was not unconstitutional. It was not unreasonable, the court said, for a state to insist upon a prior showing of medical necessity to insure that the state's money was being spent only for authorized purposes. The court said that the simple answer to the argument that a similar requirement was not imposed for other medical procedures was that such procedures did not involve the termination of a potential human life.

IV. Notice of Intended Abortion

A. Requirement of Notice to Parent

§ 14. As violative of Federal Constitution generally

[a] Particular requirements held to be unconstitutional

The Supreme Court has held that, once a mature minor has petitioned for judicial approval to obtain an abortion, it would be unconstitutional to require, under a state statute, that her parents be notified of her request.[23]

In Akron v Akron Center for Reproductive Health, Inc. (1983) 462 US 416, 76 L Ed 2d 687, 103 S Ct 2481, ovrld on other grounds by Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791, the court held that a state statutory requirement that a pregnant minor's parents be notified once a petition to obtain judicial approval of an abortion for the minor had been filed would be unconstitutional in the case of a mature minor seeking an abortion.

[b] Particular requirements held not to be unconstitutional

State statutory provisions requiring that, before the performance of an abortion on an unemancipated minor, the minor's parents be notified that she is seeking to obtain an abortion have been held by the Supreme Court not to be unconstitutional in the following cases.

In L. v Matheson (1981) 450 US 398, 67 L Ed 2d 388, 101 S Ct 1164, the court affirmed a judgment holding that a state statute requiring that if possible, the parents or guardian of a minor seeking an abortion be notified before the abortion was performed was not unconstitutional as applied to a pregnant minor who (1) was living with and dependent upon her parents, (2) was not emancipated by marriage or otherwise, and (3) had made no claim or showing as to her maturity or her relations with her parents. The court commented that the statute gave neither parents nor judges a veto power over a minor's abortion decision, and that, as applied to immature and dependent minors, the statute plainly served the important considerations of family integrity and the protection of adolescents. Moreover, the court said that, as applied to immature and dependent minors, the statute served a significant state interest by providing an opportunity for parents to supply essential medical and other information to a physician intending to perform an abortion on their daughter, even thought the statute did not provide a detailed description of what information parents might provide and did not impose a mandatory period of delay after parental notification, and even though the state allowed a pregnant minor who carried a child to term to consent to other medical procedures without formal notification to a parent. The court observed that the medical, emotional, and psychological consequences of an abortion are serious and can be lasting, particularly when the patient is immature. Concluding that a pregnant minor who was unmarried and dependent on her parents had no constitutional right to notify a court, in lieu of notifying her parents, that she was intending to undergo an abortion, the court said that the case at hand did not require the court to decide in what circumstances a state might have to provide alternatives to parental notification. The court said that the fact that the requirement of notice to parents might inhibit some minors from seeking abortions was not a valid basis for voiding the statute as applied to unmarried, unemancipated, pregnant minors living with their parents, because the Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions.

---

[23] For purposes of this annotation, the term "parental notification" refers to notification of a parent, guardian, or the like.

In Hodgson v Minnesota (1990) 497 US 417, 111 L Ed 2d 344, 110 S Ct 2926, the court affirmed a judgment holding that a state had not violated the Constitution by enacting a statute providing that (1) except under certain circumstances, both of an unemancipated minor's parents had to be notified that the minor was seeking an abortion before an abortion could be performed on the minor, but (2) a court of competent jurisdiction could authorize such an abortion without parental notification if the court determined that the minor was mature and capable of giving informed consent or that an abortion without notice to both parents would be in the minor's best interest. The five Justices who joined in this holding were unable to agree on an opinion supporting the holding, where, of the five Justices, one Justice concluded that, by including the judicial bypass procedure that allowed a minor seeking an abortion to avoid notifying one or both parents, the statute avoided interfering with the internal operation of the family, and four Justices concluded that a law that requires notification to one or both parents that a minor is seeking an abortion is constitutional if the law contains a judicial procedure for bypassing the parental notification requirement. Under the statute, the bypass procedure was confidential and a pregnant minor had a right to court-appointed counsel and to free court access "24 hours a day, seven days a week." The court held also that the requirement, under the statute, that no abortion be performed until at least 48 hours after parental notification had been given was not unconstitutional. The six Justices who joined in this holding were unable to agree on an opinion, where, of the six Justices, two Justices were of the opinion that the waiting period furthered legitimate state interests in the welfare of its young citizens and in insuring that a minor's decision to have an abortion was knowing and intelligent, and four Justices, in addition to sharing the opinion that the waiting period furthered a legitimate state interest in the welfare of a pregnant minor, were of the opinion that the waiting period represented a permissible, reasoned attempt to preserve the parents' role in a minor's decision to have an abortion, without placing any absolute obstacles before a minor who was determined to elect to have an abortion.

§ 15. As violative of due process rights

[a] Generally

The Supreme Court has held that, if a procedure for bypassing a statutory parental consent requirement for a minor's abortion satisfies the due process provisions of the Fourteenth Amendment with respect to parental consent, the procedure will also satisfy the due process provisions with respect to a statutory parental notification requirement.

In Ohio v Akron Center for Reproductive Health (1990) 497 US 502, 111 L Ed 2d 405, 110 S Ct 2972, the court said—with respect to judicial procedures by which a statutory requirement of parental notification that a minor is seeking an abortion may be bypassed—that it is a corollary to the greater intrusiveness of statutes which require parental consent for a minor's abortion that a bypass procedure that will suffice, under the due process provisions of the Fourteenth Amendment, for a consent statute will suffice also for a parental notice statute.

[b] Particular requirements held to violate rights

It has been held by the Supreme Court that, in the absence of a procedure allowing judicial bypass of a particular state statute's general requirement that both of an unemancipated minor's parents be notified before the performance of an abortion on the minor, the parental notice requirement violated the Fourteenth Amendment's due process clause.

In affirming the portion of a judgment holding that a state had not violated the Constitution by enacting a statute that (1) provided, with certain exceptions, that both of an unemancipated minor's parents had to be notified that the minor was seeking an abortion before an abortion could be performed on the minor, and (2) separately provided that a court of competent jurisdiction could authorize such an abortion without parental notification if the court determined that the minor was mature and capable of giving informed consent or that an abortion without notice to both parents would be in the minor's best interest, in Hodgson v Minnesota (1990) 497 US 417, 111 L Ed 2d 344, 110 S Ct 2926, supra § 14[b], the court also affirmed the portion of the judgment holding that, without the separate statutory procedure that allowed a minor to judicially bypass the parental notification requirements, the other statutory provision violated the Fourteenth Amendment's due process guarantees. The statute, which included exceptions to the notification requirement where an immediate abortion was necessary to prevent the minor's death or where the minor declared to the proper authorities that she was a victim of parental abuse or neglect, required notification to only one parent if the second one was dead or could not be located through reasonably diligent effort. However, the statute made no exception to the two-parent notice requirement with respect to a divorced parent, a noncustodial parent, or a biological parent who had never married or lived with the minor's mother. The court said that the two-parent notice requirement did not reasonably further any legitimate state interest, given that (1) to the extent that a state has a legitimate interest in insuring that a minor's decision to terminate her pregnancy is knowing, intelligent, and deliberate by supporting the authority of a parent who is presumed to act in a minor's best interest, such an interest would be fully served by a requirement that the minor notify one parent, (2) although both parents may well have an interest in a minor's abortion decision, full communication among all members of a family may not validly be decreed by a state, and (3) any state interest in protecting one parent's interest in shaping a child's values and lifestyle cannot overcome the liberty interests of a minor acting with the consent of the other parent. With respect to dysfunctional families, the court noted that, in light of evidence that in thousands of such families a two-parent notice requirement would be harmful to the minor and her family, such a requirement would disserve a state's interest in protecting and assisting a minor. The court concluded that the fact that other state and federal consent provisions governing the health, welfare, and education of children required the consent of only one parent provided testimony to the unreasonableness of the two-parent notice requirement and to the ease with which the state could adopt less burdensome means to protect the welfare of a minor who was seeking an abortion.

[c] Particular requirements held not to violate rights

The Supreme Court has held that the due process provisions of the Fourteenth Amendment were not violated by a particular state statute that required parental notification before the performance an abortion on an unmarried, unemancipated minor but contained a procedure under which the notification requirement could be judicially bypassed.

In Ohio v Akron Center for Reproductive Health (1990) 497 US 502, 111 L Ed 2d 405, 110 S Ct 2972, the court held that the due process provisions of the Fourteenth Amendment were not violated by the parental notice requirements of a state statute that prohibited the performance of an abortion on an unmarried, unemancipated minor absent either parental notice, parental consent, a judicial bypass procedure, or certain judicial inaction with respect to the minor's complaint seeking the right to have an abortion. The statute provided that its notice requirements would be satisfied if either (1) one of the minor's parents, or her guardian or custodian, was given at least 24 hours' actual notice, in person or by telephone, of the intention to perform the abortion, (2) the minor's adult brother, sister, stepparent, or grandparent was notified, if the minor and the other relative each had filed an affidavit in a juvenile court stating that the minor feared physical, sexual, or severe emotional abuse from one of her parents, or (3) after an unsuccessful reasonable effort to give actual notice, at least 48 hours' constructive notice was given by both ordinary and certified mail. Moreover, the statute provided that the notice requirements could be bypassed (1) if the minor (a) filed a complaint stating that she desired an abortion without parental notification, and (b) proved either that she was sufficiently mature and informed to intelligently decide whether to have an abortion without parental notification, that one of her parents had abused her, or that notice was not in her best interests, or (2) if certain judicial inaction, such as a juvenile court's failure to hold a hearing within 5 business days after the minor filed her complaint or an appellate court's failure to issue a decision within 5 days after docketing an appeal in the case, had constructively authorized the minor to consent to have an abortion without parental notice. The court, reversing a judgment holding that the statute was constitutionally defective, said that, whether the Fourteenth Amendment requires judicial bypass procedures for statutes calling for parental notice of a minor's request for an abortion, a question that the court left open, the bypass procedure contained in the statute in question satisfied the minimum due process requirements of the Fourteenth Amendment, because (1) the procedure—by being expeditious, and by insuring a pregnant minor's anonymity and allowing her to show that she had the maturity and information to decide to have an abortion without regard to her parents' wishes or that, even if she could not make the decision alone, an abortion would be in her best interests—satisfied the constitutional requirements for an abortion statute's parental consent provisions, and (2) it is a corollary to the greater intrusiveness of consent provision that a bypass procedure that will suffice for a consent provision will suffice also for a notice provision.

§ 16. As violative of right of privacy

Relying on a pregnant minor's

constitutional right of privacy, the Supreme Court has held that a requirement, under a particular state statute, of two-parent notification before the performance of an abortion on an unemancipated minor was unconstitutional.

In Hodgson v Minnesota (1990) 497 US 417, 111 L Ed 2d 344, 110 S Ct 2926, supra § 15[b], in affirming a judgment holding that the general two-parent notice provision of a state statute—which (1) provided generally that both of an unemancipated minor's parents had to be notified that the minor was seeking an abortion before an abortion could be performed on the minor, (2) required notification to only one parent if the second one was dead or could not be located through reasonably diligent effort, but (3) made no exception to the two-parent notice requirement with respect to a divorced parent, a noncustodial parent, or a biological parent who had never married or lived with the minor's mother—without the statute's separate provision authorizing judicial bypass of the general notification requirement, was unconstitutional, the court concluded that the combined force of one parent's separate interest and the minor's privacy interest outweighed the separate interest of the second parent.

B. Requirement of Notice to Spouse

§ 17. Generally

The Supreme Court has decided that a state abortion statute's provision that, with certain exceptions, prohibited a physician from performing an abortion on a married woman without receiving a signed statement from the woman that she had notified her spouse that she was about to undergo an abortion violated a woman's rights under the due process clause of the Fourteenth Amendment.

In Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791, the court determined that a state abortion statute's provision prohibiting a physician from performing an abortion on a married woman without receiving a signed statement from the woman that she had notified her spouse that she was about to undergo an abortion—unless the woman provided an alternative signed statement certifying that her husband was not the man who impregnated her, that her husband could not be located, that her pregnancy was the result of a spousal sexual assault which she had reported, or that she believed that notifying her husband would cause him or someone else to inflict bodily injury upon her—was an undue burden on a woman's right, under the due process clause of the Fourteenth Amendment, to decide whether to terminate a pregnancy, and thus was unconstitutional. The court said that (1) the vast majority of women notified their male partners of the decision to obtain an abortion; (2) in many cases in which married woman did not notify their husbands, the pregnancy was the result of an extramarital affair; (3) when the husband was the father, the primary reason women did not notify their husbands was that the husband and wife were experiencing marital difficulties, often accompanied by incidents of violence; (4) victims of a spousal sexual assault were extremely reluctant to report the assault to the government; and (5) thus the spousal notification requirement imposed a substantial obstacle that was likely to prevent a significant number of women from procuring an abortion as surely as if the state had outlawed abortion in all cases. The court stated that the spousal notice provision embodied a view of marriage that was repugnant to modern understanding of marriage and of the nature of the rights secured by the Constitution, because women do not lose their constitutionally protected liberty when they marry. State regulation with respect to the child a woman was carrying had a far greater impact on the mother's liberty than on the father's liberty and touched upon the bodily integrity of the pregnant woman, the court noted, and the court added that the right of privacy includes the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters that so fundamentally affect a person as does the decision whether to bear or beget a child. The Constitution protects all individuals, male or female, married or unmarried, from unjustified state interference, even when the interference is employed for the supposed benefit of a member of the individual's family, including the individual's spouse, the court concluded.

V. Regulation of Abortion-related Activities of Persons Other Than Pregnant Woman or Her Parents or Spouse

A. Specifying Who May Provide Particular Information Prior to Abortion

§ 18. Requirement that person giving parental notification be physician who is to perform abortion

The Supreme Court has determined that a state statute generally requiring parental notification before a minor could obtain an abortion was not rendered unconstitutional by the fact that the statute required that the physician who was to perform the abortion was to be the person providing parental notification.

In Ohio v Akron Center for Reproductive Health (1990) 497 US 502, 111 L Ed 2d 405, 110 S Ct 2972, supra § 15[c], the court held that a state statute that required parental notice before an unmarried, unemancipated minor could obtain an abortion was not rendered unconstitutional by the fact that the statute required the parental notice to be given by the physician who was to perform the abortion, rather than by some other qualified person. The court said that the state could constitutionally require a physician to take reasonable steps to notify a minor's parent that the minor was seeking an abortion, because (1) a parent often will provide important medical data to the physician, (2) a conversation with the physician may enable a parent to provide better advice to the minor, given that, in an ideal case, a detached physician can assist the parent in approaching a complex philosophical and emotional problem in a mature and balanced way, and (3) any imposition that such a notice requirement made on a physician's schedule was unobjectionable in light of the statute's allowance for notice by mail and for the forgoing of notice in the event of certain emergencies.

§ 19. Counseling for pregnant woman

It has been held by the Supreme Court that the Constitution, although allowing a state to establish reasonable minimum qualifications for the people who provide the primary counseling to pregnant woman concerning whether to have an abortion, does not allow a state to require that the people providing abortion counseling to pregnant women be physicians.

The court, in Akron v Akron Center for Reproductive Health, Inc. (1983) 462 US 416, 76 L Ed 2d 687, 103 S Ct 2481, ovrld on other grounds by Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791, although recognizing that a state may establish reasonable minimum qualifications for those people who perform the primary counseling function with respect to a woman's decision whether to have an abortion, and although saying that a state may require a physician to make certain that a pregnant woman in the physician's care understands the physical and emotional implications of having an abortion, held that a provision of a city abortion ordinance requiring that a physician inform a woman seeking an abortion of the particular risks associated with her own pregnancy and of the abortion technique to be employed, in addition to giving her other information which in the physician's judgment was relevant to the woman's abortion decision, was unconstitutional, because it is unreasonable for a state to insist that only a physician is competent to provide the information and counseling relevant to a woman's informed consent to have an abortion.

As to the constitutionality of federal regulations prohibiting abortion counseling by family planning projects that receive federal funds, see Rust v Sullivan (1991, US) 114 L Ed 2d 233, 111 S Ct 1759, infra §§ 38[a] and 38[b].

B. Regulation of Decision to Perform, or Performance of, Abortion

§ 20. Requirements as to physician's decision to perform abortion as being unconstitutionally vague

A statute making it a crime for a physician to perform an abortion except when, based upon the physician's best clinical judgment, an abortion was necessary has been held by the Supreme Court not to be unconstitutionally vague.

In Doe v Bolton (1973) 410 US 179, 35 L Ed 2d 201, 93 S Ct 739, reh den 410 US 959, 35 L Ed 2d 694, 93 S Ct 1410, the court, while holding a state abortion statute unconstitutional on other grounds, rejected the contention that the statute was unconstitutionally vague by making it a crime for a physician to perform an abortion except when it was "based upon his best clinical judgment that an abortion is necessary." The court rejected the contentions that the word "necessary" did not warn the physician of what conduct was proscribed; that the statute was wholly without objective standards and was subject to diverse interpretation; and that with respect to the statute, physicians would choose to err on the side of caution and would be arbitrary. It was noted that under the statutory language which was challenged as vague, a physician's abortion determination was to be made in the exercise of the physician's "best clinical" judgment in the light of all the attendant circumstances. It was further noted that whether a particular operation was necessary for a patient's physical or mental health was a judgment which physicians were obviously called upon to make routinely whenever surgery was considered, and that whether an abortion was necessary was a professional judgment which a physician would be called upon to make routinely. In addition, it was pointed out that, under the statute, a physician's medical judgment could be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient; that all of these factors could relate to health; that, therefore, the attending physician was allowed the room needed to make the physician's best medical judgment; and that the statute in this way operated for the benefit, not the disadvantage, of a pregnant woman.

§ 21. Requirement that physician's decision to perform abortion be approved by others as violative of Fourteenth Amendment

[a] Approval by hospital staff abortion committee

The Supreme Court, determining that a state statutory requirement that a physician's decision to perform an abortion be approved by a hospital staff abortion committee served the interests of neither the hospital nor the state, has held that such a requirement violated the Fourteenth Amendment.

Invalidating a state statutory requirement that abortions be approved by a hospital staff abortion committee, the court, in Doe v Bolton (1973) 410 US 179, 35 L Ed 2d 201, 93 S Ct 739, reh den 410 US 959, 35 L Ed 2d 694, 93 S Ct 1410, held that the requirement violated the Fourteenth Amendment. Concluding that there was no constitutionally justifiable basis for advance approval by a hospital abortion committee, the court stated that with regard to the protection of potential life, the medical judgment was already completed prior to the committee stage, and that review by a committee once removed from diagnosis was basically redundant. The court stated that it had not been made aware of any other surgical procedure that was subject to committee approval as a matter of state criminal law, and that a woman's right to receive medical care in accordance with her licensed physician's judgment and the physician's right to administer such care were substantially limited by the committee requirement. The court noted that a hospital was free, under the state's legislation, not to admit a patient for an abortion or not to have an abortion committee; that a physician or any other employee had the right to refrain, for moral or religious reasons, from participating in an abortion procedure; that these other provision obviously were included in the legislation in order to afford appropriate protection to individuals and to denominational hospitals; that such provisions afforded adequate protection to a hospital; and that little more was provided by the requirement that an abortion be approved by a hospital abortion committee. Thus, it was held that the interposition of the hospital abortion committee was unduly restrictive of the patient's rights and needs which had already been medically delineated and substantiated by her personal physician, and that to ask more served the interests of neither hospitals nor the state.

[b] Approval by other physicians

The Supreme Court has held that a state statutory requirement that a physician's decision to perform an abortion be confirmed by the independent examinations of the patient by two other licensed physicians violated the Fourteenth Amendment, where the court concluded that the requirement had no rational connection with a patient's needs and unduly infringed on a physician's right to practice.

The court, in Doe v Bolton (1973) 410 US 179, 35 L Ed 2d 201, 93 S Ct 739, reh den 410 US 959, 35 L Ed 2d 694, 93 S Ct 1410, invalidating a state statutory requirement that the performing physician's judgment to perform an abortion be confirmed by the independent examinations of the patient by two other licensed physicians, held that the requirement violated the Fourteenth Amendment. It was noted that the statutory requirement of an attending physician's best clinical judgment that an abortion was necessary should be sufficient; that the reasons for confirmation by two additional physicians were insufficient to withstand constitutional challenge; and that the court had been informed of no other voluntary medical or surgical procedure for which the state required confirmation by two other physicians. It was pointed out that if a physician was licensed by the state, the physician was recognized by the state as being capable of exercising acceptable clinical judgments; that professional censure or deprivation of a physician's license were available remedies for failure to exercise such judgment; and that required acquiescence by copractitioners had no rational connection with a patient's needs and unduly infringed on the performing physician's right to practice. Moreover, the court pointed out that an attending physician would know when a consultation was advisable, in such situations as those where there was a need for assurance concerning a delicate medical decision; that physicians had followed this routine historically and knew its usefulness and benefit for all concerned; and that reliance had to be placed upon the assurance given by a physician's license that the physician possessed the requisite qualifications.

§ 22. Requirements with respect to determining viability

[a] As being unconstitutional generally

Certain state statutory provisions imposing particular standards of care on physicians with respect to the gestational stage at which a viability determination had to be made before an abortion was performed, and with respect to tests to be used to make the determination, have been held by the Supreme Court not to be unconstitutional.

In Webster v Reproductive Health Services (1989) 492 US 490, 106 L Ed 2d 410, 109 S Ct 3040, the court, reversing a judgment invalidating certain state statutory provisions governing a physician's standard of care with respect to determining whether a fetus was viable before aborting the fetus, held that the provisions were not unconstitutional, where the statute required that (1) before performing an abortion on any woman whom a physician had reason to believe was carrying a fetus of 20 or more weeks' gestational age, the physician was to determine whether the fetus was viable by exercising the degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions, and (2) in making the viability determination, the physician was to perform or cause to be performed the medical examinations and tests that were necessary to determine the gestational age, weight, and lung maturity of the fetus. The five Justices who joined in holding that the statutory provisions were not unconstitutional were unable to agree on an opinion, where, of the five Justices, three Justices expressed the view that, although the viability tests required under the statute would in many cases show that a fetus was not viable, the statutory viability testing requirement permissibly furthered the state's interest in protecting potential human life; a fourth Justice expressed the view that, when viability is possible and it would not be medically imprudent to perform tests useful in determining whether a fetus is viable, the performance of such tests does not impose an undue burden on a woman's abortion decision; and a fifth Justice expressed the view that the viability testing requirement should be held valid based on an explicit overruling of Roe v Wade (1973) 410 US 113, 35 L Ed 2d 147, 93 S Ct 705, reh den 410 US 959, 35 L Ed 2d 694, 93 S Ct 1409, supra § 4.

[b] As being unconstitutionally vague

The Supreme Court has concluded that a particular state statute requiring every person performing or inducing an abortion to make a prior determination, based on the person's experience, judgment, or professional competence, that the fetus was not viable was unconstitutionally vague.

In Colautti v Franklin (1979) 439 US 379, 58 L Ed 2d 596, 99 S Ct 675, the court, affirming a judgment invalidating the viability determination provision of a state statute regulating abortion, held that the provision was unconstitutionally vague, where the provision, for violation of which the statute imposed civil and criminal sanctions, required every person performing or inducing an abortion to make a prior determination, based on the person's experience, judgment, or professional competence, that the fetus was not viable. The court noted that as a matter of due process, a criminal statute is void for vagueness if it (1) fails to give a person of ordinary intelligence fair notice that the person's contemplated conduct is forbidden by the statute, or (2) is so indefinite that it encourages arbitrary and erratic arrests and convictions. The court said that the statute's viability determination requirement was ambiguous, in that it was unclear whether the statute imported a purely subjective standard or imposed a mixed subjective and objective standard with respect to the determination of viability or possible viability. Observing that, by conditioning potential criminal liability on confusing and ambiguous criteria, the statute presented serious problems with respect to notice, discriminatory application, and a chilling effect on the exercise of constitutional rights, the court added that the vagueness of the viability determination requirement was compounded by the fact that the statute subjected physicians to potential criminal liability without regard to fault. The court said that a determination whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician, and that state law that impinges upon this determination, if the law is to be constitutional, must allow the room needed for the attending physician to make the physician's best medical judgment.

§ 23. Requirement that abortion be performed by physician only

[a] As unconstitutional generally

In the following cases, the Supreme Court indicated that it was not unconstitutional for a state to promote the state's interest in insuring the safety of the abortion procedure by mandating that only physicians could perform abortions in the state.

In Roe v Wade (1973) 410 US 113, 35 L Ed 2d 147, 93 S Ct 705, reh den 410 US 959, 35 L Ed 2d 694, 93 S Ct 1409, supra § 4, the court recognized that after a certain stage of pregnancy, it was constitutionally permissible for a state to (1) regulate requirements as to the qualification of the person who was to perform an abortion and as to the licensing of such a person, (2) define the term "physician" to mean only a physician currently licensed by the state, and (3) proscribe the performance of any abortion by a person who was not a physician as so defined. The court observed that a state has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest extends to the performing physician and the physician's staff, to the availability of aftercare, and to adequate provision for any complication or emergency that might arise, the court said.

In Akron v Akron Center for Reproductive Health, Inc. (1983) 462 US 416, 76 L Ed 2d 687, 103 S Ct 2481, ovrld on other grounds by Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791, the court, recognizing that, to insure the safety of the abortion procedure, the states may mandate that only physicians perform abortions, held that it is permissible for states to impose criminal sanctions on the performance of an abortion by a nonphysician. The court indicated that requiring that abortions be performed by medically competent personnel helped to insure maximum safety for pregnant women.

See Cheaney v Indiana (1973) 410 US 991, 36 L Ed 2d 189, 93 S Ct 1516, holding that where a petitioner, who was not a physician, had been convicted for violating a state abortion statute and was challenging the statute as unconstitutional, the petition for certiorari would be denied for want of standing of the petitioner.

[b] As violative of right to privacy

The Supreme Court has concluded that prosecutions for abortions conducted by nonphysicians do not infringe upon the constitutional right of privacy.

Concluding that prosecutions for abortions conducted by nonphysicians infringe upon no realm of personal privacy secured, by the Constitution, against state interference, and that as pregnancy progresses, the ever increasing state interest in maternal health provides additional justification for such prosecutions, the court, in Connecticut v Menillo (1975) 423 US 9, 46 L Ed 2d 152, 96 S Ct 170, held that, as applied to the performance of abortions by nonphysicians, a state statute that made criminal any person's attempted abortion that was not necessary to preserve the life of the pregnant woman or her fetus was not unconstitutional. Vacating a judgment that had overturned a nonphysician's conviction under the statute, the court indicated that only if an abortion performed during the early stages of pregnancy was performed by medically competent personnel under conditions insuring maximum safety for the pregnant woman would the abortion be as safe for the woman as would normal childbirth at term.

§ 24. Physician's standard of care with respect to preserving life or health

[a] Of pregnant woman—as unconstitutionally vague

It has been held by the Supreme Court that a statute making it unlawful to perform any abortion that was not necessary for the preservation of the pregnant woman's life or health was not unconstitutionally vague, where the court said that construing the statute to permit abortions for physical or mental health reasons accorded with the modern understanding of the word "health."

In United States v Vuitch (1971) 402 US 62, 28 L Ed 2d 601, 91 S Ct 1294, it was held that a District of Columbia abortion statute, which made it unlawful to perform an abortion unless the abortion was "necessary for the preservation of the mother's life or health," was not unconstitutionally vague. Reversing a Federal District Court judgment which had held the statute to be unconstitutionally vague, the Supreme Court rejected the District Court's conclusion that the word "health" in the statute was so imprecise that it failed to inform a defendant of the charge against him, so as to make the statute violative of due process. Rejecting the District Court's view that the term "health" was vague because there was no indication whether it included varying degrees of mental as well as physical health, the Supreme Court stated that the statute could be construed to permit abortions for both physical and mental health reasons, whether or not a patient had a previous history of mental defects; that such a construction accorded with the general usage and modern understanding of the word "health," which included psychological as well as physical well-being; that viewed in this light, the term "health" presented no problem of vagueness; and that whether a particular operation was necessary for a patient's physical or mental health was a judgment which physicians were obviously called upon to make routinely whenever surgery was considered.

[b] —As violative of constitutional presumption of innocence

With respect to the contention that a statute which made it unlawful to perform any abortion unless the abortion was necessary to preserve a pregnant woman's life or health violated the constitutional presumption of innocence by requiring proof that an abortion performed by the accused fell within the statutory exception, the Supreme Court has held that the statute (1) would be construed to require proof that the abortion did not fall within the statutory exception, and (2) as so construed, was not subject to challenge as violating the constitutional presumption.

Reversing—on the ground that a District of Columbia abortion statute was not unconstitutionally vague (see § 24[a], supra)—a Federal District Court's dismissal of an indictment of a physician for producing and attempting to produce abortions in violation of the statute, the Supreme Court in United States v Vuitch (1971) 402 US 62, 28 L Ed 2d 601, 91 S Ct 1294, held that the District Court had erroneously interpreted the statute, which made it unlawful to perform an abortion unless the abortion was "necessary for the preservation of the pregnant woman's life or health," as providing that once it was proved that a physician had performed an abortion, the physician was presumed guilty of violating the statute and remained guilty unless a jury could be persuaded that the physician's acts had been necessary to preserve the pregnant woman's life or health. The Supreme Court observed that a statute which outlawed only a limited category of abortions but "presumed" guilt whenever the mere fact of abortion was established would at the very least present serious constitutional problems under the Supreme Court's previous decisions interpreting the Fifth Amendment. The Supreme Court concluded that, under the District of Columbia abortion statute, (1) Congress did not intend that a physician who had performed an abortion be required to prove his innocence, and (2) the burden was on the prosecution to plead and prove that an abortion was not necessary to preserve the pregnant woman's life or health.

[c] Of fetus—as unconstitutional generally

In the following cases, the Supreme Court has held that a particular state statutory provision imposing on a physician a certain standard of care with respect to preserving the life or health of an aborted fetus was unconstitutional.

The court, in Planned Parenthood of Cent. Missouri v Danforth (1976) 428 US 52, 49 L Ed 2d 788, 96 S Ct 2831, affirmed a judgment holding unconstitutional a state statutory requirement that (1) no person who performed or induced an abortion should fail to exercise that degree of professional skill, care, and diligence to preserve the life and health of the fetus that such a person would be required to exercise to preserve the life and health of any fetus intended to be born and not aborted, and (2) any physician or person who assisted in an abortion and failed to take such measures to encourage or sustain the life of the child, resulting in the death of the child, would be deemed guilty of manslaughter and be liable in an action for damages. The court held that, by failing to specify that the imposed duty of care need be taken only after the state of viability had been reached, the statute impermissibly required a physician to preserve the life and health of a fetus no matter what the stage of pregnancy was. The fact that the second part of the statutory provision referred to a criminal penalty where a physician failed to take the required measures to encourage or sustain the life of a "child," resulting in the death of the "child," did not modify the duty imposed by the previous part of the provision or limit that duty to pregnancies that had reached the stage of viability, the court concluded.

In Thornburgh v American College of Obstetricians & Gynecologists (1986) 476 US 747, 90 L Ed 2d 779, 106 S Ct 2169, ovrld on other grounds by Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791, the court, referring to the undesirability of a tradeoff between a pregnant woman's health and fetal survival, affirmed a judgment holding that a state statutory provision concerning the degree of care to be exercised with respect to a postviability abortion was unconstitutional because the language of the provision was not susceptible to a construction that did not require a pregnant woman to bear an increased medical risk in order to save her viable fetus. The statutory provision required that (1) any person performing an abortion after a fetus had been determined to be viable was to exercise the degree of professional skill, care, and diligence that the person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted, and (2) the abortion technique employed was to be that which would provide the best opportunity for the fetus to be aborted alive unless such a technique would present a significantly greater risk to the life or health of the pregnant woman than would another available technique.

[d] —As unconstitutionally vague

The Supreme Court has held that a particular state statute's standard of care requiring, in aborting a potentially viable fetus, the exercise of the degree of professional skill, care, and diligence to preserve the life and health of the fetus that would be required to preserve the life and health of any fetus intended to be born was unconstitutionally vague.

Affirming a judgment invalidating a state statute's provisions imposing a particular standard of care upon a physician with respect to preserving the life or health of an aborted fetus that was viable or potentially viable, the court, in Colautti v Franklin (1979) 439 US 379, 58 L Ed 2d 596, 99 S Ct 675, held that the provisions, for violation of which the statute imposed civil and criminal sanctions, were unconstitutionally vague. The provisions required that every person performing or inducing an abortion, if determining that the fetus "is viable or . . . may be viable," (1) exercise the degree of professional skill, care, and diligence to preserve the life and health of the fetus that the person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted, and (2) employ the abortion technique that would provide the best opportunity for the fetus to be aborted alive, so long as a different technique was not necessary to preserve the life or health of the pregnant woman. The court commented that as a matter of due process, a criminal statute is void for vagueness if it (1) fails to give a person of ordinary intelligence fair notice that the person's contemplated conduct is forbidden by the statute, or (2) is so indefinite that it encourages arbitrary and erratic arrests and convictions. The court said that the provisions were ambiguous because of the uncertainty whether the phrase "may be viable" simply referred to viability or referred to an undefined "gray" area prior to the stage of viability. By conditioning potential criminal liability on confusing and ambiguous criteria, the statute presented serious problems of notice, discriminatory application, and a chilling effect on the exercise of constitutional rights, the court said. Noting that there was disagreement among medical authorities about the relative merits and safety of different abortion procedures, the court commented that the statute did not clearly specify that a pregnant woman's life and health always had to prevail over the life and health of the fetus when these interests conflicted. The court, pointing out that there was uncertainty whether the statute permitted a physician to consider the physician's duty to the patient to be paramount to the physician's duty to the fetus or required the physician to make a tradeoff between the woman's health and additional percentage points of fetal survival, held that where conflicting duties of this magnitude are involved, before a state may subject a physician to possible criminal sanctions, the state, at the least, must proceed with greater precision than had the state in this statute. In addition, the court said that the statute's lack of any scienter requirement with respect to the standard of care provision exacerbated the uncertainty of the statute.

§ 25. Prohibition of particular method of abortion

Concluding that a state statute's outright proscription of the use of saline amniocentesis as an abortion method after the first 12 weeks of pregnancy was an unreasonable or arbitrary regulation that inhibited the vast majority of abortions after that stage of pregnancy, the Supreme Court has determined that such a proscription was unconstitutional, where it was not shown that safer methods of abortion were available in the state.

A state statutory provision prohibiting the use of saline amniocentesis as a method or technique of abortion after the first 12 weeks of pregnancy was held to be unconstitutional in Planned Parenthood of Cent. Missouri v Danforth (1976) 428 US 52, 49 L Ed 2d 788, 96 S Ct 2831, in which the court reversed a judgment holding that the provision was valid. The statute described the saline amniocentesis method as one whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac, and the statute imposed the prohibition of this method of abortion on the ground that the method was deleterious to maternal health. The court commented that (1) the use of saline amniocentesis was a nationally accepted medical procedure that was employed in a substantial majority of postfirst-trimester abortions and resulted in a maternal mortality rate that was lower than the maternal mortality rate in childbirth, (2) no evidence had been offered that the potentially safer abortion method using a prostaglandin injection was available in the state, and (3) the statute's reference to the insertion of a saline or other fluid appeared to include within the statute's proscription the intra-amniotic injection of prostaglandin itself as well as other abortion methods that might be developed in the future and might prove highly effective and completely safe. The court said that, by not prohibiting abortion techniques that were many times more likely than was the saline amniocentesis method to result in maternal death, the statutory provision, as a practical matter, had forced a woman and her physician to fulfill the woman's desire for an abortion by terminating her pregnancy by methods that were more dangerous to her health than was the method outlawed by the statute. As so viewed, the statute's outright proscription of saline amniocentesis was an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks of pregnancy, the court concluded.

§ 26. Requiring presence of second physician during performance of abortion

[a] When viability is possible

A state statutory provision requiring that a physician who intended to abort a potentially viable fetus arrange for a second physician to be present during the performance of the abortion has been held by the Supreme Court to be unconstitutional, where the provision contained no express exception for medical emergencies and evinced no intent to protect a pregnant woman whose life might be at risk.

In Thornburgh v American College of Obstetricians & Gynecologists (1986) 476 US 747, 90 L Ed 2d 779, 106 S Ct 2169, ovrld on other grounds by Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791, the court affirmed a judgment holding unconstitutional a state statutory provision requiring that a physician who intended to perform an abortion, and had determined that there was a possibility that the fetus that was to be aborted would be viable, arrange for a second physician to be present while the abortion was being performed. Noting that the statutory provision contained no express exception for medical emergencies and evinced no intent to protect a pregnant woman whose life might be at risk, the court said that the existence of medical-emergency exceptions elsewhere in the statute required the conclusion that the omission of such an exception in the provision in question was intentional. The court stated that, under these circumstances, all factors were present for chilling the performance of a late abortion, and that a late abortion, more than one performed at an earlier date, perhaps tended to be performed under emergency conditions.

[b] After viability occurs

The Supreme Court has determined that a state statutory requirement that, in addition to the physician performing an abortion on a viable fetus, a second physician be present during the performance of the abortion was not unconstitutional, because the state had a compelling interest in preserving life.

In Planned Parenthood Assn. v Ashcroft (1983) 462 US 476, 76 L Ed 2d 733, 103 S Ct 2517, the court, reversing the portion of a judgment that had invalidated a state statutory requirement that, in addition to the physician performing an abortion, a second physician be present during abortions being performed on a viable fetus, held that the requirement was not unconstitutional, because the state had a compelling interest in preserving life. Under the statute, the second physician was to take control of and provide immediate medical care for a child born as a result of an abortion.

§ 27. Prohibition of public employee involvement in performance of abortion

[a] As violative of due process rights

The Supreme Court, noting that a state statutory prohibition against public employees' performance or assistance in the performance of any abortion not necessary to save the life of a pregnant woman placed no governmental obstacle in the path of a woman choosing to have an abortion, held that the prohibition did not violate the Fourteenth Amendment's due process clause.

In Webster v Reproductive Health Services (1989) 492 US 490, 106 L Ed 2d 410, 109 S Ct 3040, the court determined that state statutory provisions prohibiting public employees within the scope of their employment from performing or assisting an abortion not necessary to save the life of the mother did not violate the Fourteenth Amendment's due process guarantees, because (1) the state's decision to use public employees to encourage childbirth over abortion placed no governmental obstacle in the path of a woman who chose to terminate her pregnancy and left a pregnant woman with the same choices as if the state had chosen not to operate any public hospitals; (2) the prohibition restricted a woman's ability to obtain an abortion only to the extent that she chose to use a physician affiliated with a public hospital, which circumstance is more easily remedied, and thus is considerably less burdensome, than indigency, which may make it difficult, or perhaps impossible, for some women to obtain abortions without public funding; and (3) nothing in the Federal Constitution requires states to be in the business of performing abortions, and a state need not commit any resources to facilitating abortions even if it can turn a profit by doing so (infra § 34[a]). The court indicated that given that a state's refusal to fund abortions is not unconstitutional, it would strain logic to hold that a state's refusal to use public employees to perform or assist abortions is unconstitutional, and the court reversed a judgment under which enforcement of the statutory provisions prohibiting public employees from performing or assisting abortions had been enjoined on the ground that the provisions violated the due process provisions of the Fourteenth Amendment.

[b] As violative of equal protection rights

A city's general prohibition of hospital staffs' performance of abortions in city-owned hospitals has been determined by the Supreme Court not to violate indigent women's equal protection rights under the Constitution.

Reversing a judgment holding that a city-owned hospital's staffing practices and the city's policy with respect to abortions violated indigent women's equal protection rights under the Constitution, the court in Poelker v Doe, 432 US 519, 53 L Ed 2d 528, 97 S Ct 2391, held that the city's prohibition of hospital staffs' performance of abortions in city-owned hospitals except where there was a threat of grave physiological injury or death to the pregnant woman was not unconstitutional, where the hospital in question staffed its obstetrics-gynecology clinic with physicians and medical students from the faculty and student body of a medical school that was institutionally opposed to abortion.

C. Other Regulations

§ 28. Requirements as to disposal of fetal remains as violative of physician's due process rights

The requirement, under a city ordinance, that any physician who performed an abortion had to insure that the fetal remains were disposed of in a humane and sanitary manner has been held by the Supreme Court to violate the constitutional due process guarantees by failing to give a physician fair notice that the physician's contemplated conduct was forbidden.

In Akron v Akron Center for Reproductive Health, Inc. (1983) 462 US 416, 76 L Ed 2d 687, 103 S Ct 2481, ovrld on other grounds by Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791, the court, affirming a judgment invalidating the provision of a city ordinance requiring that any physician performing or inducing an abortion had to insure that the remains of the fetus were disposed of in a humane and sanitary manner, held that the provision violated the due process guarantees of the Constitution, because the provision failed to give a physician fair notice that the physician's contemplated conduct was forbidden. The phrase "humane and sanitary" suggested a possible intent to mandate some sort of decent burial of an embryo at the earliest stages of formation, the court said, and the court added that the level of uncertainty as to the purpose of the provision was fatal where criminal liability was imposed for violation of the provision.

§ 29. Record keeping and reporting requirements

[a] Held valid

In the following cases, the Supreme Court has determined that certain state statutory record keeping and reporting requirements with respect to the performance of abortions in the state were not unconstitutional.

The court affirmed a judgment holding that a state statute's provisions imposing record keeping and reporting requirements on health facilities and physicians with respect to abortions regardless of the stage of pregnancy at which the abortion was performed were not unconstitutional, in Planned Parenthood of Cent. Missouri v Danforth (1976) 428 US 52, 49 L Ed 2d 788, 96 S Ct 2831. Under the statute, each such facility and physician was to be supplied with forms that had the purpose of (1) preserving maternal health and life through the compilation of data relevant to maternal health and life, and (2) monitoring abortions to assure that they were done in accordance with the law. The statute provided that the information on the forms was confidential and would be used only for statistical purposes, but that local, state, or national public health officers could inspect and acquire health data from the records, which were to be kept for 7 years in the permanent files of the health facility at which the abortion had been performed. The court said that, although the record keeping and reporting provisions perhaps approached impermissible limits, they were not constitutionally offensive in themselves. Record keeping of the kind required under the statute, if not abused or overdone, could be useful to a state's interest in protecting the health of its female citizens, and might be a resource that was relevant to decisions involving medical experience and judgment, the court said. The court recognized, with respect to abortions, that record keeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible, and the court indicated that this principle is particularly strong after the first stage of pregnancy, because after this stage a state may enact substantive as well as record keeping regulations that are reasonable means of protecting the health of a pregnant woman. The court concluded, in light of the statute's confidentiality requirements and its not unreasonable 7-year record retention requirement, that the record keeping and reporting requirements had no legally significant impact or consequence on the abortion decision or on the physician-patient relationship.

Reversing the portion of a judgment invalidating a state statutory requirement that a pathology report be filed for each abortion performed in the state, the court, in Planned Parenthood Assn. v Ashcroft (1983) 462 US 476, 76 L Ed 2d 733, 103 S Ct 2517, held that the requirement did not unconstitutionally burden a pregnant woman's abortion decision. The statute required that a pathologist who examined a tissue sample that was removed at the time of an abortion file a copy of the tissue report with the state division of health and provide a copy of the report to the abortion facility or hospital in which the abortion was performed, and that the report be made a part of the patient's permanent record, where state law required pathology examinations of surgically removed tissue.

In Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791, the court held that the record keeping and reporting requirements of a state abortion statute did not violate the due process clause of the Federal Constitution's Fourteenth Amendment, where the statute, which in no event required revealing of the identity of a woman who had undergone an abortion, provided that (1) every facility performing abortions was required to file a report stating the facility's name and address as well as the name and address of any related entity; (2) such information, when it came from state-funded institutions, became public; and (3) for each abortion, a report had to be filed specifying such information as (a) the performing physician, (b) the facility, (c) the referring physician or agency, (d) the pregnant woman's age, (e) the number of prior pregnancies and abortions had by the woman, (f) gestational age, (g) the type of abortion procedure, (h) the date of the abortion, (i) whether there were any pre-existing medical conditions that would have complicated pregnancy, (j) the basis for the determination that the abortion was medically necessary, and (k) the weight of the aborted fetus. Although the eight Justices of the Supreme Court who agreed with this holding were unable to agree on an opinion, four of the Justices expressed the view that the statutory requirements related to maternal health and did not pose a substantial obstacle to a woman's choice as to whether to terminate a pregnancy, and the other four Justices expressed the view that the requirements rationally furthered the state's legitimate interests in medical knowledge concerning maternal health and prenatal life, in gathering statistical information concerning patients, and in assuring compliance with other provisions of the abortion statute.

[b] Held invalid

The Supreme Court has held that certain state statutory provisions requiring the reporting of information with respect to the performance of abortions in the state were unconstitutional.

In Thornburgh v American College of Obstetricians & Gynecologists (1986) 476 US 747, 90 L Ed 2d 779, 106 S Ct 2169, ovrld on other grounds by Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791, the court affirmed a judgment holding that state statutory provisions requiring the reporting of certain information with respect to an abortion were unconstitutional, where the required information included information that was not reasonably directed to the preservation of the health of the pregnant woman. The provisions required, with respect to an abortion performed after the first trimester of pregnancy, that a physician report the basis for his or her determination that the child was not viable. The provisions also required that the attending physician file a report including (1) identification of the performing and referring physicians and of the abortion facility or agency; (2) information regarding the pregnant woman's political subdivision and state of residence, age, race, marital status, and number of prior pregnancies; (3) the date of the woman's last menstrual period and the probable gestational age of the fetus; (4) the basis for any judgment that a medical emergency existed; (5) the basis for any determination of nonviability; and (6) the method of payment for the abortion. The required reports, although claimed by the state not to be public records, were available to the public for inspection and copying, and there was no limit on the use to which the state or public copiers could put the reports. The court determined that the scope of information required to be reported and the public availability of the reports belied any assertions by the state that the reports advanced any legitimate state interest. The court commented that, although the statutory provisions did not specifically require the reporting of the name of a woman who had an abortion, public identification based on the reported information was likely and was the obvious purpose of the statutory reporting requirements. The requirements raised the spectre of harassment of women who, with their physician, chose to exercise the right to end a pregnancy, the court said, and the court concluded that the requirements imposed an unacceptable danger of deterring the exercise of that right.

The court in Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791, held that a state statutory provision requiring that facilities performing abortions report a married woman's reason for failure to notify her husband of her decision to obtain an abortion violated the Fourteenth Amendment's due process clause. Although the five Justices of the Supreme Court who agreed with this holding were unable to agree on an opinion, four of the Justices expressed the view that the provision by, in effect, requiring women, as a condition of obtaining an abortion, to provide the state with the precise information that many women had pressing reasons not to reveal, placed an undue burden on a woman's choice whether to terminate a pregnancy; and the other Justice expressed the view that the state's abortion restrictions should be subjected to strict scrutiny, and that under this standard, the state's statutory requirements concerning reporting of abortion-related information had to be invalidated.

§ 30. Prohibition of advertisements concerning abortion services as violative of First Amendment rights of free speech and press

The Supreme Court has held that a state criminal statute that prohibited the sale or circulation of any publication to encourage abortion unconstitutionally infringed upon the First Amendment free speech and press rights of a newspaper editor who was prosecuted under the statute for publishing an advertisement by an out-of-state organization that offered services relating to obtaining legal abortions in the state in which the organization was located.

In Bigelow v Virginia (1975) 421 US 809, 44 L Ed 2d 600, 95 S Ct 2222, 1 Media L R 1919, the court held that a state statute that made it a misdemeanor, by the sale or circulation of any publication, to encourage or prompt the procuring of an abortion unconstitutionally infringed upon the First Amendment rights of free speech and press of a newspaper editor who was prosecuted under the statute for publishing an advertisement from an out-of-state organization that offered services related to obtaining legal abortions in the state in which the organization was located. The advertisement stated that the organization would help women with unwanted pregnancies to obtain immediate placement in accredited hospitals and clinics at low cost, would make all arrangements on a strictly confidential basis, and would help the pregnant woman with information and counseling. Reversing a judgment that had upheld the editor's conviction, the court said that the advertisement, rather than simply proposing a commercial transaction, contained factual material of clear public interest, and that portions of the advertisement's message, most prominently in the lines that abortions were legal in the state in which the organization was located and that there was no residency requirement for obtaining an abortion in the state, involved the exercise of the freedom of communicating information and disseminating opinion. Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the law of another state, and to readers seeking to change the law of the prosecuting state—the court said. Moreover, the court said that the mere existence of the organization that placed the advertisement and the availability of the services offered by the organization were not unnewsworthy, that the activity advertised pertained to constitutional interests, and thus that the editor's First Amendment interests coincided with the constitutional interests of the general public. The court noted that the prosecuting state could neither regulate the advertiser's activity in the advertiser's state nor prevent residents of the prosecuting state from traveling to the advertiser's state to obtain the advertised services. Commenting that there was no possibility that the editor's activity would invade the privacy of other citizens of the prosecuting state or infringe on other rights of those citizens, the court indicated that the strength of the editor's First Amendment interest was augmented by the fact that the statute was applied against the editor as publisher and editor of a newspaper, rather than being applied against the advertiser, an abortion referral agency, or an abortion practitioner.

VI. Specifying Type of Facility in Which Abortion May be Performed

§ 31. Generally

In the following cases, the Supreme Court, in light of a state's legitimate interest in insuring maximum safety for a woman who has an abortion, indicated that it is not unconstitutional for a state to impose certain requirements, including licensing requirements, as to the facility in which an abortion may be performed.

In Roe v Wade (1973) 410 US 113, 35 L Ed 2d 147, 93 S Ct 705, reh den 410 US 959, 35 L Ed 2d 694, 93 S Ct 1409, the court indicated that after the first trimester of pregnancy, it is constitutionally permissible for a state to impose requirements as to the facility in which an abortion may be performed and as to the licensing of such a facility. The court observed that a state has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient, and that this interest extends to the facilities involved in the performance of an abortion.

To similar effect are Doe v Bolton (1973) 410 US 179, 35 L Ed 2d 201, 93 S Ct 739, reh den 410 US 959, 35 L Ed 2d 694, 93 S Ct 1410; and Akron v Akron Center for Reproductive Health, Inc. (1983) 462 US 416, 76 L Ed 2d 687, 103 S Ct 2481, ovrld on other grounds by Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791.

> ☆CAUTION: In Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791, the Supreme Court rejected the trimester framework that the court established and applied in Roe v Wade, supra, and applied in later cases, to determine the constitutionality of state regulation of abortion, where (1) three Justices of the Supreme Court adhered to the essential holding of Roe v Wade but expressed the view that the trimester framework was not part of the essential holding, and (2) four Justices expressed the view that Roe v Wade was wrongly decided and should be overruled.

§ 32. Requirement that abortions be performed in hospital only

In the following cases, the Supreme Court has held that a law providing that any abortion subsequent to a specified stage of pregnancy had to be performed in a hospital was unconstitutional, because the provision unreasonably infringed upon a woman's constitutional right to have an abortion.

In Doe v Bolton (1973) 410 US 179, 35 L Ed 2d 201, 93 S Ct 739, reh den 410 US 959, 35 L Ed 2d 694, 93 S Ct 1410, the court, determining that a state statutory requirement that an abortion be performed only in a hospital accredited by the Joint Commission on Accreditation of Hospitals (JCAH) was not based on differences which were reasonably related to the purposes of the statute in which the requirement was found, held that the requirement violated the Fourteenth Amendment. It was noted that (1) a mass of data had been presented purporting to demonstrate that some facilities other than hospitals were entirely adequate to perform abortions, and (2) the state had not presented persuasive data to show that only hospitals met the state's acknowledged interest in insuring the quality of abortions and the full protection of patients having abortions. Referring to information indicating that only 54 of the state's 159 counties had a JCAH-accredited hospital, the court indicated that the state had to show more than it had shown in order to prove that only the full resources of a licensed hospital, rather than those of some other appropriately licensed institution, satisfied the state's health interests with respect to abortions. Moreover, the court concluded that because the statutory requirement at issue failed to exclude the first trimester of pregnancy, the requirement was also invalid under Roe v Wade (1973) 410 US 113, 35 L Ed 2d 147, 93 S Ct 705, reh den 410 US 959, 35 L Ed 2d 694, 93 S Ct 1409, which established that a woman has a constitutional right to have an abortion without governmental interference during the first trimester of pregnancy.

> ☆CAUTION: In Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120

L Ed 2d 674, 112 S Ct 2791, the Supreme Court rejected the trimester framework that the court established and applied in Roe v Wade, and applied in later cases, to determine the constitutionality of state regulation of abortion, where (1) three Justices of the Supreme Court adhered to the essential holding of Roe v Wade but expressed the view that the trimester framework was not part of the essential holding, and (2) four Justices expressed the view that Roe v Wade was wrongly decided and should be overruled.

In Akron v Akron Center for Reproductive Health, Inc. (1983) 462 US 416, 76 L Ed 2d 687, 103 S Ct 2481, ovrld on other grounds by Planned Parenthood of Southeastern Pennsylvania v Casey (1992, US) 120 L Ed 2d 674, 112 S Ct 2791, the court, relying on Doe v Bolton, supra, held that a provision of a city ordinance requiring that any abortion performed subsequent to the end of the first trimester of pregnancy had to be performed in a hospital—which was defined by the ordinance as a general hospital, or a special hospital devoted to gynecology or obstetrics, which was accredited by the Joint Commission on Accreditation of Hospitals or by the American Osteopathic Association—was unconstitutional, because the provision, by having the effect of inhibiting the vast majority of abortions after the first 12 weeks of pregnancy, unreasonably infringed upon a woman's constitutional right to obtain an abortion. Noting that accreditation by these organizations required compliance with comprehensive standards governing a wide variety of health and surgical services, the court commented that a part of the ordinance not under review distinguished between a hospital and an outpatient clinic, and that the ordinance thus prevented the performance of abortions in outpatient facilities that were not part of an acute-care, full-service hospital The court said that a second-trimester hospitalization requirement might significantly limit a woman's ability to obtain an abortion, given that (1) there was testimony that a second-trimester abortion would cost more than twice as much in a hospital as in a clinic, (2) second-trimester abortions were rarely performed in hospitals in the city, and (3) thus, a second-trimester hospitalization requirement might force women to travel to find available facilities, resulting in both financial expense and additional health risk. Since the time of the Supreme Court's decision in Roe v Wade (1973) 410 US 113, 35 L Ed 2d 147, 93 S Ct 705, reh den 410 US 959, 35 L Ed 2d 694, 93 S Ct 1409, the safety of second-trimester abortions had increased dramatically, and the American Public Health Association had abandoned its prior recommendation of hospitalization for all second-trimester abortions, the court stated. Referring to evidence that, at least during the early weeks of the second trimester, abortions could be performed by the "Dilation and Evacuation" procedure as safely in an outpatient clinic as in a full-service hospital, the court concluded that by preventing the performance of abortions by this procedure in an appropriate nonhospital setting, the city had imposed a heavy and unnecessary burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure. The court reversed the portion of a judgment that upheld the validity of the hospitalization requirement of the ordinance.

In Planned Parenthood Assn. v

Ashcroft (1983) 462 US 476, 76 L Ed 2d 733, 103 S Ct 2517, the court, affirming the part of a judgment invalidating a state statutory requirement that every abortion performed after the first 12 weeks of pregnancy be performed in a hospital, held that the requirement was unconstitutional, because—for the reasons stated by the Supreme Court with respect to a similar requirement in Akron v Akron Center for Reproductive Health, supra—the requirement unreasonably infringed upon a woman's constitutional right to have an abortion, where the court said that the state's failure to define the term "hospital" in the state's statutory provisions regulating abortions required the court to assume that the term had its common meaning of a general, acute-care facility.

§ 33. Requirement that abortions be performed in either hospital or licensed clinic

The Supreme Court has held that a requirement, under a state statute, that second-trimester abortions be performed only in hospitals licensed by the state was not unconstitutional, where, in addition to including full-service hospitals, the term "hospital" in the statute included outpatient surgical hospitals or clinics that had been licensed as hospitals by the state.

In Simopoulos v Virginia (1983) 462 US 506, 76 L Ed 2d 755, 103 S Ct 2532, the court held that a state's statutory requirement that second-trimester abortions be performed only in hospitals licensed by the state was not unconstitutional, where, in addition to including full-service hospitals, the term "hospital" in the statute included outpatient surgical hospitals or clinics that had been licensed as hospitals by the state. The court affirmed a judgment upholding a conviction for performing a second-trimester abortion at a clinic at a time when the clinic was not licensed and a license had not been sought for the clinic. Observing that the state had a legitimate interest in regulating the abortions and setting forth the standards for facilities in which the abortions were performed, and that the statutory requirement, on its face, appeared to be generally compatible with accepted medical standards governing outpatient second-trimester abortions, the court said that the requirement was not an unreasonable means of furthering the state's compelling interest in protecting a pregnant woman's health and safety.

§ 34. Prohibition of use of public facility for performance of abortions

[a] As violative of due process rights

A state statute's general prohibition of the use of any public facility for the purpose of performing or assisting in the performance of an abortion has been determined by the Supreme Court not to violate the due process clause of the Fourteenth Amendment, given that the prohibition left a pregnant woman with the same choices as if the state had chosen not to operate any public hospitals.

Reversing a judgment under which enforcement of state statutory provisions prohibiting the use of any public facility for the purpose of performing or assisting in the performance of an abortion not necessary to save the life of the mother had been enjoined on the ground that the provisions violated the due process clause of the Fourteenth Amendment, the court, in Webster v Reproductive Health Services (1989)

492 US 490, 106 L Ed 2d 410, 109 S Ct 3040, held that the statutory provisions were not unconstitutional. The court said that, rather than placing any governmental obstacle in the path of a woman who chose to terminate her pregnancy, the state's decision to use public facilities to encourage childbirth over abortion left a pregnant woman with the same choices as if the state had chosen not to operate any public hospitals. The court noted that the statutory provisions restricted a woman's ability to obtain an abortion only to the extent that she chose to use a physician affiliated with a public hospital, which restriction is more easily remedied than indigency, which may make it difficult, or perhaps impossible, for some women to obtain abortions without public funding. The Constitution does not require states to be in the business of performing abortions, and a state is not required to commit any resources to facilitating abortions, even if the state can turn a profit by doing so, the court said. The court observed that given that a state's refusal to fund abortions was not unconstitutional (§ 35, infra), it would strain logic to hold that a state's refusal to use public facilities for the performance or assistance of the performance of abortions was unconstitutional.

[b] As violative of equal protection rights

The Supreme Court has held that a city's prohibition of the performance of abortions in city-owned hospitals except where there was a threat of grave physiological injury or death to the pregnant woman did not violate indigent women's equal protection rights under the Constitution.

In Poelker v Doe, 432 US 519, 53 L Ed 2d 528, 97 S Ct 2391, the court determined that a city's prohibition—through its mayor's policy directive—of the performance of abortions in city-owned hospitals except where there was a threat of grave physiological injury or death to the pregnant woman did not violate indigent women's equal protection rights under the Constitution. Commenting that the policy instituted by the mayor was subject to public debate and approval or disapproval at the polls, the court said that the Constitution does not forbid a state or city, pursuant to democratic processes, from expressing a preference for normal childbirth, as the city in this case had done. The court reversed a judgment that had invalidated the city's abortion policy.

VII. Public Funding

§ 35. Generally

The Supreme Court has indicated, in the following cases, that the Constitution requires neither states nor the federal government to pay for abortions.

In Maher v Roe (1977) 432 US 464, 53 L Ed 2d 484, 97 S Ct 2376, the court held that the Constitution imposes no obligation on the states to pay the abortion expenses of indigents, but that, when a state decides to alleviate some of the hardships of poverty by providing medical care, the manner in which the state dispenses benefits is subject to constitutional limitations.

The Supreme Court, in Harris v McRae (1980) 448 US 297, 65 L Ed 2d 784, 100 S Ct 2671, reh den 448 US 917, 65 L Ed 2d 1180, 101 S Ct 39, said that the federal government has no constitutional obligation to pay for indigent women's abortions. Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress, not a matter of constitutional entitlement, the court concluded.

In Webster v Reproductive Health Services (1989) 492 US 490, 106 L Ed 2d 410, 109 S Ct 3040, the court indicated that the Constitution does not require a state to commit any resources to facilitating abortions.

But see Williams v Zbaraz (1979) 442 US 1309, 60 L Ed 2d 1033, 99 S Ct 2095, wherein an individual United States Supreme Court Justice, as Circuit Justice—denying applications for a stay, pending appeal to the Supreme Court, of a Federal District Court order enjoining a state from refusing to fund, under its medical assistance programs, medically necessary abortions performed prior to viability—said that whether or not a state was obligated, under the Constitution, to fund the abortions of pregnant women who were eligible for state medical assistance programs, and for whom abortions were medically necessary, the meaningful exercise of the women's constitutional right to choose to have an abortion depended on the actual availability of abortions.

§ 36. Particular state or local laws denying public funding as violative of equal protection rights

In the following cases, the Supreme Court has held that a particular state or local prohibition against the provision of public funding for abortions did not violate the equal protection clause of the Federal Constitution's Fourteenth Amendment.

In Maher v Roe (1977) 432 US 464, 53 L Ed 2d 484, 97 S Ct 2376, the court held that a state welfare regulation limiting state Medicaid benefits for first-trimester abortions to those benefits that were medically necessary—which term was defined with respect to the regulation to include psychiatric necessity—did not violate the equal protection clause of the Fourteenth Amendment where, in participating in the Medicaid program of the Social Security Act (42 USCS §§ 1396 et seq.), the state generally subsidized the medical expenses of needy persons incident to pregnancy and childbirth. The state enforced the benefits limitation through a system under which, in order to obtain authorization for a Medicaid-funded first-trimester abortion, the hospital or clinic in which the abortion was to be performed had to submit a certificate from the pregnant woman's attending physician stating that the abortion was medically necessary. The court, reversing a judgment enjoining the state from requiring such a certificate of medical necessity, said that (1) indigent women desiring abortions do not constitute a constitutionally suspect class; (2) the state's exclusion of funding for nontherapeutic abortions did not impinge upon the constitutional right of a woman to decide whether to terminate her pregnancy free from unduly burdensome interference, given that the state regulation placed no obstacles, absolute or otherwise, in a pregnant woman's path to an abortion, in light of the fact that the indigency that might make it difficult, and in some cases, perhaps, impossible, for some women to have abortions was neither created nor in any way affected by the regulation; and (3) the state unquestionably had a strong and legitimate interest in encouraging normal childbirth, which interest was rationally furthered by the regulation.

In Poelker v Doe (1977) 432 US 519, 53 L Ed 2d 528, 97 S Ct 2391, the court held that, for reasons set forth by the Supreme Court in Maher v Roe, supra, a city's election, through a policy directive of its mayor, to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions did not violate indigent women's equal protection rights under the Constitution. The court reversed a judgment that had invalidated the city's policy.

Vacating a judgment enjoining enforcement of a state statute prohibiting state medical assistance payments for all abortions except those that, in the opinion of a physician, were necessary to preserve the life of the pregnant woman, the court in Williams v Zbaraz (1980) 448 US 358, 65 L Ed 2d 831, 100 S Ct 2694, reh den 448 US 917, 65 L Ed 2d 1180, 101 S Ct 38, and reh den 448 US 917, 65 L Ed 2d 1180, 101 S Ct 39, and reh den 448 US 917, 65 L Ed 2d 1180, 101 S Ct 39, held that the statute did not violate the equal protection clause of the Fourteenth Amendment. The court said that the argument that the state's funding of medically necessary services generally but not of certain medically necessary abortions violated the equal protection clause, was foreclosed by the Supreme Court's decision in Harris v McRae, infra § 37[c], that the withholding of federal funding for certain medically necessary abortions did not violate the equal protection component of the Fifth Amendment.[24]

§ 37. Hyde Amendment denying federal funding under Medicaid program

[a] As unconstitutionally vague

The Supreme Court has held that various versions of the Hyde Amendment—which refers to the annual prohibitions, either by amendment to the annual appropriations bill for the Department of Health and Human Services (formerly known as the Department of Health, Education, and Welfare) or by joint resolution, enacted by Congress beginning in 1976, against the use of any federal funds to reimburse the cost of abortions under the Social Security Act's Medicaid program (42 USCS §§ 1396 et seq.) except under certain specified circumstances—were not unconstitutionally vague, despite the variance in scope under the different versions of the Hyde Amendment.

In Harris v McRae (1980) 448 US 297, 65 L Ed 2d 784, 100 S Ct 2671, reh den 448 US 917, 65 L Ed 2d 1180, 101 S Ct 39, the court, reversing a judgment invalidating, on constitutional grounds, all three versions of the Hyde Amendment that had been enacted as of the time of the judgment, held that the Hyde Amendment, with its variance in scope under its various versions, was not unconstitutionally vague. In response to the argument that physicians might be unable to understand or implement the Hyde Amendment's exceptions under which abortions were reimbursable by federal Medicaid funds, the court noted that (1) the sanction provision under the Medicaid program of the Social Security Act (42 USCS §§ 1396 et seq.) contained a clear scienter requirement under which good-faith errors were not penalized, and (2) in any event, the exceptions to the Hyde Amendment were set out in terms that the ordinary person exercising ordinary common sense could sufficiently understand and comply with without sacrifice to the public interest.

---

[24] See, however, Williams v Zbaraz (1979) 442 US 1309, 60 L Ed 2d 1033, 99 S Ct 2095, in which an individual United States Supreme Court Justice, as Circuit Justice, denying applications by a state and two physicians for a stay—in a Federal District Court action challenging a state law denying reimbursement, under the state's medical assistance programs, for medically necessary abortions—pending appeal to the Supreme Court of an order of the District Court enjoining the state from refusing funds under the programs for medically necessary abortions performed prior to viability, said that under the District Court's judgment, women would be free to decide whether to have an abortion, while a stay of the judgment would, for many women, render meaningless their constitutional right to so choose. The Justice, referring to the District Court's finding that the failure to perform medically necessary abortions at issue in the case might subject pregnant woman to severe medical problems or death, observed that, in these circumstances, the loss of a meaningful right to choose to have an abortion might be particularly grievous.

[b] As violative of First Amendment's establishment of religion clause

The Supreme Court has held that the fact that the funding restrictions in the Hyde Amendment, which generally prohibited the use of federal Medicaid funding for abortions, accorded with the religious tenets of the Roman Catholic Church did not place the Hyde Amendment in violation of the proscription, under the Federal Constitution's First Amendment, of laws respecting an establishment of religion.

Reversing a judgment invalidating, on constitutional grounds, all three versions of the Hyde Amendment that had been enacted as of the time of the judgment, the court, in Harris v McRae (1980) 448 US 297, 65 L Ed 2d 784, 100 S Ct 2671, reh den 448 US 917, 65 L Ed 2d 1180, 101 S Ct 39, held that the Hyde Amendment did not violate the First Amendment's establishment of religion clause. The court commented that, although neither a state nor the federal government can constitutionally pass laws which aid one or all religions or prefer one religion over another, it does not follow that a statute violates the establishment of religion clause merely by coinciding or harmonizing with the tenets of some or all religions. The court said that, although the Hyde Amendment might coincide with the doctrines of the Roman Catholic Church concerning the sinfulness of abortion and the time at which life commences, the Hyde Amendment was as much a reflection of traditionalist values toward abortion as it was an embodiment of the views of any particular religion.

[c] As violative of Fifth Amendment's equal protection guarantees

It has been held by the Supreme Court that the Hyde Amendment, which generally prohibited the use of federal Medicaid funding for abortions, did not violate the equal protection guarantees of the Federal Constitution's Fifth Amendment.

The court, in Harris v McRae (1980) 448 US 297, 65 L Ed 2d 784, 100 S Ct 2671, reh den 448 US 917, 65 L Ed 2d 1180, 101 S Ct 39, reversing a judgment invalidating, on constitutional grounds, all three versions of the Hyde Amendment—which generally prohibits federal Medicaid funding for abortions—that had been enacted as of the time of the judgment, held that the Hyde Amendment, in not permitting federal reimbursement of all medically necessary abortion expenses despite the fact that federal Medicaid reimbursement was available for medically necessary services generally, did not violate the equal protection guarantees of the Constitution's Fifth Amendment. Indicating that poverty, standing alone, was not a constitutionally suspect classification, and that the Hyde Amendment was facially neutral as to age, the court said that the Hyde Amendment was not predicated on a constitutionally suspect classification and bore a rational relationship to the federal government's legitimate interest in protecting potential human life by encouraging childbirth except in the most urgent circumstances.

[d] As violative of right to liberty under Fifth Amendment's due process clause

Concluding that the Hyde Amendment did not place any governmental obstacle in the path of a woman choosing to terminate her pregnancy, the Supreme Court has held that the Hyde Amendment did not violate indigent women's right to liberty existing under the due process clause of the Federal Constitution's Fifth Amendment.

In Harris v McRae (1980) 448 US 297, 65 L Ed 2d 784, 100 S Ct 2671, reh den 448 US 917, 65 L Ed 2d 1180, 101 S Ct 39, the court, reversing a judgment invalidating, on constitutional grounds, all three versions of the Hyde Amendment that had been enacted as of the time of the judgment, held that the Hyde Amendment, in restricting the availability of certain medically necessary abortions under the Medicaid program, did not violate indigent women's right to liberty existing under the First Amendment's due process clause. The court observed that the Hyde Amendment placed no governmental obstacle in the path of a woman who chose to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encouraged alternative activity deemed to be in the public interest. Stating that the financial constraints restricting an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice with respect to an abortion were the product not of governmental restrictions on access to abortions, but rather of the woman's indigency, the court said that the Hyde Amendment left an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all. Moreover, the court said that the Hyde Amendment did not penalize the exercise of a woman's choice to terminate a pregnancy by abortion, and that, because the constitutional entitlement of a physician who administers medical care to an indigent woman is no broader than that of the patient, the amendment did not violate the due process rights of a physician who advised a Medicaid recipient to obtain a medically necessary abortion.

§ 38. Federal regulations limiting abortion-related activities of Title X recipients

[a] As violative of First Amendment's free speech clause

Department of Health and Human Services regulations limiting abortion-related activities of family planning projects funded under Title X of the Public Health Service Act (42 USCS §§ 300-300a-41) have been held by the Supreme Court not to violate the rights, under the free speech clause of the First Amendment, of either private health care organizations that received Title X funds, their staff, or their patients.

In Rust v Sullivan (1991, US) 114

L Ed 2d 233, 111 S Ct 1759, the court held that certain Department of Health and Human Services regulations (42 CFR §§ 59.2, 59.8, 59.9, and 59.10)—specifying, with respect to Title X of the Public Health Service Act (42 USCS §§ 300-300a-41), which authorizes the Secretary of Health and Human Services to make grants to, and enter into contracts with, public or nonprofit private entities to assist in family planning projects, that projects receiving Title X funds (1) may not provide counseling concerning the use of abortion, or referral for abortion, as a method of family planning, (2) may not engage in activities that encourage, promote, or advocate abortion as a method of family planning, and (3) must be organized so that they are physically and financially separate from prohibited abortion activities—did not impose viewpoint-discriminatory conditions on a government subsidy, so as to violate the rights, under the free speech clause of the First Amendment, of either private health care organizations that received Title X funds, their staff, or their patients. Affirming a judgment upholding the constitutionality of the regulations, the court said that (1) the 42 USCS § 300a-6 provision that Title X funds not be used in programs in which abortion is a method of family planning, which provision the regulations implemented, was constitutional, (2) to hold that the government unconstitutionally discriminates on the basis of viewpoint by funding a program dedicated to advancing certain permissible goals would render numerous government programs constitutionally suspect, (3) neither § 300a-6 nor the regulations barred abortion referral or counseling involving a woman whose pregnancy placed her life in imminent peril, (4) the regulations, which did not penalize speech funded by non-Title X moneys, were narrowly tailored to fit Congress' intent in Title X that federal funds not be used to promote or advocate abortion as a method of family planning, and (5) the regulations did not significantly impinge upon the doctor-patient relationship. The court observed that Title X grantees and their employees were free to pursue abortion-related activities that were independent of Title X, and that the regulations did not raise the sort of grave and doubtful constitutional questions that would lead to the assumption that Congress did not intend to authorize their issuance.

[b] As violative of Fifth Amendment's due process clause

The Supreme Court has determined that Department of Health and Human Services regulations limiting abortion-related activities of family planning projects funded under Title X of the Public Health Service Act (42 USCS §§ 300-300a-41) did not violate women's rights under the due process clause of the Fifth Amendment.

Affirming a judgment upholding the constitutionality of certain Department of Health and Human Services regulations (42 CFR §§ 59.2, 59.8, 59.9, and 59.10)—specifying, with respect to Title X of the Public Health Service Act (42 USCS §§ 300-300a-41), which authorizes the Secretary of Health and Human Services to make grants to, and enter into contracts with, public or nonprofit private entities to assist in family planning projects, that projects receiving Title X funds (1) may not provide counseling concerning the use of abortion, or referral for abortion, as a method of family planning, (2) may not engage in activities that encourage, promote, or advocate abortion as a method of family planning, and (3) must be organized so that they are physically and financially separate from prohibited abortion activities—the Supreme Court in Rust v Sullivan (1991, US) 114 L Ed 2d 233, 111 S Ct 1759, held that the regulations did not violate a woman's rights under the due process clause of the Fifth Amendment. The court observed that (1) Congress' refusal to fund abortion counseling and advocacy under Title X left a pregnant woman with the same choices as if the Federal Government had chosen not to fund family planning services at all, (2) the regulations did not violate a woman's right to medical self-determination and to make informed medical decisions free of government-imposed harm, because a doctor's ability to provide, and a woman's right to receive, information concerning abortion and abortion-related services outside the context of Title X remained unfettered, and (3) the financial constraints that restricted an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice were the product not of governmental restrictions on access to abortion, but rather of her indigency.

Consult POCKET PART in this volume for later case service

OHIO, Appellant

v

AKRON CENTER FOR REPRODUCTIVE HEALTH et al.

Reported in this volume: p 405, supra.

Holding: Fourteenth Amendment held not violated by Ohio statute prohibiting abortion on minor absent either (1) parental notice, (2) parental consent, (3) judicial bypass, or (4) judicial inaction.

Annotation: p 879, supra.

BRIEFS AND APPEARANCES OF COUNSEL

Rita S. Eppler, Assistant Attorney General of Ohio, of Columbus, Ohio, argued the cause and, with **Anthony J. Celebrezze, Jr.,** Attorney General, and **Thomas J. O'Connell** and **Suzanne E. Mohr,** Assistant Attorneys General, all also of Columbus, Ohio, filed briefs for appellant:

A statute that requires only parental notification of a minor's abortion decision need not contain a judicial bypass procedure to comply with the due process clause of the Fourteenth Amendment.

The judicial bypass procedure provided by the Ohio parental notification statute is consistent with the dictates of this court and insures the due process rights of a minor seeking an abortion without parental notification.

The Ohio statute's requirements that a physician notify one parent of a minor's abortion decision imposes no undue burden under the due process clause of the Fourteenth Amendment.

Linda R. Sogg, of Cleveland, Ohio, argued the cause and, with **Dara Klassel, Roger Evans, Barbara E. Otten,** and **Eve W. Paul,** all of New York City, filed a brief for appellee:

Laws that require parental notification of a minor's abortion decision must provide a procedure to bypass the requirement for mature minors and those who would be harmed by parental involvement.

The Ohio judicial bypass procedure fails to meet constitutional standards.

The Ohio statute's bypass procedure violates the minor's right to procedural due process.

The physician notice requirement significantly burdens a minor's right to abortion and, standing alone, renders the entire statute unconstitutional.

Peggy M. Coleman filed a brief for American Family Association, Inc. as amicus curiae urging reversal; **Ann-Louise Lohr, Paige Comstock Cunningham,** and **Kent Masterson Brown** filed a brief for Association of American Physicians and Surgeons as amicus curiae urging reversal; **Mark N. Troobnick, Jordan W. Lorence, Cimron Campbell,** and **Wendell R. Bird** filed a brief for Concerned Women for America as amicus curiae urging reversal; **Brendan V. Sullivan, Kevin J. Hasson, W. Patrick Donlin,** and **Carl A. Anderson** filed a brief for the Knights of Columbus as amicus curiae urging reversal; **Mark E. Chopko** filed a brief for the United States Catholic Conference as amicus curiae urging reversal; and **Patrick J. Perotti, David F. Forte, John Makdisi,** and **Joseph Meissner** filed a brief for Representative Jerome S. Luebbers et al. as amici curiae urging reversal.

Kathleen Sullivan, Susan R. Estrich, Barbara Jordan, and **Estelle H. Rogers** filed a brief for 274 Organizations in Support of Roe v Wade as amicus curiae urging affirmance; **Carter G. Phillips, Elizabeth H. Esty, Mark E. Haddad, Ann E. Allen, Stephan E. Lawton, Laurie R. Rockett,** and **Joel I. Klein** filed a brief for the American College of Obstetricians and Gynecologists et al. as amici curiae urging affirmance; and **Donald N. Bersoff, Susan R. Podolsky,** and **Mark D. Schnieder** filed a brief for the American Psychological Association et al. as amici curiae urging affirmance.

Rhonda Copelon, Joan P. Gibbs, Sara Rios, and **Nadine Taub** filed a brief for American Indian Health Care Association et al. as amici curiae; **H. Robert Showers** and **Richard M. Campanelli** filed a brief for Focus on the Family et al. as amici curiae; **Lynn D. Wardle** filed a brief for Save America's Youth, Inc. as amicus curiae; and **Hannah E. M. Lieberman** and **Pamela H. Anderson** filed a brief for 13 Individual Members of the Panel on Adolescent Pregnancy and Childbearing or the Committee on Child Development Research and Public Policy as amicus curiae.

HORACIO ALVARADO, Petitioner

v

UNITED STATES

Reported in this volume: p 439, supra.

Holding: Federal Court of Appeals' judgment rejecting federal defendant's claim that prosecution improperly challenged black jurors remanded for reconsideration in light of Solicitor General's recognition of error.

METRO BROADCASTING, INC., Petitioner

v

FEDERAL COMMUNICATIONS COMMISSION et al. (No. 89-453)

ASTROLINE COMMUNICATIONS COMPANY LIMITED PARTNERSHIP, Petitioner

v

SHURBERG BROADCASTING OF HARTFORD, INC., et al. (No. 89-700)

Reported in this volume: p 445, supra.

Holding: FCC's minority preference policies with regard to applications for new broadcast licenses and "distress sales" of licenses held not to violate equal protection component of Fifth Amendment.

BRIEFS AND APPEARANCES OF COUNSEL

Gregory H. Guillot, of Washington, D.C., argued the cause and, with **John H. Midlen, Jr.,** also of Washington, D.C., filed briefs for petitioner in No. 89-453:

The FCC's race-, ethnic-, and gender-based preference policies violate the equal protection component of the due process clause of the Constitution of the United States of America.

Congress' 1988, 1989, and 1990 Appropriations Acts exceeded congressional authority under § 5 of the Fourteenth Amendment and violated the equal protection principles embodied in the due process clause of the Fifth Amendment to the Constitution.

J. Roger Wollenberg, of Washington, D.C., argued the cause and, with **Lee H. Simowitz, Edward Hayes, Jr.,** and **Linda R. Bocchi,** all also of Washington, D.C., filed briefs for petitioner in No. 89-700:

The distress sale policy of the FCC is narrowly tailored to advance the compelling interest in diversity of expression in broadcasting.

Daniel M. Armstrong, of the Federal Communications Commission, Washington, D.C., argued the cause and, with **Robert L. Pettit, Renee Licht,** and **C. Grey Pash, Jr.,** all also of the Federal Communications Commission, Washington, D.C., filed a brief for respondent Federal Communications Commission in No. 89-453:

The minority enhancement policy reflects a deliberate and considered congressional choice.

The minority enhancement credit serves the compelling governmental interests of promoting diversity in broadcast programming and remedying discrimination.

The minority enhancement credit is narrowly tailored to achieve its intended goal.

Margot Polivy, of Washington, D.C., argued the cause and, with **Katrina Renouf,** also of Washington, D.C., filed a brief for respondent Rainbow Broadcasting Company in No. 89-453:

The minority enhancement policy is a constitutionally legitimate exercise of the Commission's judicially approved statutory mandate to advance the collective First Amendment right of the viewing and listening public to programming from diverse sources.

The minority enhancement policy satisfies the demands of prevailing equal protection scrutiny whether considered in light of its unique First Amendment imperative or its more traditional remedial purpose.

Harry F. Cole, of Washington, D.C., argued the cause and filed a brief for respondent Shurberg Broadcasting of Hartford, Inc. in No. 89-700:

Race-based governmental policies can be sustained only if they are narrowly tailored to achieve a compelling interest which is either clearly and particularly remedial in nature or necessary to address a clear and present threat to the public welfare.

The minority distress sale policy is not intended to remedy any identified discrimination and it is not, in any event, narrowly tailored to effect any such remedy.

Program diversity is not a compelling interest sufficient to legitimize the minority distress sale policy and, in any event, that policy is not narrowly tailored to accomplish the goal of program diversity.

The Court of Appeals did not improperly disregard any action of the Congress.

Robert L. Pettit, of the Federal Communications Commission, Washington, D.C., with **Daniel M. Armstrong** and **C. Grey Pash, Jr.,** both also of the Federal Communications Commission, Washington, D.C., filed a brief for respondent Federal Communications Commission in No. 89-700, under Court Rule 12.4, in support of petitioner:

The Federal Communications Commission's minority distress sale policy does not violate the equal protection component of the Fifth Amendment.

Acting Solicitor General **John G. Roberts, Jr.,** Acting Assistant Attorney General **James P. Turner,** Deputy Solicitor General **Thomas W. Merrill,** Deputy Assistant Attorney General **Roger Clegg,** and **Michael R. Lazerwitz** filed a brief for the United States as amicus curiae urging reversal in No. 89-453; **Charles J. Cooper, Michael A. Carvin, Susan E. Morley,** and **Michael E. Kennedy** filed a brief for Associated General Contractors of America, Inc. as amicus curiae urging reversal in No. 89-453; **Ronald D. Maines** filed a brief for Galaxy Communications, Inc. as amicus curiae urging reversal in No. 89-453; **William Perry Pendley** and **Gary N. Herbert** filed a brief for Mountain States Legal Foundation et al. as amici curiae urging reversal in No. 89-453; **Ronald A. Zumbrun, Anthony T. Caso,** and **Sharon L. Browne** filed a brief for Pacific Legal Foundation as amicus curiae urging reversal in No. 89-453; and **Glen D. Nager, Patricia A. Dunn, Daniel J. Popeo, Paul D. Kamenar,** and **John C. Scully** filed a brief for the Washington Legal Foundation as amicus curiae urging reversal in No. 89-453.

Vincent A. Pepper, Louis C. Stephens, and **Thomas A. Hart, Jr.** filed a brief for the Committee to Promote Diversity as amicus curiae urging reversal in No. 89-700.

Burt Nueborne, Steven R. Shapiro, John A. Powell, Russell Pearce, Rolando T. Acosta, Helen R. Nueborne, and **Sarah E. Burns** filed a brief for the American Civil Liberties Union et al. as amici curiae urging affirmance in No. 89-453 and reversal in No. 89-700; **David E. Honig, Herbert H. Henderson, Brian J. Carter, Willie Abrams, Eduardo Peña, Squire Padgett, George W. Jones, Verna L. Williams, Robert Sedler,** and **Grant David Ward** filed a brief for the Congressional Black Caucus et al. as amici curiae urging affirmance in No. 89-453 and reversal in No. 89-700; **Lois E. Wright, James L. Winston, Walter E. Diercks, Desmond P. Brown,** and **Cherri Branson** filed a brief for the National Association of Black Owned Broadcasters, Inc. et al. as amici curiae urging affirmance in No. 89-453 and reversal in No. 89-700; and **J. Clay Smith, Erroll D. Brown, Cynthia R. Mabry,** and **Lisa C. Wilson** filed a brief for the National Bar Association as amicus curiae urging affirmance in No. 89-453 and reversal in No. 89-700.

Michael Davidson, Ken U. Benjamin, Jr., Morgan J. Frankel, and **Claire M. Sylvia** filed a brief for the United States Senate as amicus curiae urging affirmance in No. 89-453; **Angela J. Campbell, Louis M. Seidman,**

Jean D. Larosiliere, Andrew Jay Schwartzman, Gigi B. Sohn, Elliot Mincberg, and **Anthony L. Pharr** filed a brief for American Jewish Committee et al. as amici curiae urging affirmance in No. 89-453; **J. Roger Wollenberg, Joel Rosenbloom, Carl Willner, Stephen A. Weiswasser,** and **Sam Antar** filed a brief for Capital Cities/ABC, Inc. as amicus curiae urging affirmance in No. 89-453; **Vernon E. Jordan, Jr., Daniel Joseph, James P. Denvir, Elizabeth Haile Hayes,** and **Cynthia A. Young** filed a brief for Cook Inlet Region, Inc. et al. as amici curiae urging affirmance in No. 89-453; **Douglas B. McFadden, Donald J. Evans, William J. Sill,** and **William D. Goddard** filed a brief for Giles Television, Inc. as amicus curiae urging affirmance in No. 89-453; **John Payton, Mark S. Hersh, Michael C. Small, Robert F. Mullen, David S. Tatel, Norman Redlich, Barbara R. Arnwine,** and **Paul Holtzman** filed a brief for Lawyers' Committee for Civil Rights Under Law as amicus curiae urging affirmance in No. 89-453; **Julius L. Chambers, Charles Stephen Ralston, Ronald L. Ellis, Eric Schnapper, Clyde E. Murphy,** and **Nolan A. Bowie** filed a brief for the NAACP Legal Defense & Education Fund, Inc. as amicus curiae urging affirmance in No. 89-453; and **Benna Ruth Solomon, Richard A. Simpson, Eleni M. Constantine,** and **Sharon R. Vinick** filed a brief for the National League of Cities et al. as amici curiae urging affirmance in No. 89-453.

Acting Solicitor General **John G. Roberts, Jr.,** Acting Assistant Attorney General **James P. Turner,** Deputy Solicitor General **Thomas W. Merrill,** Deputy Assistant Attorney General **Roger Clegg,** and **Michael R. Lazerwitz** filed a brief for the United States as amicus curiae urging affirmance in No. 89-700; **Ronald A. Zumbrun, Anthony T. Caso,** and **Sharon L. Browne** filed a brief for Pacific Legal Foundation as amicus curiae urging affirmance in No. 89-700; and **Robert L. Barr, Jr., G. Stephen Parker,** and **Robert B. Baker, Jr.** filed a brief for Southeastern Legal Foundation, Inc. as amicus curiae urging affirmance in No. 89-700.

Richard P. Holme, Miriam C. Kircher, and **Dawnee H. Giammittorio** filed a brief for American Women in Radio and Television, Inc. as amicus curiae in No. 89-453; and **Michael P. McDonald** and **M. Miller Baker** filed a brief for Jerome Thomas Lamprecht as amicus curiae in No. 89-453.

JEFFREY ALAN WALTON, Petitioner
v
ARIZONA

Reported in this volume: p 511, supra.

Holding: Arizona capital sentencing statute providing for finding of aggravating and mitigating circumstances by trial court held valid; statutory aggravating circumstance held not unconstitutionally vague.

Annotation: p 947, infra.

BRIEFS AND APPEARANCES OF COUNSEL

Timothy K. Ford, of Seattle, Washington, argued the cause and, with **Denise I. Young,** of Tempe, Arizona, filed briefs for petitioner:

The Arizona capital punishment scheme denies defendants on trial for their life the right to have a jury determine the fact of their guilt of a capital offense.

The application of the heinous, cruel, or depraved factor in this case exemplifies its standardlessness.

Paul J. McMurdie, Assistant Attorney General of Arizona, of Phoenix, Arizona, argued the cause and, with **Robert K. Corbin** Attorney General, and **Jessica Gifford Funkhouser,** both also of Phoenix, Arizona, filed a brief for respondent:

Because aggravating circumstances are not elements of the offense, and are instead sentencing factors that apply only after the defendant has been convicted, the Sixth Amendment does not require that the state provide a jury trial on the aggravating circumstances.

The Arizona sentencing procedure that requires a defendant to prove the existence of mitigation by a preponderance of the evidence does not violate due process as it does not lessen the state's burden to prove every element of the crime.

The Arizona sentencing procedure that requires the sentencer to impose death if it determines there is insufficient mitigation to warrant leniency does not create a mandatory or presumptive death penalty.

John A. Powell, Michael Laurence, Welsh S. White, and **Randy Hertz** filed a brief for the American Civil Liberties Union et al. as amici curiae urging reversal.

Ernest S. Preate, Jr., Attorney General of Pennsylvania, **Robert A. Graci,** Chief Deputy Attorney General, and **Mary Benefield Seiverling** Deputy Attorney General, and the following attorneys for their respective jurisdictions filed a brief for the Commonwealth of Pennsylvania et al. as amici curiae: **John J. Kelly,** Chief State's Attorney of Connecticut, **Robert Butterworth,** Attorney General of Florida, **James T. Jones,** Attorney General of Idaho, **Neil F. Hartigan,** Attorney General of Illinois, **Robert T. Stephan,** Attorney General of Kansas, **Frederic J. Cowan,** Attorney General of Kentucky, **Michael C. Moore,** Attorney General of Mississippi, **William L. Webster,** Attorney General of Missouri, **Marc Racicot,** Attorney General of Montana, **Brian McKay,** Attorney General of Nevada, **John P. Arnold,** Attorney General of New Hampshire, **Hal Stratton,** Attorney General of New Mexico, **Lacy H. Thornburg,** Attorney General of North Carolina, **Anthony J. Celebrezze, Jr.,** Attorney General of Ohio, **Robert H. Henry,** Attorney General of Oklahoma, **Roger A. Tellinghuisen,** Attorney General of South Dakota, **Kenneth O. Eikenberry,** Attorney General of Washington, and **Joseph B. Meyer,** Attorney General of Wyoming.

ANNOTATION

VALIDITY OF DEATH PENALTY, UNDER FEDERAL CONSTITUTION, AS AFFECTED BY CONSIDERATION OF AGGRAVATING OR MITIGATING CIRCUMSTANCES—SUPREME COURT CASES

by

John E. Theuman, J.D.

I. Preliminary Matters

§ 1. Introduction
  [a] Scope
  [b] Related matters
§ 2. Background and summary

II. Aggravating Circumstances

A. In General

§ 3. Necessity of statutory aggravating circumstances

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

21 Am Jur 2d, Criminal Law §§ 609, 628; 40 Am Jur 2d, Homicide § 556

Annotations: See the related matters listed in the annotation.

9 Federal Procedure, L Ed, Criminal Procedure § 22:925

21 Am Jur Proof of Facts 2d 645, Expert Testimony at Sentencing

7 Am Jur Trials 477, Homicide

USCS, Constitution, Amendments 8, 14

L Ed Digest, Criminal Law §§ 82, 83, 93; Evidence §§ 850, 851.3; Jury § 33

L Ed Index, Capital Offenses and Punishment; Cruel and Unusual Punishment; Mitigation or Aggravation of Punishment; Sentence or Punishment

Index to Annotations, Capital Offenses and Punishment; Cruel and Unusual Punishment; Mitigation or Aggravation of Punishment; Sentence and Punishment

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

Consult POCKET PART in this volume for later case service

§ 4. Consideration of nonstatutory aggravating circumstances
    [a] Propriety of considering nonstatutory circumstances
    [b] Prejudicial effect of improperly considering nonstatutory circumstances
§ 5. Jury consideration of aggravating circumstances
    [a] Necessity of jury finding
    [b] Effect of advisory jury's consideration of invalid circumstance
§ 6. Effect of appellate invalidation of aggravating circumstance

B. PARTICULAR STATUTORY AGGRAVATING CIRCUMSTANCES

§ 7. Vileness, heinousness, or cruelty of offense
    [a] Circumstance held valid
    [b] Circumstance held invalid as construed or applied
§ 8. Concurrent capital offenses
§ 9. Creation of great risk of death to many persons
§ 10. Defendant's prior criminal record
    [a] Generally
    [b] Effect of reversal of prior conviction
§ 11. Defendant's future dangerousness
    [a] Generally
    [b] Admissibility of psychiatric testimony
§ 12. Defendant's escape from custody
§ 13. Miscellaneous circumstances

III. MITIGATING CIRCUMSTANCES

A. IN GENERAL

§ 14. Necessity of consideration of mitigating circumstances or evidence
    [a] Generally
    [b] Defendant's difficult childhood; mental or emotional problems
    [c] Defendant's adjustment to prison; potential for rehabilitation
    [d] Jury's residual doubt as to guilt
    [e] Miscellaneous circumstances
§ 15. Relevancy of mitigating evidence, generally
§ 16. Validity of statutory mitigating circumstances
§ 17. Necessity of jury finding as to mitigating circumstances
§ 18. Burden of proof as to mitigating circumstances

B. VALIDITY OF PARTICULAR ALLEGED RESTRICTIONS ON CONSIDERATION OF MITIGATING CIRCUMSTANCES OR EVIDENCE

§ 19. Restriction to statutory mitigating circumstances
§ 20. Unanimous finding requirement
§ 21. Hearsay rules
§ 22. Instructional descriptions or examples of mitigating circumstances
§ 23. Instruction against influence of sympathy

IV. INTERACTION OF AGGRAVATING AND MITIGATING CIRCUMSTANCES

§ 24. Generally

INDEX

Abuse during childhood, § 14[b]
Adjustment to prison, § 14[c]
Advisory verdict, §§ 5, 19
Age of defendant, §§ 14[a, b, e], 16, 19, 22
Aggravating circumstances, §§ 3-13
Alcohol, influence of, § 14[e]
Appellate invalidation of aggravating circumstance, § 6
Armed robbery, §§ 9, 10[a]
Assault with intent to commit rape, § 10[b]
Assistance of counsel, § 14[b]
Atrocious offense, §§ 4, 6, 7
Automatic appeal of death sentences, § 7[a]
Background and family history, §§ 14[a, b], 19, 22
Background and summary, § 2
Balancing aggravating and mitigating factors, §§ 6, 24
Burden of proof and presumptions, §§ 18, 24
Burglary, §§ 7[a], 10[a], 12
Capacity to conform conduct to requirements of law, § 16
Character of accused, mitigating circumstances, generally, §§ 14[a], 22
Childhood history, §§ 14[a, b], 19, 22
Coercion or duress, §§ 14[a], 22
Concurrent capital offenses, § 8
Criminal record, §§ 4[b], 6, 10, 14[e], 16, 19, 22
Cruel and unusual punishment, §§ 3 et seq.
Cruelty, §§ 4, 6, 7
Dangerousness, future, §§ 4[b], 11, 14[b-d]
Deliberateness of action, §§ 14[b-d]
Depravity, §§ 6, 7
Doubt as to guilt, § 14[d]
Drugs, influence of, § 14[e]
Drug transactions, § 14[a]
Due process, §§ 6, 7[b], 8, 13, 21
Duress or coercion, §§ 14[a], 22
Eighth Amendment, §§ 3 et seq.
Element of crime, aggravating circumstance which duplicates, § 9
Emotional disturbance or problems, §§ 7[a], 13, 14[a, b, e], 16, 22
Enjoyment of killing or suffering, § 7
Escape, §§ 6, 12
Examples of mitigating circumstances, instructions to jury, § 22
Expert testimony, § 11[b]
"Extreme" disturbance or duress, as precluding consideration of lesser degrees, § 22
Family history and childhood, §§ 14[a, b], 19, 22
Finding by jury, necessity, §§ 5, 6, 15, 17, 20
First Amendment, §§ 11[a], 14[a]
Fourteenth Amendment, §§ 5[a], 6, 7[a], 14[a, b], 17, 18, 21-24
Future dangerousness, §§ 4[b], 11, 14[b-d]
Gang, membership in racist gang, §§ 11[a], 14[a]
Getaway car, defendant in, § 14[a]
Guilt, jury's residual doubt as to, § 14[d]
Harmless error, §§ 4[b], 6, 14[a]
Hearsay rules, § 21
Heinousness, §§ 4, 6, 7
Homicide, §§ 3-14, 16, 18-24
Hypothetical questions, § 11[b]
Indifference to suffering of victim, § 7
Instructions, examples of mitigating circumstances, § 22
Intent to cause death, §§ 14[a, e]
Interaction of aggravating and mitigating circumstances, § 24
Intoxication, § 14[e]
Introduction to annotation, § 1
Jury finding, §§ 5, 6, 15, 17, 20
Jury's residual doubt as to guilt, § 14[d]
Jury trial right, § 13
Kidnapping, §§ 3, 4, 7[a], 8, 9, 11[a], 14[a], 24
Mandatory death sentences, §§ 14[e], 24
Membership in racist prison gang, §§ 11[a], 14[a]
Mental or emotional disturbance or problems, §§ 7[a], 13, 14[a, b, e], 16, 22
Mental retardation or deficiency, §§ 14[a, b]
Minor role in offense, §§ 14[a, e], 16
Mitigating circumstances, §§ 14-23
Moral justification for conduct, reasonable belief in, § 14[e]
Murder, §§ 3-12, 14, 16, 18-24
Nonstatutory aggravating circumstances, generally, § 4
Nonstatutory mitigating circumstances, generally, §§ 14[c, e], 19
Outrageously or wantonly vile, horrible, or inhuman, § 7
Pleasure in killing or suffering, § 7
Political affiliation as aggravating circumstance, § 13
Preliminary matters, §§ 1, 2
Preponderance of evidence, §§ 18, 20
Presumptions and burden of proof, §§ 18, 24
Prior criminal record, §§ 4[b], 6, 10, 14[e], 16, 19, 22
Prison gang, membership in, §§ 11[a], 14[a]
Prison record, § 14[c]
Proportionality of sentence to crime, § 6
Provocation, §§ 14[a, b]
Psychiatric testimony, § 11[b]
Race as aggravating circumstance, § 13
Racial motive of crime, § 4[a]
Racist prison gang, membership in, §§ 11[a], 14[a]
Rape, §§ 3, 6-8, 10[b], 11[a], 14[c]
Record, criminal, §§ 4[b], 6, 10, 14[e], 16, 19, 22
Record, prison, § 14[c]
Rehabilitation potential, §§ 14[c], 19
Related matters, § 1[b]

Relevancy of mitigating evidence, generally, § 15
Religion as aggravating circumstance, § 13
Reversal of prior conviction in other state, § 10[b]
Reweighing by appellate court of aggravating and mitigating circumstances, §§ 5[a], 6, 14[a], 17
Risk of death, creation of, §§ 4, 7[a], 9
Robbery, §§ 6, 7[a], 9, 10[a], 14[a], 24
Scope of annotation, § 1[a]
Serious assaultive criminal convictions, history of, §§ 6, 7[a], 10[a]
Sexual offenses, §§ 3, 6, 8, 10[b], 11[a], 14[c]
Sixth Amendment jury trial provision, §§ 5[a], 17
Sodomy, § 8
Spontaneous statement against interest, § 21
Statutory aggravating circumstances, generally, § 3
Statutory mitigating circumstances, generally, §§ 16, 19
Strangling, § 7[a]
Substantial history of serious assaultive criminal convictions, §§ 6, 7[a], 10[a]
Summary, § 2
Surrender to authorities, voluntary, §§ 14[e], 19
Sympathy, instruction against, § 23
Threat to society, §§ 11, 14[b]
Torture, § 7
Unanimity, mitigating circumstances, §§ 15, 20
Vagueness, §§ 5[b], 6, 7, 9, 10[a], 11[a], 16
Validity of statutory mitigating circumstances, § 16
Victim inducing or facilitating offense, § 14[a]
Vileness, § 7
Voluntary surrender to authorities, §§ 14[e], 19
White racist prison gang, membership in, §§ 11[a], 14[a]
Witnesses, murder of, § 9

I. Preliminary Matters

§ 1. Introduction

[a] Scope

This annotation[1] collects and analyzes the decisions of the United States Supreme Court which have determined the validity, under the Federal Constitution,[2] of the death penalty, as affected by the manner in which courts or juries have considered, or have been required or permitted to consider, "aggravating" circumstances[3] supposedly supporting the imposition of the death penalty, or "mitigating" circumstances supposedly weighing against such a penalty.

[b] Related matters

Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed or carried out. 90 L Ed 2d 1001.

---

[1] The present annotation supersedes §§ 18-26 of the annotation at 90 L Ed 2d 1001, entitled "Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed or carried out."

[2] Cases in this annotation deal primarily with the cruel and unusual punishment clause of the Federal Constitution's Eighth Amendment, the due process clause of the Fourteenth Amendment, or the jury trial clause of the Sixth Amendment; but cases in which questions as to the validity of a death sentence, though relating to the consideration of aggravating or mitigating circumstances, depend upon an analysis of prior proceedings under the double jeopardy clause of the Federal Constitution's Fifth Amendment, involve distinctive considerations and are therefore not included in this annotation. As to the Supreme Court's views on double jeopardy, generally, see the annotations at 95 L Ed 2d 924, regarding state prosecutions, and 50 L Ed 2d 830, regarding federal prosecutions.

Except to the extent necessary to discuss the constitutionality of the consideration of aggravating and mitigating circumstances in capital sentencing proceedings, this annotation does not discuss (1) questions as to the standard of review which a federal court should apply when reviewing the validity of state-imposed death sentences on petitions for writs of habeas corpus or similar collateral relief; or (2) rules as to the availability of such relief.

[3] In addition to cases discussing aggravating or mitigating "circumstances," the present annotation includes cases employing such variant terms as aggravating or mitigating "factors" or "evidence."

Federal constitutional guaranty against cruel and unusual punishment—Supreme Court cases. 33 L Ed 2d 932.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant committed murder while under sentence of imprisonment, in confinement or correctional custody, and the like—post-Gregg cases. 67 ALR4th 942.

Sufficiency of evidence, for death penalty purposes, to establish statutory aggravating circumstance that murder was committed in course of committing, attempting, or fleeing from other offense, and the like—post-Gregg cases. 67 ALR4th 887.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed for pecuniary gain, as consideration or in expectation of receiving something of monetary value, and the like—post-Gregg cases. 66 ALR4th 417.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant was previously convicted of or committed other violent offense, had history of violent conduct, posed continuing threat to society, and the like—post-Gregg cases. 65 ALR4th 838.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that in committing murder, defendant created risk of death or injury to more than one person, to many persons, and the like—post-Gregg cases. 64 ALR4th 837.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed to avoid arrest or prosecution, to effect escape from custody, to hinder governmental function or enforcement of law, and the like—post-Gregg cases. 64 ALR4th 755.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was heinous, cruel, depraved, or the like—post-Gregg cases. 63 ALR4th 478.

◆

Homan, The Juvenile Death Penalty: Counsel's Role in the Development of a Mitigation Defense. 53 Brooklyn L Rev 767 (Fall 1987).

Williams, Mitigating Evidence After Deere: Will a Defendant Proceeding In Propria Persona Be Required to Present Mitigating Evidence During the Penalty Phase of a Capital Trial? 24 Cal W L Rev 363 (1987-1988).

Sondheimer, A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing. 41 Hastings L J 409 (January 1990).

Rosen, The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard. 64 NC L Rev 941 (June 1986).

§ 2. Background and summary

The death penalty is irrevocable and is thus different from all other punishments which modern society metes out to its criminal offenders. This unique quality, and the value which American culture places upon human life, have made the use of capital punishment a subject of bitterly emotional controversy, between those who believe that it is the only effective way to demonstrate society's revulsion at and determination to end the scourge of violent crime, and those who believe that it is a false solution and morally equivalent to murder. Although many of these battles have been fought in the political arena, the foes of capital punishment, perhaps inevitably, have sought support for their position in the fundamental principles of American democracy, contending that to inflict death as a punishment for criminal offenses is a violation of the individual rights guaranteed by the Constitution of the United States.

By and large, that contention has failed: despite vigorous and sustained dissents, the United States Supreme Court has repeatedly rejected the claim that the death penalty is, in and of itself, cruel and unusual punishment within the prohibition of the Federal Constitution's Eighth Amendment. But this does not mean that there are no constitutional restraints on the use of the death penalty. Commenting repeatedly on the unique severity of capital punishment, the Supreme Court has stated that the capital sentencing process must be subjected to special scrutiny, in order to insure the reliability of a determination that death is the appropriate punishment in a particular case and to avoid unfairness or arbitrariness in the application of that penalty. In particular, the Supreme Court has ruled that the Eighth Amendment requires the sentencer in a capital case to make an individualized determination as to whether a particular capital defendant deserves the death penalty, which determination must take into account the character and record of that defendant and the circumstances surrounding his or her offense.

Although death penalty statutes and procedures vary considerably, a common mechanism for providing such individualized consideration of particular capital cases has been to require the sentencer to examine the evidence presented therein with an eye to determining the presence or absence of (1) "aggravating circumstances," that is, aspects of the offense or of the defendant, such as a particularly cruel method of murder or a callous attitude toward the killing, which make it particularly appropriate to impose the death penalty in that case, as distinguished from other cases in which defendants may have been convicted of the same general offense; and (2) "mitigating circumstances," that is, aspects of the defendant's character, record, or conduct, such as a mental or emotional disease, which tend to make the ultimate penalty of death seem disproportionate to the defendant's culpability. Questions concerning a sentencer's consideration of aggravating and mitigating circumstances, and its effect on the constitutionality of death sentences, have received considerable attention from the Supreme Court.

Although statutory provisions spelling out the sort of aggravating circumstances which a sentencer may consider serve a constitutionally necessary function in circumscribing the class of offenders who are eligible for the death penalty, the Supreme Court has held, the same function may be performed in other ways, such as by narrowly defining capital offenses, and a death penalty statute which does not specify aggravating circumstances is not thereby invalid (§ 3, infra). Even where a statute does specify particular aggravating circumstances, the

Supreme Court has added, the Federal Constitution does not require the sentencer to ignore other factors, not directly relating to those statutory circumstances, which might be considered to aggravate the offense (§ 4[a], infra); and even if the statute specifically limits the sentencer to considering the statutory aggravating circumstances, the improper consideration of nonstatutory circumstances in a particular case may be harmless error if the death sentence imposed therein was also based on proper statutory circumstances (§ 4[b], infra).

Capital defendants have often argued that particular statutory aggravating circumstances provisions are so broad or vague that they do not meaningfully limit the sentencer's discretion as required by the Eighth Amendment, or otherwise fail to protect the defendant's constitutional rights. It has especially been argued that aggravating circumstances provisions which allow the imposition of the death penalty for a murder which was especially "atrocious," "cruel," "heinous," "horrible," "inhuman," "vile," or some combination of these or similar terms, are too broad to be useful, because these adjectives might be applied to any murder. While appearing to recognize that these statutory terms in themselves provide little meaningful guidance, the Supreme Court has frequently upheld death sentences imposed under such statutes, on the ground that the courts of the jurisdiction in question had expressly or apparently applied an appropriate limiting construction of the statutory language (§ 7[a], infra); where such challenges have succeeded, it has generally been because the state courts had departed from such apparent limits in applying such statutory language to the facts of a particular case, or because instructions explaining the statutory language to the sentencing jury in a particular case did not meaningfully limit the reach of that language (§ 7[b], infra). For similar reasons, the Supreme Court has often rejected challenges to death sentences imposed under statutes which identified the knowing creation of "a great risk of death to many persons" as an aggravating circumstance, even where this circumstance duplicated an element of the underlying capital offense (§ 9, infra). The narrowing function has also been held to be properly served by an aggravating circumstances provision which referred to a defendant's previous conviction of a capital felony (§ 10, infra) or escape from lawful custody (§ 12, infra). Statutory provisions asking the sentencer to determine whether a defendant would be likely to pose a continuing threat to society have also been held not to be so vague and meaningless as to violate the Eighth Amendment (§ 11[a], infra), and psychiatric testimony assessing the likelihood of such future dangerousness has been held to be admissible, without violating the defendant's constitutional rights, even where such testimony involves responses to hypothetical questions (§ 11[b], infra). Again, defendants have had more success challenging the application of aggravating circumstances provisions to the facts of particular cases: in at least one case, a death sentence imposed for a capital offense on the ground that the defendant had committed that offense while engaged in the commission of another capital offense has been invalidated where the Supreme Court found that there had been no proper finding at trial as to the commission of the concurrent offense (§ 8, infra). Speaking hypothetically, the Supreme Court has indicated that a death sentence would violate due process if it were imposed on the basis of aggravating circumstances relating to the defendant's race, religion, politics, invocation of constitutional rights, or mental illness (§ 13, infra).

The Supreme Court has held that the jury trial clause of the Constitution's Sixth Amendment does not require that the specific findings authorizing the imposition of a death sentence, such as findings as to the existence of aggravating circumstances, be made by a jury, and has upheld such sentences in cases where the trial judge made the ultimate determination on such issues (§ 5[a], infra). However, in a state where the jury merely renders an advisory verdict on the imposition of the death sentence, the jury's weighing of an invalid aggravating circumstance nevertheless has been held to invalidate a death sentence imposed by a trial court following the jury's recommendation where state law required the court to give "great weight" to that recommendation (§ 5[b], infra). The consideration of aggravating circumstances on appeal has received significant attention from the Supreme Court, which has held that a reviewing court, upon determining that some of the statutory aggravating circumstances relied on by a sentencer in imposing a death sentence were invalid on their face or as applied, need not declare the sentence invalid and remand for further proceedings, but may instead uphold the sentence either by (1) applying harmless error analysis, or (2) reweighing the remaining valid aggravating circumstances against the mitigating circumstances presented by the record (§ 6, infra). However, if the courts of one state overturn a felony conviction which had since been used as an aggravating circumstance to justify the imposition of the death penalty in a capital trial in another state, the Supreme Court has held that the Eighth Amendment requires that that death sentence be reconsidered (§ 10[b], infra).

The Supreme Court has determined that the Eighth Amendment requires substantial protections for capital defendants with regard to sentencers' consideration of mitigating circumstances. In particular, the Supreme Court has held that sentencers may not be barred from considering, nor refuse to consider, evidence of any relevant mitigating circumstances which may be offered by the defense, especially where such evidence relates to the character or record of the defendant or the circumstances of the offense (§ 14[a], infra); and by "relevant," the court has stated, it means only that such evidence must tend logically to prove or disprove some fact or circumstance which a factfinder could reasonably deem to have mitigating value, regardless of whether such evidence is accepted or rejected by the factfinder or would be sufficient to convince the factfinder of the proposition for which it is offered (§ 15, infra). Various types of evidence have specifically been held by the Supreme Court to be relevant in mitigation of capital offenses, including evidence that the defendant had had a difficult childhood or suffered from a mental or emotional disorder (§ 14[b], infra); that the defendant had adjusted well to prison and caused no trouble, or otherwise showed a good potential for rehabilitation (§ 14[c], infra); or that there were various other aspects of the defendant or the offense which weighed against the ultimate sanction, such as the defendant's age, intoxication, voluntary surrender to authorities, lack of prior convictions, or reasonably perceived moral justification for the offense (§ 14[e], infra). It has also been held, however, that a sentencing jury is not required to reconsider, as a mitigating circumstance, any residual doubt that they may have had as to the defendant's guilt (§ 14[d], infra). Statutory provisions describing specific mitigating circumstances, such as those referring to a defendant's youth or to an "extreme mental or emotional disturbance," have withstood claims that they were too vague or imprecise to satisfy constitutional requirements (§ 16, infra).

In applying the requirement that capital sentencers must consider any relevant mitigating circumstances, the Supreme Court has rejected a number of purported limitations on such consideration. A sentencer may not be restricted to considering only those mitigating circumstances that are specifically identified by the applicable death penalty statute, the court has held (§ 19, infra), and it is unconstitutional for capital sentencing statutes or instructions to limit members of sentencing juries to considering only those mitigating circumstances which the jury unanimously finds to exist, or to bar the jury from considering any mitigating evidence if no mitigating circumstances are unanimously found to exist (§ 20, infra). Also, the Supreme Court has ruled, the due process clause of the Constitution's Fourteenth Amendment prohibits state hearsay evidence rules from being applied so as to bar the defendant from introducing relevant mitigating evidence (§ 21, infra). However, instructions to sentencing juries which gave specific examples of mitigating circumstances which the jury could consider, or which described a general "catch-all" mitigating circumstance in arguably restrictive terms, have been held not to violate the defendant's rights in particular cases where the Supreme Court found that the jury could not reasonably have understood these instructions as restricting its consideration of relevant mitigating circumstances (§ 22, infra); and instructions advising sentencing juries to avoid any influence of sympathy have also been held not to impermissibly restrict the consideration of relevant mitigating evidence (§ 23, infra).

As with aggravating circumstances, the Supreme Court has held that the Eighth Amendment does not require that findings as to the presence of mitigating circumstances in a capital case be made by a jury (§ 17, infra). Also, the Supreme Court has held that state capital sentencing statutes may place upon the defendant the burden of establishing mitigating circumstances by a preponderance of the evidence, so long as the prosecution's burdens of proving the elements of the capital offense and of establishing aggravating circumstances are not lessened (§ 18, infra).

Finally, with regard to how aggravating and mitigating circumstances are to be weighed against each other in determining the appropriateness of a death sentence in a particular case, the Supreme Court has held that the Eighth Amendment does not require that death penalty statutes (1) require that any particular weight be assigned to single or multiple aggravating circumstances, or (2) set any particular standard for weighing aggravating and mitigating circumstances; and the court has rejected claims that death penalty statutes or instructions were impermissibly mandatory where they stated that the death penalty "shall" be imposed in particular cases if the sentencer finds either (1) at least one aggravating circumstance and no mitigating circumstances, or (2) aggravating circumstances which outweigh any mitigating circumstances (§ 24, infra).

II. Aggravating Circumstances

A. In General

§ 3. Necessity of statutory aggravating circumstances

It has been held that death penalty statute provisions specifying those "aggravating" circumstances, beyond the simple commission of a capital offense, that will support the imposition of the death penalty in particular capital cases, serve a constitutionally necessary function by circumscribing the class of persons who may be sentenced to death.

Apparently applying the cruel and unusual punishment clause of the Federal Constitution's Eighth Amendment, the court in Zant v Stephens (1983) 462 US 862, 77 L Ed 2d 235, 103 S Ct 2733, infra § 12, stated that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition by circumscribing the class of persons eligible for the death penalty. A fair statement of the consensus expressed in Furman v Georgia (1972) 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726, reh den 409 US 902, 34 L Ed 2d 163, 93 S Ct 89, the court observed, was that where discretion is afforded to a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. Also, the Supreme Court ruled that states are free to limit the evidence of aggravating factors that the prosecution may offer at a sentencing hearing.

However, the Supreme Court has held, in the following cases, that the narrowing function performed by statutory aggravating circumstances may be achieved through other methods, so that a death penalty statute which does not specify aggravating circumstances does not necessarily fail to satisfy the requirements of the Federal Constitution.

In Jurek v Texas (1976) 428 US 262, 49 L Ed 2d 929, 96 S Ct 2950, reh den 429 US 875, 50 L Ed 2d 158, 97 S Ct 197, 97 S Ct 198, where the court affirmed the death sentence imposed against an individual who had been convicted of committing murder in the course of an attempted kidnaping and rape, the opinion announcing the judgment of the court—which opinion was written by Justice Stewart and joined by Justices Powell and Stevens—(1) rejected claims that the state death penalty statute violated the cruel and unusual punishment clause of the Federal Constitution's Eighth Amendment, and specifically (2) pointed out that while the statute did not adopt a list of statutory aggravating circumstances which could justify the imposition of the death penalty, as had other death penalty statutes which the Supreme Court had found constitutionally valid, much the same purpose was served by the statute's provisions narrowing the categories of murders for which a death sentence could be imposed. The death penalty was authorized under the statute only for the murder of a peace officer or fireman, or for murders committed (1) in the course of a kidnaping, burglary, robbery, forcible rape, or arson, (2) while escaping or attempting to escape from a penal institution, (3) for remuneration, or (4) by a prison inmate when the victim is a prison employee.

Referring to its decision in Jurek v Texas, supra, the court in Lowenfield v Phelps (1988) 484 US 231, 98 L Ed 2d 568, 108 S Ct 546, reh den 485 US 944, 99 L Ed 2d 286, 108 S Ct 1126, infra § 9, similarly held that, while a capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder, this narrowing function could be provided either by jury findings of aggravating circumstances at the penalty phase of the trial or, as a valid alternative, by narrowly defining capital offenses so that the jury finding of guilt responded to this concern.

§ 4. Consideration of nonstatutory aggravating circumstances

[a] Propriety of considering nonstatutory circumstances

The United States Supreme Court held in the following cases that the Federal Constitution does not prohibit the sentencer in a capital case from considering, in support of the imposition of a death sentence, factors or circumstances of a particular case that do not directly relate to the "aggravating circumstances" specifically identified by the applicable death penalty statute as justifying a sentence of death.[4]

Apparently referring to the cruel and unusual punishment clause of the Federal Constitution's Eighth Amendment, the court in Zant v Stephens (1983) 462 US 862, 77 L Ed 2d 235, 103 S Ct 2733, stated that, while statutory aggravating circumstances play a constitutionally necessary function in capital cases, the Federal Constitution does not require the jury in such a case to ignore possible nonstatutory aggravating circumstances in the process of deciding who will be sentenced to death.

The death sentence imposed against a convicted murderer was held not to have been rendered invalid by the judge's discussion of the racial motive behind the crime and his comparison of the crime with Nazi concentration camps which he had seen while serving in the army during World War II, even though these circumstances were not among the exclusive aggravating factors listed in the state's death penalty law, in Barclay v Florida (1983) 463 US 939, 77 L Ed 2d 1134, 103 S Ct 3418, reh den 464 US 874, 78 L Ed 2d 185, 104 S Ct 209, where the plurality opinion and concurring opinions were apparently based on the cruel and unusual punishment clause of the Federal Constitution's Eighth Amendment. A plurality opinion expressing the views of Justice Rehnquist, Chief Justice Burger, and Justices Powell and O'Connor, found nothing irrational or arbitrary in the fact that the trial judge had considered the defendant's purpose to be relevant in establishing the presence of several statutory aggravating factors. The defendant and his alleged confederates, all black, were accused of kidnaping a white man whom they did not know, and then killing him by repeated stabbings and shootings, as part of a campaign to start a revolution and racial war. Following the defendant's conviction, the jury had recommended life imprisonment, but the trial judge decided to sentence the defendant to death, based in part on the absence of any mitigating circumstances and on the statutory aggravating circumstances that the defendant (1) had knowingly created a great risk of death to many people, (2) had committed the murder while engaged in a kidnaping, (3) had endeavored to disrupt governmental functions and law enforcement, and (4) had committed an especially heinous, atrocious, or cruel offense. In supporting the affirmance of a state supreme court decision which had upheld the death sentence, the plurality opinion rejected the defendant's contention that the trial judge had improperly added a nonstatutory aggravating factor of racial hatred, and noted that the trial judge had discussed the alleged racial motive in the course of finding the statutory aggravating factors numbered (1), (3), and (4) above. The plurality stated that the concentration camp comparison was not an inappropriate way of weighing factor (4) in order to determine whether that factor warranted the imposition of the death penalty in this case. Finally, the plurality rejected the defendant's contention that it was improper for the judge to rely on his own experiences; it is neither possible nor desirable, the Justices found, for a person to whom the state entrusts such an important judgment to make his or her decision in a vacuum. An opinion expressing the views of Justices Stevens and Powell, who concurred in the judgment, stated that (1) the state's rule that statutory aggravating circumstances must be exclusive afforded greater protection than the Federal Constitution required; and (2) the judge's concern about racial crimes, though it had no bearing on any statutory aggravating factor, did not in itself undermine the legitimacy of the sentence.

---

[4] For cases considering whether it was prejudicial for a sentencer to improperly consider, as aggravating circumstances, factors not identified as such in a statute establishing an exclusive list of such circumstances, see § 4[b], infra.

[b] Prejudicial effect of improperly considering nonstatutory circumstances

Considering death sentences imposed under a state statute which established an exclusive list of "aggravating circumstances" that would support the imposition of the death penalty in particular capital cases, the United States Supreme Court held in the following cases that a sentencer's alleged improper consideration of nonstatutory aggravating circumstances[5] was not a prejudicial error rendering the resulting death sentences constitutionally invalid under the particular circumstances presented.

The death sentence imposed against a convicted murderer was held not to be rendered unconstitutional[6] by the trial judge's consideration of the convict's prior record as an aggravating circumstance, even though this was not a proper aggravating circumstance under the state's death penalty statute which set forth an exclusive list of aggravating circumstances that could be considered in a capital sentencing proceeding, in Barclay v Florida (1983) 463 US 939, 77 L Ed 2d 1134, 103 S Ct 3418, reh den 464 US 874, 78 L Ed 2d 185, 104 S Ct 209, supra § 4[a], where a plurality opinion, expressing the views of Justice Rehnquist, Chief Justice Burger, and Justices White and O'Connor, (1) noted that the death sentence in question had also been based on valid statutory aggravating factors, and (2) found that the trial judge's error in considering the defendant's record as an aggravating factor was harmless under state law, which required a finding of at least one statutory aggravating factor to support a death sentence, but which stated that the invalidity of one of multiple aggravating factors considered would be a ground for invalidating a death sentence only if the consideration of that factor had affected the sentencer's overall balancing of aggravating and mitigating factors. Following the defendant's conviction, the jury had recommended life imprisonment, but the trial judge had decided to sentence the defendant to death, based on the absence of any mitigating circumstances and on the aggravating circumstances that the defendant (1) had knowingly created a great risk of death to many people, (2) had committed the murder while engaged in a kidnaping, (3) had endeavored to disrupt governmental functions and law enforcement, (4) had committed an especially heinous, atrocious, or cruel offense, and (5) had an extensive criminal record. In supporting the affirmance of a state supreme court decision which had upheld that death sentence, the plurality opinion noted that all but the last of these aggravating factors were authorized by state law. The plurality also observed that while the defendant's record was not a statutory aggravating factor, it was information that was properly before the trial judge and jury under both state law and the Federal Constitution. An opinion expressing the views of Justices Stevens and Powell, who concurred in the judgment, also expressed the view that the information about the defendant's record was properly before the trial court.

---

[5] For cases considering generally whether a sentencer may constitutionally consider, in support of a death sentence, factors not directly relating to statutory aggravating circumstances, see § 4[a], supra. For cases considering whether an appellate court may uphold a death sentence after having determined that a statutory aggravating circumstance provision was invalid or improperly applied, see § 6, infra.

[6] The plurality and concurring opinions in this case do not expressly mention any particular constitutional provision, but do make some reference to the Federal Constitution's Eighth Amendment and to decisions in which the Supreme Court applied the Eighth Amendment's cruel and unusual punishment clause.

Even assuming, as alleged in a petition for federal habeas corpus relief from a state-imposed death sentence, that the sentencing judge in the capital murder case in question had considered the defendant's future dangerousness, which was not one of the aggravating circumstances exclusively listed in the state's death penalty statute, in imposing the death penalty, the court in Wainwright v Goode (1983) 464 US 78, 78 L Ed 2d 187, 104 S Ct 378, reh den 465 US 1014, 79 L Ed 2d 247, 104 S Ct 1017, ruled that state procedures had not produced an arbitrary or freakish sentence forbidden by the Federal Constitution's Eighth Amendment where a properly instructed jury had recommended a death sentence and, on direct appeal, the state's highest court had affirmed the defendant's conviction and sentence after properly conducting an independent reweighing of the aggravating and mitigating circumstances in the case. The trial judge, in sentencing the defendant to death, had found that three statutory aggravating circumstances were proven beyond a reasonable doubt and that they outweighed the two mitigating circumstances which had been established; and the judge had also made certain comments about society's need to deal harshly with such cases. In reversing and remanding the judgment of a Federal Court of Appeals which had granted the defendant's habeas corpus petition, the United States Supreme Court ruled that (1) the Court of Appeals had erred in substituting its view of the facts for that of the state courts which had upheld the trial judge's sentence, but also (2) the Court of Appeals' judgment was in error even if it had correctly interpreted the facts. The Supreme Court cited Barclay v Florida (1983) 463 US 939, 77 L Ed 2d 1134, 103 S Ct 3418, reh den 464 US 874, 78 L Ed 2d 185, 104 S Ct 209, supra, to the effect that in a federal court review of a state death sentence imposed in reliance on an aggravating factor that was improper under state law, the critical question is whether the trial judge's consideration of that factor so infected the balancing process required by state law that it was constitutionally impermissible for the state's highest court to let the sentence stand. There had been no such infection in the case at hand, the Supreme Court found, given the jury's recommendation and the fact that the reviewing state court had clearly not considered future dangerousness in its weighing of the aggravating and mitigating circumstances.

§ 5. Jury consideration of aggravating circumstances

[a] Necessity of jury finding

The United States Supreme Court, or an individual Justice thereof, held in the following cases that the jury trial clause of the Federal Constitution's Sixth Amendment, among other constitutional provisions, does not require that the specific findings authorizing the imposition of the death penalty in a capital case—including findings as to the existence of one or more "aggravating circumstances"—be made by a jury.

The jury trial clause of the Sixth Amendment to the Federal Constitution does not require that the specific findings authorizing the imposition of a sentence of death be made by a jury, it was held in Hildwin v Florida (1989) 490 US 638, 104 L Ed 2d 728, 109 S Ct 2055, where the court accordingly rejected a convicted murderer's claim that the state death penalty scheme violated the Sixth Amendment because it permitted the imposition of the death penalty without a specific finding by the jury that sufficient aggravating circumstances exist to qualify a defendant for capital punishment. Under the sentencing system in question, the trial court, following a defendant's conviction of a capital felony, was required to conduct a separate sentencing proceeding, after which the jury would render an advisory verdict and the trial court would make the ultimate decision whether to impose a sentence of death after finding at least one aggravating circumstance. In the case at hand, the jury had unanimously recommended a death sentence, and the trial judge had concurred after finding four aggravating circumstances and no mitigating circumstances. In affirming state court decisions which had upheld this sentence, the Supreme Court noted that it had (1) previously rejected a claim that the Sixth Amendment required a jury trial on the sentencing issue of life or death, and therefore (2) upheld a trial judge's imposition of a death sentence where the jury had recommended life imprisonment. If the Sixth Amendment permits a judge to impose a death sentence in such a case, the Supreme Court concluded, then it follows that the Sixth Amendment does not forbid a judge from making the written findings that authorize imposition of the death sentence when the jury recommends such a sentence. The existence of an aggravating factor, the Supreme Court pointed out, is not an element of the offense but rather a sentencing factor that comes into play only after a defendant has been found guilty.

In holding that the Federal Constitution did not prevent a state appellate court from upholding a death sentence, which had been based in part on an invalid or improperly defined aggravating circumstance, by reweighing the aggravating and mitigating evidence in the case, the court in Clemons v Mississippi (1990) 494 US 738, 108 L Ed 2d 725, 110 S Ct 1441, noted that any argument that the Constitution required that a jury impose the sentence of death or make the findings prerequisite to the imposition of such a sentence had been soundly rejected by prior Supreme Court decisions such as Hildwin v Florida, supra.

A state capital sentencing statute which provided that factual findings with regard to the existence of aggravating or mitigating circumstances would be made by the trial judge, rather than by the jury, was held not to violate the Federal Constitution's Sixth Amendment in Walton v Arizona (1990) 497 US 639, 111 L Ed 2d 511, 110 S Ct 3047, reh den (US) 111 L Ed 2d 828, 111 S Ct 14, as the Supreme Court observed that (1) aggravating circumstances are not separate penalties or offenses, and thus (2) the judge's finding of any particular aggravating circumstance does not "convict" a defendant, that is, require the death penalty, nor does the failure to find any particular aggravating circumstance "acquit" a defendant, that is, preclude the death penalty. The Supreme Court noted that if, as it had held in a previous case, the Constitution does not require that a finding—made as a prerequisite for imposition of the death penalty—that the accused killed, attempted to kill, or intended to kill be proved as an element of the offense of capital murder or be found by a jury, then it could not be concluded that a state was required to denominate aggravating circumstances as "elements" of the offense or to permit only a jury to determine the existence of such circumstances. Citing its decision in Hildwin v Florida, supra, the Supreme Court rejected an attempt to distinguish the sentencing scheme upheld therein from the one at issue in the present case on the ground that the former called for the jury to recommend a sentence; in that scheme, the court pointed out, the jury did not make specific factual findings with regard to the existence of aggravating or mitigating circumstances, and its recommendations were not binding on the trial judge, so the trial court under that scheme no more had the assistance of a jury's factual findings with regard to sentencing issues than did a trial judge under the sentencing scheme at issue in the case at hand. State court judgments upholding the death sentence imposed against a convicted murderer were affirmed.

In Richmond v Arizona (1977) 434 US 1323, 54 L Ed 2d 34, 98 S Ct 8, infra § 17, Justice Rehnquist, as Circuit Justice, ruled that a state capital sentencing statute was not required, under the Federal Constitution's Sixth, Eighth, or Fourteenth Amendments, to provide for jury input into the determination whether aggravating and mitigating circumstances do or do not exist in a particular capital case.

[b] Effect of advisory jury's consideration of invalid circumstance

In a state where the jury merely rendered an advisory verdict on the imposition of the death sentence, the jury's weighing of an invalid aggravating circumstance nevertheless has been held to invalidate a death sentence imposed by a trial court following the jury's recommendation where state law required the court to give "great weight" to that recommendation.

It was held in Espinosa v Florida (1992, US) 120 L Ed 2d 854, 112 S Ct 2926, that (1) if a "weighing" state—that is, a state in which the decision whether to impose the death penalty is based on a weighing of aggravating and mitigating circumstances—decides to place capital sentencing authority in two actors rather than one, then neither actor must be permitted to weigh invalid aggravating circumstances; and thus (2) under a state capital sentencing scheme in which the jury was instructed to weigh aggravating and mitigating circumstances and to render an advisory verdict as to whether the defendant should be sentenced to life imprisonment or death, and in which the trial court itself was then required to weigh the aggravating and mitigating circumstances to determine finally what the sentence would be, a state trial court violated the Federal Constitution's Eighth Amendment in imposing a death sentence upon a person convicted of murder, following the recommendation of a jury which had been instructed that it could find as an aggravating circumstance that the murder had been "especially wicked, evil, atrocious, or cruel," where (a) the instruction was unconstitutionally vague, and (b) state law required the trial court to give "great weight" to the jury's recommendation. Although the trial court had not directly weighed any invalid aggravating circumstance, the Supreme Court ruled, it had to be presumed that the jury had done so and that the trial court had followed the "great weight" requirement. Thus, the Supreme Court concluded, the trial court had indirectly weighed the invalid aggravating factor, and this kind of indirect weighing created the same potential for arbitrariness as the direct weighing of an invalid aggravating factor. The requirement of deference to the jury's recommendation, the Supreme Court observed, essentially split the weighing process in two, where (1) the jury initially weighed aggravating and mitigating circumstances, and (2) the result of that weighing process was then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.

§ 6. Effect of appellate invalidation of aggravating circumstance

Where a state appellate court rules that one of the statutory "aggravating circumstances"[7] relied on by a trial court in imposing a sentence of death against a capital offender was invalid, or improperly defined or applied, the United States Supreme Court held in the following cases, the Federal Constitution does not require that the sentence be invalidated or remanded for new hearings; rather, the appellate court may uphold the sentence based on (1) harmless error analysis, or (2) a reweighing of aggravating and mitigating circumstances which determines that other aggravating circumstances relied on by the sentencer were sufficient to support the sentence.

---

[7] For cases considering whether an appellate court could uphold a death sentence where it was alleged that the sentencer had improperly considered a supposed aggravating circumstance which was not among those exclusively listed in the applicable death penalty statute, see § 4[b], supra.

The fact that one of the three aggravating circumstances found by a sentencing jury in imposing the death penalty against a convicted murderer was subsequently held invalid by the state supreme court was held not to render the state death penalty statute invalid as applied in Zant v Stephens (1983) 462 US 862, 77 L Ed 2d 235, 103 S Ct 2733, where the state supreme court had also found that the other two aggravating circumstances on which the jury had relied were valid and adequately supported the sentence. The jury had found that the convict's offense was aggravated by the circumstances that the convict (1) had previously been convicted of a capital felony, (2) had a "substantial history of serious assaultive criminal convictions," and (3) had escaped from the lawful custody of a peace officer or place of lawful confinement. While the convict's appeal was pending in state courts, however, the state supreme court had held in another case that the second of those statutory aggravating circumstances was unconstitutionally vague. In overturning a lower federal court's decision which granted the convict's petition for habeas corpus, the Supreme Court, apparently relying on the cruel and unusual punishment clause of the Federal Constitution's Eighth Amendment, stated that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition by circumscribing the class of persons who are eligible for the death penalty, but that the Federal Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those who will actually be sentenced to death. The Supreme Court found that the two other aggravating circumstances applied by the jury in the present case had properly achieved this narrowing function. Precedents which held that, if the jury was instructed that it could rely on any of multiple independent grounds and if one of those grounds is invalid, a jury verdict cannot stand because the jury might have relied solely on the invalid ground, were distinguished by the Supreme Court, which pointed out that the jury in the present case had not merely returned a general verdict that statutory aggravating circumstances were present in the case at hand, but had expressly found that the two valid aggravating circumstances were present. Finally, the Supreme Court, rejecting the argument that jury instructions on the invalid aggravating circumstance had unduly directed the jury's attention to the evidence of the convict's record, which was otherwise properly before the court, (1) found that there was nothing improper in instructing the jury that it could consider such evidence, and (2) noted that the instruction objected to, while improperly labeling such evidence as a statutory aggravating circumstance, had placed no particular emphasis on the importance of such circumstances in the jury's ultimate decision.

The Federal Constitution was held not to prevent a state appellate court from upholding a death sentence that was based in part on an invalid or improperly defined aggravating circumstance by either (1) reweighing the aggravating and mitigating evidence in the case or (2) engaging in harmless error analysis, in Clemons v Mississippi (1990) 494 US 738, 108 L Ed 2d 725, 110 S Ct 1441, where the Supreme Court nevertheless vacated the death sentence imposed against a convicted murderer in a state trial court, which sentence had been affirmed by a state appellate court despite that court's determination that one of the two statutory aggravating factors found by the jury was unconstitutionally vague, because the Supreme Court found it unclear whether the state appellate court had employed either of the methods described above. The defendant had allegedly lured a pizza delivery man to an apartment complex, robbed him, and finally shot him despite the man's pleas for his life; and the prosecution had contended, at the sentencing hearing following the defendant's conviction for capital murder, that two statutory aggravating circumstances were present in this case, namely that the murder (1) had been committed during the course of a robbery for pecuniary gain, and (2) had been "especially heinous, atrocious, or cruel." The jury, having received instructions which did not expand on the meaning of the statutory language as to the "especially heinous" factor, found both aggravating circumstances to be present, and sentenced the defendant to death. The state appellate court found the "especially heinous" aggravating circumstance invalid, but ruled that the death sentence could be upheld on other grounds. In holding that the state court could have upheld the sentence through a reweighing process, the Supreme Court stated that such a process (1) would not violate a defendant's right to a jury trial under the Constitution's Sixth Amendment, since it had been established that that Amendment does not require that a jury impose a death sentence or make the findings necessary to the imposition of such a sentence; (2) did not violate a supposed liberty interest of the defendant, protected by the due process clause of the Constitution's Fourteenth Amendment, in having the jury make all determinations relevant to his sentence as purportedly required by state law, since the Supreme Court had no basis for disputing the state appellate court's view that state law allowed that court to determine whether the sentence would be upheld without remanding for a new sentencing proceeding before a jury; and (3) was not inherently inconsistent with the pursuit of the objective, required by the Constitution's Eighth Amendment, of measured consistent application and fairness to the accused in capital sentencing proceedings. However, the Supreme Court found it unclear whether the state appellate court had actually reweighed the aggravating and mitigating circumstances in the case, or had improperly applied an automatic rule authorizing or requiring affirmance of a death sentence so long as there remained at least one valid aggravating circumstance. As to harmless error analysis, the Supreme Court found it impossible to determine whether the state appellate court—which had stated that it was of the opinion "beyond a reasonable doubt" that the jury's verdict would have been the same with or without the invalid aggravating circumstance—had meant that it was beyond reasonable doubt that the sentence would have been the same even if (1) the jury had never been instructed on that circumstance and had balanced only the remaining aggravating circumstance against the mitigating circumstances, or (2) the invalid aggravating circumstance had been given a proper limiting construction in the jury instructions. While the former possibility expressed a permissible standard of review, the Supreme Court held, the conclusion that this standard had been satisfied in the case at hand would be very difficult for the Supreme Court to accept based on the available record, and impossible to accept absent a more detailed explanation by the state court.

While holding that a provision of a state capital sentencing statute, which provision treated as an aggravating circumstance a finding that the offense had been committed in an "especially heinous, cruel or depraved manner," did not violate the Federal Constitution's Eighth or Fourteenth Amendment by failing to channel the sentencer's discretion under the circumstances, the court in Walton v Arizona (1990) 497 US 639, 111 L Ed 2d 511, 110 S Ct 3047, reh den (US) 111 L Ed 2d 828, 111 S Ct 14, infra § 7[a], recognized that even if a death sentence is based on the finding of a statutory aggravating circumstance that is unconstitutionally vague on its face, and the trial court has failed to apply a narrowing construction or has applied an improper construction, a state appellate court is not necessarily required to vacate the death sentence, but may (1) determine for itself whether the evidence supports the existence of the aggravating circumstance as properly defined, or (2) eliminate consideration of that aggravating circumstance altogether and determine whether the remaining aggravating circumstances are sufficient to warrant the death penalty.

The rule that a reviewing court which strikes one or more of the aggravating circumstances relied on by the sentencer may constitutionally reweigh the remaining evidence or conduct harmless error analysis, and affirm a death sentence on that basis, was restated in Parker v Dugger (1991, US) 112 L Ed 2d 812, 111 S Ct 731, 91 CDOS 652, 91 Daily Journal DAR 947, reh den (US) 113 L Ed 2d 271, 111 S Ct 1340, infra § 14[a], where the Supreme Court determined, however, that the state appellate court below had failed to properly follow either course where the state appellate court had invalidated two of the six aggravating circumstances relied on by the sentencing judge and had erroneously determined that the judge had not found any mitigating circumstances.

Applying the rule stated in Parker v Dugger, supra, the court in Sochor v Florida (1992, US) 119 L Ed 2d 326, 112 S Ct 2114, held that the death sentence imposed on a homicide defendant by a state trial judge, based in part on the judge's finding that the offense had been committed "in a cold, calculated and premeditated manner," could not stand on the existing record of appellate review, because (1) the judge's weighing of the "coldness factor" as an aggravating circumstance violated the Federal Constitution's Eighth Amendment, where a state appellate court found that the evidence failed to support the judge's finding; and (2) the error had not been cured by the appellate court's decision affirming the sentence, which decision did not explain or even declare a belief that the judge's error was harmless beyond a reasonable doubt. The defendant allegedly had attempted to rape a woman and then strangled her to death when her resistance angered him, and the appellate court ruled that the crime did not show the heightened degree of premeditation required by the coldness factor. The sentence could nevertheless stand, held the appellate court, because (1) the judge had carefully weighed aggravating and mitigating circumstances, (2) even without the coldness factor, there were three aggravating circumstances to be weighed against no mitigating circumstances, (3) striking one aggravating circumstance when there are no mitigating circumstances does not necessarily require resentencing, and (4) in comparison with other death cases, the accused's death sentence was "proportionate" to his crime. Even when other valid aggravating circumstances also exist, the Supreme Court ruled, merely affirming a death sentence reached by weighing an invalid aggravating circumstance deprives a defendant of the individualized treatment required by the Eighth Amendment; and while federal law does not require a state appellate court to remand for resentencing in such a case, the state court must, short of remand, either reweigh without the invalid aggravating circumstance or determine that weighing the invalid circumstance was harmless error. In the case at hand, the Supreme Court observed, this requirement was not met because the appellate court's opinion did not mention "harmless error," but instead referred to the quite different inquiry as to proportionality, and only one of the four precedents cited by the appellate court had explicitly used harmless error analysis. The appellate court's judgment upholding the defendant's sentence was vacated, and the case was remanded.

But see Maynard v Cartwright (1988) 486 US 356, 100 L Ed 2d 372, 108 S Ct 1853, infra § 7[b], where the Supreme Court held that the fact that the jury in a state capital sentencing proceeding had found more than one statutory aggravating circumstance to be present in the case of a convicted murderer, whom the jury sentenced to death, did not render erroneous the judgment of a Federal Court of Appeals invalidating the death sentence on the basis of that court's ruling that one of those aggravating circumstances was invalid under the Federal Constitution's Eighth Amendment as applied to the case, where state precedents at the time of the Court of Appeals' decision had made no provision for curing on appeal a sentencer's consideration of an invalid aggravating circumstance. The Court of Appeals could not be faulted, the Supreme Court stated, for not undertaking what the state courts themselves refuse to do.

◆

In holding that a state criminal defendant's alleged murder confession, while in prison on an unrelated federal charge, to a fellow inmate who was a paid informant of the Federal Bureau of Investigation, had been coerced, and that the admission of that confession into evidence at the defendant's murder trial—even if subject to harmless error analysis—had not been shown to be harmless error beyond a reasonable doubt, the United States Supreme Court observed in Arizona v Fulminante (1991, US) 113 L Ed 2d 302, 111 S Ct 1246, that although its concern was with the effect on the defendant's conviction, the presence of the confession had also influenced the trial's sentencing phase, in which the trial judge had sentenced the defendant to death based on the single aggravating circumstance that the murder had been committed in "an especially heinous, cruel, and depraved manner." According to the supposed confession, and an alleged corroborating confession to a woman who later became the informant's wife, the defendant had driven his 11-year-old stepdaughter out into the desert, choked her, sexually assaulted her, and made her beg for her life, before shooting her twice in the head. The Supreme Court pointed out that the trial judge, in passing sentence, had relied heavily on certain evidence concerning the manner of the killing and the defendant's motives and state of mind, which evidence could be found only in the two confessions. Although the judge might have reached the same conclusion without the confession to the informant, the Supreme Court stated, it was impossible to say so beyond a reasonable doubt. The judge's assessment of the woman's credibility, and hence the reliability of the second confession, might well have been influenced by the corroborative effect of the erroneously admitted confession to the informant, the Supreme Court noted; and the fact that the judge had focused on the similarities between the two confessions in determining that they were reliable suggested that either confession alone, even when considered with all the other evidence, would have been insufficient to permit the judge to find an aggravating circumstance beyond a reasonable doubt as required for the imposition of the death penalty. The judgment of a state appellate court, which judgment had reversed the defendant's conviction and had ordered that he be retried without admitting the confession to the informant into evidence, was affirmed.

> ☆ **Observation:** In holding that a federal habeas corpus petitioner whose Mississippi homicide conviction and death sentence became final in 1985 was entitled to rely on decisions such as Maynard v Cartwright (1988) 486 US 356, 100 L Ed 2d 372, 108 S Ct 1853, infra § 7[b], in support of a claim that his sentence was invalid under the cruel and unusual punishment clause of the Federal Constitution's Eighth Amendment because one of the aggravating factors found by the jury was so vague as to render the sentence arbitrary, the court in Stringer v Black (1992, US) 117 L Ed 2d 367, 112 S Ct 1130, observed that (1) the import and effect of invalid aggravating factors must receive close appellate scrutiny in order to implement the well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases; and (2) in order for a state appellate court to affirm a death sentence after the sentencer was instructed to consider an invalid factor, the court must determine what the sentencer would have done absent the factor, as the defendant otherwise is deprived of the precision that individualized consideration requires. In a "nonweighing" capital sentencing system such as that considered in Maynard, where the sentencer is required to find at least one aggravating circumstance but aggravating circumstances play no further specific function in the sentencing decision, the Supreme Court added, so long as the sentencer finds at least one valid aggravating factor the fact that an invalid factor is also found does not infect the sentencing process, and, assuming a determination by a state appellate court that the invalid factor would not have made a difference to the sentencer's determination, there is

no constitutional violation resulting from the introduction of the invalid factor. But when the sentencer is told to weigh an invalid factor in its decision, as under the Mississippi capital sentencing system, the Supreme Court ruled, a reviewing court may not assume that it would have made no difference had that factor not been considered; when the weighing process itself has been skewed, only constitutional harmless error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence. The differences between weighing and nonweighing sentencing systems, the Supreme Court concluded, only emphasized the requirement that aggravating factors be defined with precision, and did not render the Maynard decision a "new rule" as applied to the Mississippi system.

B. Particular Statutory Aggravating Circumstances

§ 7. Vileness, heinousness, or cruelty of offense

[a] Circumstance held valid

Death penalty statute provisions which designated as an "aggravating circumstance"—supporting the imposition of the death penalty in particular capital cases—a determination by the sentencer that the defendant's crime was especially "atrocious," "cruel," "heinous," "horrible," "inhuman," "vile," or some combination of those or similar terms, were held in the following decisions of the United States Supreme Court not to be so vague or broad on their face, or as applied to particular cases by state courts, as to render the statutes, and death sentences imposed thereunder, invalid under the Federal Constitution for failure to meaningfully limit or channel the sentencer's discretion as to whether to impose a death sentence in a particular case.

In upholding a state's death penalty statute against challenges under the cruel and unusual punishment clause of the Federal Constitution's Eighth Amendment, an opinion announcing the judgment of the court, and expressing the views of Justices Stewart, Powell, and Stevens, in Gregg v Georgia (1976) 428 US 153, 49 L Ed 2d 859, 96 S Ct 2909, reh den 429 US 875, 50 L Ed 2d 158, 97 S Ct 197, 97 S Ct 198, rejected the contention that some of the aggravating circumstances specified by the statute as supporting the imposition of the death penalty were so broad and vague as to leave juries free to act arbitrarily and capriciously in deciding whether to impose the death penalty, and particularly rejected the argument that the statutory provision allowing imposition of the death penalty if the murder in question had been "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim" was so broad that capital punishment could be imposed in any murder case. While any murder arguably involves depravity of mind or an aggravated battery, the court observed, there was no reason to assume that the state supreme court would adopt such an open-ended interpretation of the statutory language, and in fact the state supreme court had upheld a death sentence based solely on that aggravating circumstance in only one case, involving a horrifying torture-murder. The opinion also pointed out that the state court had demonstrated its concern that the state aggravating circumstances provide real guidance to juries, since the state court had (1) struck down, as impermissibly vague, the provision authorizing the jury to consider whether the defendant has a "substantial history of serious assaultive criminal convictions," and (2) upheld the application of a provision which speaks of the creation of a "great risk of death to more than one person" in only one case, involving a man who fired indiscriminately into the audience at a church. An opinion by Justice White, joined by Chief Justice Burger and Justice Rehnquist, concurring in the judgment, generally rejected the argument that the aggravating circumstances provisions were so broad and vague that the death penalty would inevitably be imposed in a discriminatory, standardless manner, as the Justices pointed to the safeguard provided by a statutory provision granting automatic appeal of death sentences to the state supreme court.

> ☆Caution: Compare the Supreme Court's subsequent decision in Godfrey v Georgia (1980) 446 US 420, 64 L Ed 2d 398, 100 S Ct 1759, infra § 7[b], where it was held that the statutory aggravating factor which relies on the "especially heinous, atrocious, or cruel" nature of an offense, though valid on its face, was unconstitutional as applied where the state courts had departed from the construction noted in Gregg v Georgia, supra.

The court in Proffitt v Florida (1976) 428 US 242, 49 L Ed 2d 913, 96 S Ct 2960, reh den 429 US 875, 50 L Ed 2d 158, 97 S Ct 197, 97 S Ct 198, in holding that the imposition of the death penalty under a new state statute was not cruel and unusual punishment in violation of the Federal Constitution's Eighth Amendment, rejected a claim that the aggravating and mitigating circumstances enumerated in the statute—particularly the aggravating circumstance provision which authorized the imposition of the death penalty if a crime was "especially heinous, atrocious, or cruel"—were so vague and so broad that virtually anyone convicted of first-degree murder would be a candidate for a death sentence. Stating that these provisions must be considered as they have been construed by the state supreme court, an opinion announcing the judgment of the court, and expressing the views of Justices Stewart, Powell, and Stevens, found that the "especially heinous" provision was not impermissibly vague, since the state supreme court had indicated that such provision was directed only at a conscienceless or pitiless crime which is unnecessarily torturous to the victim. In an opinion concurring in the judgment, Justice White, joined by Chief Justice Burger and Justice Rehnquist, expressed the view that, although the aggravating and mitigating circumstances identified by this statute were not susceptible to mechanical application, they were by no means so vague and overbroad as to leave the discretion of the sentencing authority unfettered. The Supreme Court affirmed a death sentence imposed pursuant to the state statute, based in part on the trial judge's finding that the murder—which had involved the defendant's stabbing a man with a butcher knife while burglarizing the man's home—had been especially heinous, atrocious, and cruel.

A state capital sentencing statute which provided that a trial court, in determining whether to impose the death penalty on a defendant convicted of first-degree murder, could consider whether the defendant had committed the offense in an "especially heinous, cruel or depraved manner," was held not to violate the Federal Constitution's Eighth or Fourteenth Amendment by failing to channel the sentencer's discretion under the circumstances presented in Walton v Arizona (1990) 497 US 639, 111 L Ed 2d 511, 110 S Ct 3047, reh den (US) 111 L Ed 2d 828, 111 S Ct 14, where the Supreme Court noted that although the statutory language was facially vague, the state's highest court had stated that (1) a crime is committed in an "especially cruel" manner when the perpetrator inflicts mental anguish or physical abuse before a victim's death; (2) mental anguish includes a victim's uncertainty as to his ultimate fate; and (3) a crime is committed in an "especially depraved" manner when the perpetrator relishes the murder, evidencing debasement or perversion, or shows an indifference to the suffering of the victim and evidences a sense of pleasure in the killing. In the case at hand, following the defendant's conviction for first-degree murder, the trial judge had found that the crime had been committed in an "especially heinous, cruel or depraved manner" on the basis of evidence that the defendant and his accomplices had robbed the victim at gunpoint, forced him into a car, and driven him out into the desert; that the victim had been frightened; that the defendant had marched the victim into the desert, forced the victim to lie on the ground, placed the defendant's foot on the victim's neck, and shot the victim once in the head; and that the defendant subsequently told his alleged accomplices that he had shot the victim and that he had "never seen a man pee in his pants before." The death sentence imposed by the trial judge had been upheld by a state appellate court, and the United States Supreme Court affirmed. When a jury is the final sentencer, the Supreme Court observed, it is essential that the jurors be properly instructed on all facets of the sentencing process, and it is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face; but the court pointed out that (1) trial judges are presumed to know the law and to apply it in making their decisions, and (2) where, as here, the state's highest court has narrowed the definition of the aggravating circumstance in question, it must be presumed that trial judges are applying the narrower construction, and it is irrelevant that the statute itself may not narrow the construction of the circumstance.

The "especially heinous, cruel or depraved manner" statutory aggravating circumstance considered in Walton v Arizona, supra, was again upheld in Lewis v Jeffers (1990) 497 US 764, 111 L Ed 2d 606, 110 S Ct 3092, reh den (US) 111 L Ed 2d 829, 111 S Ct 14, where the court ruled that the statute neither (1) violated the Federal Constitution's Eighth and Fourteenth Amendments by failing to channel the sentencer's discretion through clear and objective standards that provided specific and detailed guidance and made the capital sentencing process rationally reviewable, nor (2) was unconstitutionally vague under the Eighth and Fourteenth Amendments as applied to the facts of the case at hand. The defendant had been convicted in state court of the first-degree murder of his girlfriend, whom he had been told was informing on him to police. He had allegedly lured the victim to his motel room, given her an overdose of heroin, strangled her to death when the heroin failed to kill her, and beaten the corpse with his bare hands, saying that each blow was for a particular person the victim had supposedly informed on. Reversing a Federal Court of Appeals' habeas corpus decision holding the defendant's death sentence invalid, the Supreme Court noted that there was no question that the state's highest court, in upholding the death sentence, had applied its narrowing construction of the aggravating circumstance in question to the facts of the case. As to the validity of the statute as applied, the Supreme Court ruled that, if a state has adopted a constitutionally narrow construction of a facially vague aggravating circumstance, and has applied that construction to the facts of the particular case, then the fundamental constitutional requirement of channeling and limiting the sentencer's discretion in imposing the death penalty has been satisfied, and thus the Court of Appeals had erred in conducting a case-by-case comparison of the present case with others in which the state courts had applied their construction of the statutory language.

A state trial judge's weighing, in a capital sentencing hearing following a defendant's conviction for first-degree murder and kidnaping and the jury's recommendation of a death sentence, of an aggravating factor—described in the state's capital sentencing statute as the "especially heinous, atrocious, or cruel" nature of the offense, and in the judge's instructions to the jury as requiring that the offense be "especially wicked, evil, atrocious, or cruel"—that was alleged to be impermissibly vague, was held not to violate the Federal Constitution's Eighth Amendment under the circumstances presented in Sochor v Florida (1992, US) 119 L Ed 2d 326, 112 S Ct 2114, where (1) the defendant had been found to have choked his victim to death when she resisted his attempt to rape her, and (2) the state's highest court had consistently held that heinousness is properly found where a capital defendant had strangled a conscious victim. In reviewing the defendant's sentence on certiorari, the Supreme Court ruled, it had to presume that the trial judge had been familiar with this body of case law, which, at minimum, gave the judge some guidance in applying the aggravating factor. However, a state appellate court judgment upholding the defendant's death sentence—imposed by the trial judge based on the judge's finding of four aggravating circumstances, including the heinousness factor, and no mitigating circumstances—was vacated on other grounds, discussed in § 6, supra.

[b] Circumstance held invalid as construed or applied

The United States Supreme Court held in the following cases that death penalty statute provisions which designated as an "aggravating circumstance"—supporting the imposition of the death penalty in particular capital cases—a determination by the sentencer that the defendant's crime was especially "atrocious," "cruel," "heinous," "horrible," "inhuman," "vile," or some combination of those or similar terms, were so vague or broad, as construed or applied by state courts to the circumstances of the particular cases at hand, as to render the death sentences imposed in those cases invalid under the Federal Constitution for failure to meaningfully limit or channel the sentencer's discretion as to whether to impose a death sentence.

Considering a provision of a state

death penalty statute that allowed such a penalty to be imposed against convicted murderers if it was found beyond a reasonable doubt that the offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim"—which provision had previously been held to be constitutionally valid on its face[8]—the court in Godfrey v Georgia (1980) 446 US 420, 64 L Ed 2d 398, 100 S Ct 1759, held that a state supreme court had violated the cruel and unusual punishment clause of the Federal Constitution's Eighth Amendment by applying that provision so as to affirm the death sentence imposed against a defendant who had shot his wife and mother-in-law, with whom he had been having a family dispute, in the head, killing them instantly, where there was no evidence or allegation that either victim had suffered an aggravated battery prior to death or that the murders had involved torture. In support of the Supreme Court's judgment reversing the decision of the state court, a plurality opinion expressing the views of Justices Stewart, Blackmun, Powell, and Stevens noted that a death penalty statute must be tailored and applied in such a way as to avoid the arbitrary and capricious infliction of that penalty. The plurality found nothing in the words "outrageously or wantonly vile, horrible, or inhuman" that implied any inherent restraint on the arbitrary infliction of the death penalty, and pointed out that at the time the Supreme Court had upheld the statute, state precedents had suggested (1) that this language would be applied only if the evidence demonstrated torture, depravity of mind, or an aggravated battery to the victim, (2) that "depravity of mind" referred only to the kind of mental state which led the murderer to commit torture or aggravated battery before killing the victim, and (3) that application of the term "torture" required evidence of serious physical abuse of the victim before death. In upholding the death penalty in this case, the plurality concluded, the state supreme court had applied an unconstitutional construction of the statutory language, since the defendant's crimes could not be said to reflect a consciousness materially more "depraved" than that of any murderer in view of the facts that (1) the victims had been killed instantaneously, (2) the victims had been family members who were causing the defendant extreme emotional trauma, and (3) the defendant had acknowledged his responsibility and the heinousness of his crimes shortly thereafter. Justices Marshall and Brennan, while concurring in the judgment on other grounds, agreed that the state court's construction of the statutory provision was unconstitutionally vague.

A provision of a state capital punishment statute, which provision stated that the fact that a murder was "especially heinous, atrocious, or cruel" was an aggravating circumstance supporting the imposition of the death penalty, was held to be unconstitutionally vague under the Federal Constitution's Eighth Amendment, as applied to the case of an accused who had allegedly attacked a couple, fatally shooting the husband and shooting and stabbing and slitting the throat of the wife, in Maynard v Cartwright (1988) 486 US 356, 100 L Ed 2d 372, 108 S Ct 1853, where the Supreme Court determined that (1) the statutory language in question did not provide adequate guidance for a jury's discretion; and (2) a state appellate court's finding that the particular facts of the case supported a finding that the murder was "especially heinous, atrocious, or cruel" did not cure the constitutional infirmity. The state court, in affirming the accused's conviction and sentence on that ground, had relied on the facts that the accused, a former employee of the victims, had sought to get even with them for firing him, that he had lain in wait for them, that the murder victim had heard the shot that wounded his wife, that the accused had then brutally attacked the wife, and that the accused had attempted to conceal his misdeeds and to steal some of his victims' belongings. In affirming a lower federal court decision which had invalidated the death sentence on the accused's petition for habeas corpus relief, the Supreme Court determined that claims of vagueness directed at the aggravating circumstances provisions of capital punishment statutes are to be analyzed under the Eighth Amendment, which requires the channeling and limiting of the sentencer's discretion in imposing the death penalty, and are not subject to a due process analysis which would allow such claims to be overcome in any specific case where reasonable persons would know that their conduct is at risk. Citing Godfrey v Georgia, supra, the Supreme Court stated that the statutory language in the case at hand gave no more guidance than the "outrageously or wantonly vile, horrible or inhuman" language involved in the Godfrey case. The addition of "especially" to the term "heinous" did not serve to guide the jury's discretion, the Supreme Court ruled, since such language merely suggested that the murder should be more than just "heinous," whatever that meant, and since an ordinary person could honestly believe that every unjustified taking of a human life was "especially heinous."

---

[8] See Gregg v Georgia (1976) 428 US 153, 49 L Ed 2d 859, 96 S Ct 2909, reh den 429 US 875, 50 L Ed 2d 158, 97 S Ct 197, 97 S Ct 198, supra § 7[a].

A state trial court's instruction to the sentencing jury in a capital murder case—which instruction advised that in considering whether the murder was "especially heinous, atrocious, or cruel" within the terms of an aggravating factor recognized by the state's death penalty statute, (1) the word "heinous" meant "extremely wicked or shockingly evil," (2) the word "atrocious" meant "outrageously wicked and vile," and (3) the word "cruel" meant "designed to inflict a high degree of pain with indifference to, or even enjoyment of, the suffering of others"[9]—was held in a per curiam opinion not to be a constitutionally sufficient limitation on the construction of the statutory language in Shell v Mississippi (1990, US) 112 L Ed 2d 1, 111 S Ct 313. The Supreme Court accordingly (1) reversed a state appellate court's judgment to the extent that it relied on the "especially heinous, atrocious, or cruel" aggravating factor in affirming a death sentence, and (2) remanded the case to the state court for reconsideration in the light of Clemons v Mississippi (1990) 494 US 738, 108 L Ed 2d 725, 110 S Ct 1441, supra § 6. The per curiam opinion of the court offered no explanation for its conclusion; but Justice Marshall, concurring in the reversal of the death sentence, expressed the view that (1) a limiting instruction can be used to give content to a statutory factor that is itself too vague to provide any guidance to the sentencer only if the instruction itself provides some guidance to the sentencer, (2) the trial court's definitions of the terms "heinous" and "atrocious" failed this test, because they could be used by persons of ordinary sensibility to fairly characterize almost every murder, and (3) although the trial court had defined the term "cruel" in an arguably more concrete fashion, when a case was submitted to a jury on alternative theories the unconstitutionality of any of those theories required that the conviction or verdict be set aside.

---

[9] The terms of the instruction are not stated in the United States Supreme Court's brief per curiam opinion; the description given here is derived from the opinion of the court below in Shell v State (1989, Miss) 554 So 2d 887.

An instruction to the jury in a capital sentencing hearing, which instruction informed the jury that it could find as an aggravating circumstance that the murder had been "especially wicked, evil, atrocious, or cruel," was held to be unconstitutionally vague, in violation of the Federal Constitution's Eighth Amendment, in Espinosa v Florida (1992, US) 120 L Ed 2d 854, 112 S Ct 2926, supra § 5[b].

See Stringer v Black (1992, US) 117 L Ed 2d 367, 112 S Ct 1130, supra § 6, where the court held that a federal habeas corpus petitioner whose state court homicide conviction and death sentence became final in 1985 was entitled to rely on Maynard v Cartwright, supra, in support of a claim that his sentence was invalid under the cruel and unusual punishment clause of the Federal Constitution's Eighth Amendment because one of the aggravating factors found by the jury—which factor was described in the jury's instructions, in substantially the state statutory language and without further definition, as the "especially heinous, atrocious, or cruel" nature of the murder—was so vague as to render the sentence arbitrary.

§ 8. Concurrent capital offenses

It has been held that the imposition of a death sentence on an individual who had been convicted of a capital offense, which sentence was based on a finding that the case involved the statutorily identified "aggravating circumstance" that such offense had been committed while the individual was engaged in committing another capital offense, violated due process principles of fundamental fairness where there had been no proper finding at trial as to the existence of the alleged concurrent offense.

Under due process principles of fundamental fairness, held the court in Presnell v Georgia (1978) 439 US 14, 58 L Ed 2d 207, 99 S Ct 235, a provision of a state death penalty statute, which provision authorized the imposition of that penalty for a capital offense where such offense was committed while the offender was engaged in the commission of another capital offense, had been invalidly applied to a convicted murderer whose supposed concurrent offense was "kidnaping with bodily injury, aggravated sodomy," since there had been no proper finding at trial to support the application of that aggravating factor. The state supreme court had vacated the defendant's conviction for rape, along with death penalties on counts involving the rape, on the ground that the defendant had not properly been convicted of the "forcible" rape required for a death sentence because the jury had been instructed on both forcible and statutory rape and had not specified in its verdict which offense it had found. Furthermore, the state supreme court had held that the prosecution could not rely on sodomy as constituting the bodily injury associated with the kidnaping. However, the state supreme court had upheld the death sentence for murder on the theory that even though there had not been a proper finding of forcible rape, there was evidence to support such a charge, which in turn established the element of bodily harm necessary to make the kidnaping an aggravating circumstance. The United States Supreme Court—citing precedent to the effect that (1) it is as much a violation of due process to send persons accused of crimes to prison following conviction of charges on which they were never tried as it would be to convict them of charges that were never made, and (2) due process requires the validity of convictions to be appraised by considering the case as it was tried and as the issues were determined by the trial court—ruled that these fundamental principles of procedural fairness applied with equal force at the penalty phase of a capital case, and that in light of these principles, the death sentence in this case could not stand. The state supreme court's judgment was accordingly reversed insofar as it affirmed the kidnaping conviction and death sentence, and the case was remanded for further proceedings.

§ 9. Creation of great risk of death to many persons

Death penalty statute provisions which designated as an "aggravating circumstance"—supporting the imposition of the death penalty in particular capital cases—a determination by the sentencer that the defendant had knowingly created a great risk of death to many persons, were held in the following decisions of the United States Supreme Court not to be so vague or broad on their face, or as applied by state courts, as to render the statutes, and death sentences imposed thereunder, invalid under the Federal Constitution for failure to meaningfully limit or channel the sentencer's discretion as to whether to impose a death sentence in a particular case.

The contention that a state's death penalty statute was invalid under the cruel and unusual punishment clause of the Federal Constitution's Eighth Amendment because it created a substantial risk that the death penalty would be arbitrarily inflicted—due in part to a provision which authorized the jury to consider, as an aggravating circumstance, whether the defendant had "knowingly created a great risk of death to many persons," and which was alleged to be vague and susceptible of widely varying interpretations—was rejected by the court in Gregg v Georgia (1976) 428 US 153, 49 L Ed 2d 859, 96 S Ct 2909, reh den 429 US 875, 50 L Ed 2d 158, 97 S Ct 197, 97 S Ct 198, where it was observed, in an opinion announcing the judgment of the court and expressing the views of Justices Stewart, Powell, and Stevens, that while the aggravating circumstance provision in question might be susceptible to an overly broad interpretation, the state supreme court had not so construed the provision and had upheld its application in only one case, involving a man who had fired indiscriminately into the audience at a church. Justice White, concurring in the judgment in an opinion joined by Chief Justice Burger and Justice Rehnquist, rejected the same argument in general terms.

In holding that the imposition of the death penalty under a new state statute was not cruel and unusual punishment in violation of the Federal Constitution's Eighth Amendment, the court in Proffitt v Florida (1976) 428 US 242, 49 L Ed 2d 913, 96 S Ct 2960, reh den 429 US 875, 50 L Ed 2d 158, 97 S Ct 197, 97 S Ct 198, rejected a claim that the aggravating and mitigating circumstances enumerated in the statute—particularly the aggravating circumstance provision which authorized the imposition of the death penalty if the defendant "knowingly created a great risk of death to many persons"—was so vague and so broad that virtually anyone convicted of first-degree murder would be a candidate for a death sentence. Stating that these provisions must be considered as they have been construed by the state supreme court, an opinion announcing the judgment of the court, and expressing the views of Justices Stewart, Powell, and Stevens, found that the "great risk" provision was not impermissibly vague, as the opinion observed that the only case other than the one at hand in which that court had found the "great risk" provision to be properly applied had involved a defendant who had murdered two of his victims in order to eliminate witnesses to his first murder. In an opinion concurring in the judgment, Justice White, Chief Justice Burger, and Justice Rehnquist expressed the view that, although the aggravating and mitigating circumstances identified by this statute were not susceptible to mechanical application, they were by no means so vague and overbroad as to leave the discretion of the sentencing authority unfettered. The death sentence imposed against a convicted murderer, which sentence was based in part on the trial judge's finding that the "great risk" aggravating circumstance was present where the convict had allegedly stabbed a man with a butcher knife while burglarizing the man's house, was affirmed.

The principle that, in determining whether there are aggravating factors warranting the death penalty, the statutory aggravating factors must be construed and applied in a nonarbitrary manner, was held not to have been violated under the circumstances presented, and the Supreme Court, in a per curiam opinion, ordered a stay of execution vacated, in Alabama v Evans (1983) 461 US 230, 75 L Ed 2d 806, 103 S Ct 1736, where a state trial court had found that a convicted murderer had "knowingly created a great risk of death to many persons"—an aggravating factor under the state's death penalty statute—based on his previous participation in 30 armed robberies and 9 kidnapings, and that this justified the imposition of the death penalty for a first-degree murder committed during the course of a robbery. The Supreme Court thus rejected the convict's claim that the state courts had construed that statutory aggravating factor in an unconstitutionally broad manner by applying it to acts not involving the offense for which the convict was found guilty.

◆

The mere fact that the sole aggravating circumstance found by a capital sentencing jury, and upheld by state courts, as a ground for sentencing a convicted murderer to death—namely, the jury's finding that the convict had knowingly created a great risk of death or great bodily harm to more than one person—merely duplicated an element of the underlying offense of first-degree murder which the jury had already found to exist at the guilt phase of the trial, was held in Lowenfield v Phelps (1988) 484 US 231, 98 L Ed 2d 568, 108 S Ct 546, reh den 485

US 944, 99 L Ed 2d 286, 108 S Ct 1126, not to render the death sentence in that case invalid as a violation of the Federal Constitution's Eighth Amendment. The defendant, who had been charged with killing a woman he had lived with, three members of her family, and one of her male friends, had been convicted under a homicide statute which defined first-degree murder so as to include the killing of a human being with the specific intent to kill or inflict great bodily harm upon more than one person. The defendant had sought federal habeas corpus relief after his direct appeals proved unsuccessful, but the Supreme Court affirmed lower court decisions denying the plaintiff's petition. To pass constitutional muster, the Supreme Court stated, a capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder; but there was no reason why this narrowing function could not be performed by jury findings at either the sentencing phase of the trial or the guilt phase. In the present case, the Supreme Court found, the required narrowing function was performed by the jury when it found the defendant guilty of three counts of murder under the provision requiring specific intent to kill or to inflict great bodily harm on more than one person. The fact that the sentencing jury was also required to find an aggravating circumstance was no part of the narrowing process in such a case, the Supreme Court concluded, and so the fact that that circumstance duplicated an element of the crime did not make the sentence constitutionally infirm.

§ 10. Defendant's prior criminal record

[a] Generally

In upholding a death sentence imposed under a state capital punishment statute, the United States Supreme Court has held that a statutory provision which recognized as an "aggravating circumstance"—supporting the imposition of the death penalty in particular capital cases—the fact that a particular capital defendant had previously been convicted of a capital felony did not violate the Federal Constitution's Eighth Amendment by failing to meaningfully narrow the class of capital offenders who could be sentenced to death.

Apparently applying the cruel and unusual punishment clause of the Federal Constitution's Eighth Amendment, the court in Zant v Stephens (1983) 462 US 862, 77 L Ed 2d 235, 103 S Ct 2733, stated that a provision of a state capital sentencing statute, which provision stated that the fact that a capital defendant had previously been convicted of a capital felony was properly considered as an aggravating circumstance supporting the imposition of the death penalty, satisfied the constitutional requirement that such aggravating circumstance provisions must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant to which it applies as compared to others found guilty of murder, differentiating the defendant's case in an objective, evenhanded, and substantively rational way from the many murder cases in the state in question for which the death penalty could not be imposed. The Supreme Court accordingly upheld the death sentence imposed pursuant to the state statute against a defendant who was convicted of murder for allegedly killing another while the defendant was committing a burglary, which sentence was supported in part by evidence that the defendant had previously been convicted of various offenses including armed robbery, burglary, and murder; the judgment of a Federal Court of Appeals, reversing a Federal District Court's denial of the defendant's petition for habeas corpus, was reversed.

But see Gregg v Georgia (1976) 428 US 153, 49 L Ed 2d 859, 96 S Ct 2909, reh den 429 US 875, 50 L Ed 2d 158, 97 S Ct 197, 97 S Ct 198, where (1) the Supreme Court upheld a state's death penalty statute against claims that it violated the cruel and unusual punishment clause of the Federal Constitution's Eighth Amendment by creating a substantial risk that the death penalty would be arbitrarily inflicted, which claims were based in part on a provision which authorized the jury to consider, as an aggravating circumstance, whether the defendant had a "substantial history of serious assaultive criminal convictions"; and (2) it was pointed out, in an opinion announcing the judgment of the court and expressing the views of Justices Stewart, Powell, and Stevens, that the state supreme court had struck down that provision as impermissibly vague. Justice White, concurring in the judgment in an opinion joined by Chief Justice Burger and Justice Rehnquist, rejected the same claim in general terms.

[b] Effect of reversal of prior conviction

Where the courts of one state, in sentencing a convicted capital offender to death, have relied on a felony conviction previously entered against the individual in another state as establishing an "aggravating circumstance" identified by the first state's death penalty statute, and that felony conviction is subsequently reversed by the courts of the other state, the United States Supreme Court has held that the Federal Constitution's Eighth Amendment requires that the death sentence be re-examined.

Under the cruel and unusual punishment clause of the Federal Constitution's Eighth Amendment, it was held in Johnson v Mississippi (1988) 486 US 578, 100 L Ed 2d 575, 108 S Ct 1981, the reversal by one state's courts of a felony conviction which had previously been used as an aggravating circumstance to support the imposition of the death penalty in another state required a reexamination of that death sentence. Twenty years after he had been convicted in a New York trial court of assault with intent to commit rape, the defendant in the case at hand had been convicted in a Mississippi court of murder, and the assault conviction—as a previous conviction for "a felony involving the use or threat of violence" in the terms of the Mississippi capital sentencing statute—had been one of three statutory aggravating circumstances which the sentencing jury had found to be present in the case and to outweigh the existing mitigating circumstances. After the death sentence was imposed, however, the defendant's attorneys had (1) instituted proceedings in the New York courts challenging the validity of the assault conviction, (2) won a decision by New York's highest court vacating that conviction, and (3) filed with a Mississippi appellate court a motion for postconviction relief from the death sentence on the ground that the New York conviction was invalid. The Mississippi court denied that motion, but the United States Supreme Court reversed and remanded, as it found that allowing the death sentence to stand although it had been based in part on a subsequently reversed conviction violated the principle that the decision to impose the death penalty cannot be predicated on mere caprice or on factors that are constitutionally impermissible or totally irrelevant to the sentencing process. The New York conviction provided no legitimate support for the death sentence in this case, the Supreme Court ruled, because the reversal of the conviction made evidence thereof irrelevant to the Mississippi sentencing decision, regardless of the fact that the defendant had served time in prison pursuant to that conviction. Moreover, the Supreme Court stated, the use of the New York conviction in the Mississippi sentencing hearing was prejudicial, especially since the Mississippi prosecutor had repeatedly stressed that conviction as a ground for imposing the death penalty. A rule that regularly gave capital defendants the benefit of postconviction relief in such cases, the Supreme Court found, would not render state sentencing proceedings arbitrary or capricious, but in fact would reduce the risk that death sentences might be imposed capriciously.

§ 11. Defendant's future dangerousness

[a] Generally

A death penalty statute provision which required the sentencer, in determining whether a death sentence was appropriate in a particular capital case, to consider whether the defendant would probably commit criminal acts of violence that would constitute a continuing threat to society, has been held not to be so vague and meaningless as to violate the requirements of the Federal Constitution's Eighth Amendment.

In holding that a state's death penalty statute satisfied the requirements of the Federal Constitution's Eighth Amendment, and therefore upholding the death sentence imposed pursuant to that statute against a man who had been convicted of a murder allegedly committed in the course of a kidnaping and rape, the court in Jurek v Texas (1976) 428 US 262, 49 L Ed 2d 929, 96 S Ct 2950, reh den 429 US 875, 50 L Ed 2d 158, 97 S Ct 197, 97 S Ct 198, rejected the petitioner's argument that (1) it is impossible to predict future behavior, and therefore (2) a statutory provision which required the jury to consider whether the defendant would probably commit criminal acts of violence that would constitute a continuing threat to society was so vague as to be meaningless. An opinion announcing the judgment of the court, and expressing the views of Justices Stewart, Powell, and Stevens, commented that while such a determination is difficult, this did not mean that it could not be made. Predictions of future criminal conduct, the opinion pointed out, are an essential element in many of the decisions rendered throughout the criminal justice system, such as a judge's decision whether to admit a defendant to bail. Justice White, Chief Justice Burger, and Justice Rehnquist, concurring in the judgment, expressed the view that the issues posed in the sentencing proceeding under the statute in question had a commonsense core of meaning and that juries in criminal cases should be capable of understanding them.

To similar effect, see Barefoot v Estelle (1983) 463 US 880, 77 L Ed 2d 1090, 103 S Ct 3383, 13 Fed Rules

Evid Serv 449, reh den 464 US 874, 78 L Ed 2d 185, 104 S Ct 20, infra § 11[b].

See Dawson v Delaware (1992, US) 117 L Ed 2d 309, 112 S Ct 1093, where the court, in holding that the introduction into evidence at a capital sentencing proceeding of evidence regarding the defendant's membership in a white racist prison gang violated the Federal Constitution's First Amendment, observed that (1) associational evidence, such as a defendant's membership in an organization that endorsed the killing of an identifiable group, might serve a legitimate purpose in many cases in showing that such a defendant represented a future danger to society; but (2) because the prosecution in the case at hand had not proven that the gang in question had committed or even endorsed any unlawful or violent acts, evidence as to the defendant's membership in that gang was not relevant to help prove any aggravating circumstance.

[b] Admissibility of psychiatric testimony

Psychiatric testimony which assesses the likelihood that a capital defendant would commit further acts of violence and pose a continuing threat to society has been held to be admissible in support of the imposition of a death sentence, without violating the defendant's rights under the Federal Constitution, even where such testimony involves responses to hypothetical questions.

The introduction of psychiatric testimony that a convicted murderer would probably commit further acts of violence and represent a continuing threat to society, at a capital sentencing hearing in which the jury was presented with a special question as to such future dangerousness, was held not to violate the defendant's federal constitutional rights under the circumstances presented in Barefoot v Estelle (1983) 463 US 880, 77 L Ed 2d 1090, 103 S Ct 3383, 13 Fed Rules Evid Serv 449, reh den 464 US 874, 78 L Ed 2d 185, 104 S Ct 209, where the Supreme Court apparently relied on the cruel and unusual punishment clause of the Federal Constitution's Eighth Amendment. In so holding, the Supreme Court first rejected the defendant's general argument that psychiatric testimony as to future dangerousness may never be presented because psychiatrists generally are not competent to predict future criminal activity with any degree of reliability. The likelihood of a defendant's committing further crimes had been established to be a constitutionally acceptable criterion for imposing the death penalty in Jurek v Texas (1976) 428 US 262, 49 L Ed 2d 929, 96 S Ct 2950, reh den 429 US 875, 50 L Ed 2d 158, 97 S Ct 197, 97 S Ct 198, supra § 11[a], the Supreme Court pointed out; and if lay persons can sensibly determine such a likelihood, it would make little sense to say that psychiatrists know so little about the subject that they should not be permitted to testify. Although the reliability of such testimony is a matter of dispute among psychiatrists themselves, the Supreme Court noted, it was not convinced that the adversary process could not be relied upon to distinguish between reliable and unreliable evidence and opinion about future dangerousness, particularly when the convicted felon has the opportunity to present his or her own side of the case. In rejecting the defendant's further contention that such testimony, even if admissible generally, may not be given in response to hypothetical questions, the Supreme Court pointed out that expert testimony is frequently presented in this manner, and the court found no constitutional barrier to applying the ordinary rules of evidence in this context. Finally, the Supreme Court rejected the defendant's claims that hypothetical questions had been misused in this particular case in that (1) the witnesses had been permitted to give an opinion on the ultimate issue before the jury, on hypothetical questions which were phrased in terms of the defendant's own conduct; (2) the hypothetical questions referred to controverted facts; and (3) the witnesses' answers were so positive as to amount to statements of fact rather than of opinion. The Supreme Court pointed out that these claims of misuse had been rejected by the state courts, and found no constitutional infirmity in the application of the state rules of evidence in this particular case. The judgment of a Federal District Court, which had denied the defendant's petition for habeas corpus, was affirmed.

§ 12. Defendant's escape from custody

A death penalty statute provision identifying as an "aggravating circumstance"—supporting the imposition of the death penalty in particular capital cases—the fact that an alleged capital offender had escaped from lawful custody has been held to satisfy the requirement, under the cruel and unusual punishment clause of the Federal Constitution's Eighth Amendment, that a statutory aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence than in other capital cases.

The death sentence imposed against a defendant who had been convicted of murder for allegedly killing another man in the course of the defendant's commission of a burglary, which sentence was supported in part by evidence that the defendant had committed these crimes following his escape from prison, was upheld in Zant v Stephens (1983) 462 US 862, 77 L Ed 2d 235, 103 S Ct 2733, where the court, apparently applying the cruel and unusual punishment clause of the Federal Constitution's Eighth Amendment, stated that (1) an aggravating circumstance provision of a capital sentencing statute must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant to which it applies as compared to others found guilty of murder, differentiating his or her case in an objective, evenhanded, and substantively rational way from the many murder cases in the state in question for which the death penalty could not be imposed; and (2) this requirement was met by a provision of the state death penalty statute under which the fact that a murder was committed by a person who had escaped from the lawful custody of a peace officer or from a place of lawful confinement was properly considered as an aggravating factor.

§ 13. Miscellaneous circumstances

It has been recognized by the Supreme Court that a death sentence would be invalid as a matter of due process of law if it were based on supposed aggravating circumstances involving the accused's race, religion, politics, invocation of the right to jury trial, or mental illness.

Due process of law would require the setting aside of a jury's decision to impose the death penalty, it was recognized in Zant v Stephens (1983)

462 US 862, 77 L Ed 2d 235, 103 S Ct 2733, supra § 6, if the decision were based on constitutionally invalid aggravating circumstances such as (1) the accused's race, religion, or political affiliation; (2) the fact that the accused had displayed a red flag, expressed unpopular political views, or requested a jury trial; or (3) the fact that the accused had engaged in conduct that should actually militate in favor of a lesser penalty, such as suffering from mental illness. The Supreme Court made these comments by way of comparison in the course of holding that the use in a capital case of a different statutory aggravating circumstance, which subsequently had been held invalid by the state supreme court, did not invalidate the death penalty therein.

See Sochor v Florida (1992, US) 119 L Ed 2d 326, 112 S Ct 2114, supra § 6, where the death sentence imposed on a homicide defendant by a state trial judge, following the recommendation of a jury which had been instructed on possible aggravating circumstances including the circumstance that the offense had been committed "in a cold, calculated and premeditated manner," was held not to be invalid under the Federal Constitution's Eighth Amendment on the theory that the "coldness factor," which was subsequently held by a state appellate court to be unsupported by the evidence in the case at hand, had been improperly weighed by the jury, because (1) it could not be known whether the jury had actually relied on the coldness factor, since under state capital sentencing procedures, juries rendering advisory verdicts did not reveal the aggravating factors on which they relied; (2) if the jury had not relied on the coldness factor, then there was no Eighth Amendment violation; and (3) the United States Supreme Court, in reviewing the case on certiorari, would not presume that the jury had erroneously rested its general verdict on the coldness factor rather than on independent grounds. Although a jury is unlikely to disregard a theory flawed in law, the Supreme Court observed, a jury is likely to disregard an option that is simply unsupported by the evidence.

III. Mitigating Circumstances

A. In General

§ 14. Necessity of consideration of mitigating circumstances or evidence

[a] Generally

The cruel and unusual punishment clause of the Federal Constitution's Eighth Amendment, the United States Supreme Court held in the following cases, requires that the sentencing authority in a capital case not be precluded from considering evidence of any relevant mitigating circumstances in the case, particularly with regard to the character and record of the accused and the circumstances of his or her offense.

> ☆ Observation: Although the Jurek and Lockett cases discussed in this section were decided without a majority opinion, the rules and reasoning announced therein have commonly been cited and followed as precedent in subsequent Supreme Court decisions.

The opinion announcing the judgment of the court in Jurek v Texas (1976) 428 US 262, 49 L Ed 2d 929, 96 S Ct 2950, reh den 429 US 875, 50 L Ed 2d 158, 97 S Ct 197, 97 S Ct 198, supra § 3, which opinion expressed the views of Justices Stewart, Powell, and Stevens, noted that, in order to provide the individualized sentencing determination required by the Federal Constitution's Eighth and Fourteenth Amendments, a capital sentencing system must allow the sentencing authority to consider mitigating circumstances.

A state death penalty statute was struck down in Roberts v Louisiana (1977) 431 US 633, 52 L Ed 2d 637, 97 S Ct 1993, 5 Ohio Ops 3d 252, infra § 14[e], on the ground that it violated the cruel and unusual punishment clause of the Federal Constitution's Eighth Amendment because it blocked the consideration of mitigating circumstances.

In Lockett v Ohio (1978) 438 US 586, 57 L Ed 2d 973, 98 S Ct 2954, 9 Ohio Ops 3d 26, a plurality opinion, expressing the views of Chief Justice Burger and Justices Stewart, Powell, and Stevens, stated that the state's death penalty statute, which provided only a limited list of mitigating circumstances that could avoid the imposition of the death penalty for "aggravated" murder, was invalid because the Federal Constitution's Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest sort of case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. In excluding the "rarest sort" of case, the plurality added, it expressed no opinion as to whether the need to deter certain kinds of homicide, such as those committed by a prisoner or escapee serving a life sentence, would justify a mandatory death sentence.[10] The statute in question required the imposition of the death penalty for aggravated murder unless it was found either that (1) the victim had induced or facilitated the offense, (2) the defendant had been under duress, coercion, or strong provocation and was unlikely to have committed the offense otherwise, or (3) the offense was primarily the product of a psychosis or mental deficiency. The limited range of mitigating circumstances which the sentencer could consider under this statute, the plurality found, was incompatible with constitutional requirements. The Supreme Court noted that under the statute, only the three specified factors could be considered in mitigation of the defendant's sentence, and that such factors as the absence of direct proof that the defendant intended to cause the victim's death, the defendant's minor role in the offense, or the defendant's age, would not as such be permitted to affect the sentencing decision. State court judgments imposing the death penalty, pursuant to the statute in question, upon a convicted murderer who had helped to plan a robbery and had sat in the getaway car while another participant actually shot the victim, were reversed and remanded for further proceedings.

> ☆ NOTE: Justice Scalia, concurring in the judgment in Walton v Arizona (1990) 497 US 639, 111 L Ed 2d 511, 110 S Ct 3047, reh den (US) 111 L Ed 2d 828, 111 S Ct 14, infra § 18, has expressed the view that the rule of Lockett v Ohio, supra, (1) is in-

---

[10] However, the use of mandatory death sentences for convicted murderers who are already serving life sentences without possibility of parole was held to be unconstitutional in Sumner v Shuman (1987) 483 US 66, 97 L Ed 2d 56, 107 S Ct 2716, infra.

consistent with the Supreme Court's previous holding in Furman v Georgia (1972) 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726, reh den 409 US 902, 34 L Ed 2d 163, 93 S Ct 89, that the sentencer's discretion in imposing the death penalty must be channeled and limited; (2) lacks support in the text of the Eighth Amendment; and therefore (3) is unworthy of respect under the doctrine of stare decisis. To similar effect, see Justice Scalia's dissenting opinions in Sochor v Florida (1992, US) 119 L Ed 2d 326, 112 S Ct 2114, supra § 6, and Espinosa v Florida (1992, US) 120 L Ed 2d 854, 112 S Ct 2926, supra § 5[b].

To similar effect as Lockett v Ohio, supra, is the plurality opinion in Bell v Ohio (1978) 438 US 637, 57 L Ed 2d 1010, 98 S Ct 2977, 9 Ohio Ops 3d 52, where the Supreme Court reversed a death sentence, imposed under the same statute which had been invalidated in the Lockett case, against a man who had been convicted of aggravated murder for his part in a kidnaping in which the victim had been killed, allegedly by another participant.

Eighth Amendment jurisprudence, stated the court in California v Brown (1987) 479 US 538, 93 L Ed 2d 934, 107 S Ct 837, establishes that a capital defendant generally must be allowed to introduce any relevant mitigating evidence regarding his character or record and any of the circumstances of the offense. The sentencer's consideration of such evidence, the Supreme Court added, is a constitutionally indispensable part of the process of inflicting the death penalty.

Under the Federal Constitution's Eighth Amendment prohibition against cruel and unusual punishment, held the court in McCleskey v Kemp (1987) 481 US 279, 95 L Ed 2d 262, 107 S Ct 1756, reh den 482 US 920, 96 L Ed 2d 686, 107 S Ct 3199, a state allowing the imposition of the death penalty cannot preclude a sentencer from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

In Sumner v Shuman (1987) 483 US 66, 97 L Ed 2d 56, 107 S Ct 2716, the Supreme Court observed that the Federal Constitution's ban on cruel and unusual punishment requires, in capital cases, that the sentencing authority make individualized determinations and be permitted to consider any relevant mitigating circumstances, including the character or record of the defendant and the circumstances of the offense.

In order to insure reliability in a sentencing jury's determination that death is an appropriate punishment in a specific case, held the court in Penry v Lynaugh (1989) 492 US 302, 106 L Ed 2d 256, 109 S Ct 2934, the cruel and unusual punishment clause of the Federal Constitution's Eighth Amendment requires that the jury be able to consider and give effect to any mitigating evidence relevant to the defendant's background or to the circumstances of the crime. It is not enough, the court stated, simply to allow the defendant to present mitigating evidence to a sentencing jury, if the jury is not instructed that it can consider such evidence and give it mitigating effect in imposing sentence.

The rule of McCleskey v Kemp, supra, was quoted with apparent approval in Blystone v Pennsylvania (1990) 494 US 299, 108 L Ed 2d 255, 110 S Ct 1078, where the court added that the dictates of the Federal Constitution's Eighth Amendment as to individualized sentencing in capital cases was satisfied where the jury, in a capital sentencing proceeding, was specifically instructed to consider, as mitigating evidence, any matter concerning the character or record of the defendant or the circumstances of the offense.

In Boyde v California (1990) 494 US 370, 108 L Ed 2d 316, 110 S Ct 1190, reh den 495 US 924, 109 L Ed 2d 322, 110 S Ct 1961, the Supreme Court held that the Federal Constitution's Eighth Amendment requires that a capital sentencing jury be able to consider and give effect to all relevant mitigating evidence offered by a defendant. The court added, however, that states are free to structure and shape the consideration of mitigating evidence in an effort to achieve a more rational and equitable administration of the death penalty.

In McKoy v North Carolina (1990) 494 US 433, 108 L Ed 2d 369, 110 S Ct 1227, the Supreme Court ruled that the Eighth Amendment requires states to allow consideration of mitigating evidence in capital cases, and that any barrier to such consideration must therefore fail, regardless of whether it is interposed by statute, by the sentencing court, by an evidentiary ruling, or by a single juror's holdout vote against finding the presence of a mitigating circumstance. In particular, the Supreme Court stated, the jury in a capital sentencing proceeding must be allowed to consider and give effect to mitigating evidence that is relevant to a defendant's character or record or to the circumstances of the offense, because the punishment should be directly related to the personal culpability of the defendant. The Supreme Court also observed that a state may not limit a sentencer's consideration of mitigating evidence merely because it places the same limitation on consideration of aggravating circumstances; in contrast to the carefully defined standards that must narrow a sentencer's discretion to impose the death penalty, the court stated, the Constitution limits a state's ability to narrow a sentencer's discretion to consider relevant evidence that might cause the sentencer to decline to impose the death penalty.

See Dawson v Delaware (1992, US) 117 L Ed 2d 309, 112 S Ct 1093, where the Supreme Court, in holding that the introduction into evidence at a capital sentencing proceeding of evidence regarding the defendant's membership in a white racist prison gang violated the Federal Constitution's First Amendment, observed that (1) previous Supreme Court decisions had held that a capital defendant is entitled to introduce any relevant mitigating evidence that he or she proffers in support of a sentence less than death, but (2) just as the defendant has the right to introduce any sort of mitigating evidence, the prosecution is also entitled to rebut that evidence with proof of its own.

◆

In the following cases, the United States Supreme Court held that the Eighth Amendment not only requires that the sentencing authority in a capital case be allowed to consider evidence of relevant mitigating circumstances, but also prohibits that authority from refusing to consider such evidence.

In overturning the death sentence imposed upon a convicted murderer where the trial judge had refused as a matter of law to consider mitigating evidence relating to the convict's family history and emotional disturbance, the court in Eddings v Oklahoma (1982) 455 US 104, 71 L Ed 2d 1, 102 S Ct 869, infra § 14[b], held that the Federal Constitution's Eighth and Fourteenth Amendments not only require that the sentencer in a capital case not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death, but also prohibit the sentencer from refusing to consider, as a matter of law, any relevant mitigating evidence. The Supreme Court adopted the rule and reasoning of the plurality in Lockett v Ohio (1978) 438 US 586, 57 L Ed 2d 973, 98 S Ct 2954, 9 Ohio Ops 3d 26, supra, and found that the principles stated therein were violated where the sentencer refused to consider relevant mitigating factors as the trial judge had done in this case. The sentencer, and appellate courts on review, may determine the weight to be given such evidence, the Supreme Court stated, but they may not accord it no weight at all by excluding such evidence from their consideration.

To similar effect as Eddings v Oklahoma, supra, are Skipper v South Carolina (1986) 476 US 1, 90 L Ed 2d 1, 106 S Ct 1669, 20 Fed Rules Evid Serv 241, infra § 14[c], and Hitchcock v Dugger (1987) 481 US 393, 95 L Ed 2d 347, 107 S Ct 1821, infra § 19.

See Burger v Kemp (1987) 483 US 776, 97 L Ed 2d 638, 107 S Ct 3114, reh den 483 US 1056, 97 L Ed 2d 820, 108 S Ct 32, infra § 14[b], where the court noted that potential evidence of a capital defendant's family background and developmental problems would have been relevant mitigating evidence which the sentencer could not have refused to consider nor been precluded from considering had counsel sought to introduce it.

◆

A state appellate court's affirmance of a death sentence which a state trial judge had imposed upon a defendant convicted of first-degree murder was held to be arbitrary and invalid, depriving the defendant of the individualized treatment to which he was entitled under the Federal Constitution, under the circumstances presented in Parker v Dugger (1991, US) 112 L Ed 2d 812, 111 S Ct 731, 91 CDOS 652, 91 Daily Journal DAR 947, reh den (US) 113 L Ed 2d 271, 111 S Ct 1340, where the United States Supreme Court found that the appellate court, having invalidated two of the six aggravating circumstances relied on by the trial judge, had incorrectly determined that the trial judge had found no mitigating circumstances and had therefore improperly failed to consider evidence of nonstatutory mitigating circumstances. The defendant had been convicted on two counts of first-degree murder allegedly arising out of illegal drug transactions. At the sentencing hearing, defense counsel had offered evidence of mitigating circumstances other than those specifically listed in the state's death penalty statute; and the jury had recommended sentences of life imprisonment on both first-degree counts, on the ground that the aggravating circumstances in the case were outweighed by mitigating circumstances. The trial judge, however, had sentenced the defendant to death on one count, based on his findings that (1) six aggravating circumstances were present, (2) no statutory aggravating circumstances were present, and (3) there were "no mitigating circumstances that outweigh the aggravating circumstances." The state appellate court, in affirming the death sentence, had described the trial judge as finding no mitigating circumstances to balance against the valid aggravating circumstances; but the Supreme Court, reviewing the case in habeas corpus proceedings, determined that this characterization of the trial judge's ruling was not fairly supported by the record and that the judge must have considered and found some nonstatutory mitigating circumstances. Thus, the Supreme Court concluded, the appellate court had erred in its review of the sentence. In a "weighing" state such as the one in question, where the death penalty may be imposed only where specified aggravating circumstances outweigh all mitigating circumstances, the Supreme Court noted, a reviewing court which strikes one or more of the aggravating circumstances relied on by the sentencer may constitutionally reweigh the remaining evidence or conduct harmless error analysis, and affirm a death sentence on that basis. But the appellate court in the case at hand had clearly not conducted an independent reweighing of the evidence, the Supreme Court found, since that appellate court (1) had relied upon what it took to be the trial judge's finding of no mitigating circumstances, and (2) had stated generally that it will not employ such a procedure. Nor could the appellate court's judgment have been properly based on harmless error analysis, the Supreme Court added, because, although the appellate court might have decided that the elimination of two aggravating circumstances would have made no difference to the sentence given the trial judge's supposed finding of no mitigating circumstances, the trial judge, as noted, in fact must have found mitigating circumstances. The Supreme Court therefore (1) reversed the judgment of a Federal Court of Appeals, which had reversed a Federal District Court judgment granting habeas corpus relief, and (2) remanded the case to the Court of Appeals, with instructions to return the case to the District Court for entry of an order directing the state to initiate proceedings for the reconsideration of the defendant's death sentence.

[b] Defendant's difficult childhood; mental or emotional problems

In the following cases, the United States Supreme Court held that evidence that a capital defendant had had a difficult childhood, or suffered from a mental or emotional disorder, was relevant mitigating evidence which the sentence could not refuse to consider, nor be prevented from considering, without violating the defendant's rights under the Federal Constitution's Eighth Amendment.

Holding that the Federal Constitution's Eighth and Fourteenth Amendments require that the sentencer in a capital case consider any relevant mitigating evidence,[11] the court in Eddings v Oklahoma (1982) 455 US 104, 71 L Ed 2d 1, 102 S Ct 869, concluded that the imposition of the death sentence against a 16-year-old convicted murderer was invalid because it had been done without the type of individualized consideration of mitigating factors required by the Federal Constitution, where the trial judge, while considering the convict's youth as a mitigating circumstance, had refused as a matter of law to consider evidence of the convict's turbulent family history and severe emotional disturbance in mitigation of the offense. The convict had killed a state trooper who had stopped him and his companions as they were running away from home. Evidence offered by the defense at the convict's sentencing hearing indicated that the convict's parents had been divorced when he was 5 years old; that he had lived at first with his mother, who was an alcoholic and possibly a prostitute; that he had subsequently lived with his father, who could find no way to control the child and had resorted to excessive physical punishment; and that he suffered from serious but treatable emotional problems. The trial judge, however, stated that he could not, "in following the law," consider the fact of the convict's violent background; and a state appellate court, in affirming the death sentence, found that the evidence in mitigation was not relevant because it did not provide a legal excuse from criminal responsibility. In reversing those decisions and remanding for further proceedings, the Supreme Court adopted the rule and reasoning of the plurality in Lockett v Ohio (1978) 438 US 586, 57 L Ed 2d 973, 98 S Ct 2954, 9 Ohio Ops 3d 26, supra § 14[a].

---

[11] See the discussion of this case in § 14[a], supra.

Restating the rule that, under the Federal Constitution's Eighth Amendment prohibition against cruel and unusual punishment, the sentencer in a capital case may not refuse to consider, or be precluded from considering, any relevant mitigating evidence, the court in Hitchcock v Dugger (1987) 481 US 393, 95 L Ed 2d 347, 107 S Ct 1821, infra § 19, held that this rule had been violated where, in the sentencing hearing for a convicted murderer in a state trial court, the sentencing judge had (1) refused to consider, and instructed the jury not to consider, evidence of nonstatutory mitigating circumstances, and thereby (2) effectively barred consideration of certain mitigating circumstances asserted by the defense with regard to, among other things, the difficult circumstances of the defendant's upbringing. In the sentencing phase of the trial, defense counsel had presented evidence that (1) the defendant's mind had tended to wander ever since he had passed out as a child after inhaling gasoline fumes, as he had been doing habitually; (2) the defendant had been one of seven children in a poor family that earned its living picking cotton; and (3) the defendant's father had died of cancer. The judgments of lower federal courts, which had denied the defendant's petition for habeas corpus without holding an evidentiary hearing, were reversed, and the case was remanded for further proceedings.

Apparently applying the Federal Constitution's Eighth Amendment, the court in Burger v Kemp (1987) 483 US 776, 97 L Ed 2d 638, 107 S Ct 3114, reh den 483 US 1056, 97 L Ed 2d 820, 108 S Ct 32—though affirming the denial of federal habeas corpus relief and rejecting the claim of a state prisoner, who had been sentenced to death for murder, that he had been denied his constitutional right to effective assistance of counsel as a result of his trial attorney's failure to fully investigate and present evidence of the prisoner's neglectful, sometimes even violent family background and his retarded mental and emotional development—recognized that this potential evidence would have been relevant mitigating evidence which the sentencer could not have refused to consider nor been precluded from considering had counsel sought to introduce it, particularly in view of the fact that the prisoner had been only 17 years old at the time of his offense.

Absent instructions informing the sentencing jury in a capital case that it could consider and give effect to mitigating evidence as to the defendant's alleged mental retardation and background of childhood abuse, held the court in Penry v Lynaugh (1989) 492 US 302, 106 L Ed 2d 256, 109 S Ct 2934, the Federal Constitution's Eighth Amendment prohibition against cruel and unusual punishment was violated by the application of a state capital sentencing procedure which did not provide the jury with a vehicle for expressing its reasoned moral response to such mitigating evidence in rendering its sentencing decision. The procedure in question required imposition of the death penalty if the jury answered yes to all of three special issues: (1) whether the defendant acted "deliberately" and with reasonable expectation that a death would result; (2) whether the defendant was likely to be a continuing threat to society; and (3) whether the defendant's fatal actions were unreasonable in response to any provocation offered by the victim. Although it had previously upheld a death penalty statute which did not expressly mention mitigating circumstances, the Supreme Court noted, that decision had assumed that special issues would permit juries to fully consider all relevant mitigating evidence. That had not been true in this case, the Supreme Court found, because the defendant's mitigating evidence had relevance to his moral culpability beyond the scope of the special issues. The first special issue, the Supreme Court noted, permitted the jury to consider evidence of the defendant's retardation as it bore on his ability to act "deliberately"; but in the absence of jury instructions clearly directing the jury to fully consider that evidence as it bore on the defendant's culpability, jurors who believed that such evidence diminished culpability and made the death penalty inappropriate could not have given effect to that conclusion if they nevertheless believed that the defendant had acted "deliberately." As to the second special issue, the Supreme Court found that the defendant's retardation and history of abuse, particularly his inability to learn from his mistakes, would be relevant only as an aggravating factor because it suggested that he would be dangerous in the future. As to the third special issue, the Supreme Court determined that, even if the jury found that the mitigating evidence rendered the defendant less culpable, that would not necessarily make his conduct a more reasonable response to provocation, and the jury might still have been unable to give effect to that conclusion. Given that the prosecutor had stressed the jurors' obligation to follow the law and the instructions given to them, the Supreme Court stated, a reasonable juror could have concluded that there was no vehicle for expressing the view that the mitigating evidence made the death penalty inappropriate.

In Boyde v California (1990) 494 US 370, 108 L Ed 2d 316, 110 S Ct 1190, reh den 495 US 924, 109 L Ed 2d 322, 110 S Ct 1961, infra § 22, the Supreme Court observed that evidence about the defendant's background and character was relevant in a capital sentencing proceeding because of the belief, long held by society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse.

[c] Defendant's adjustment to prison; potential for rehabilitation

Evidence tending to show that a capital defendant had adjusted well and caused no trouble while imprisoned prior to his or her capital trial, or that the defendant had a good potential for rehabilitation, was held in the following decisions of the United States Supreme Court to be relevant mitigating evidence which the sentencer could not refuse to consider, or be precluded from considering, in determining whether the defendant should be sentenced to death.

Applying the rule that the sentencing authority in a capital case may not be precluded from considering nor refuse to consider relevant mitigating evidence, the court in Skipper v South Carolina (1986) 476 US 1, 90 L Ed 2d 1, 106 S Ct 1669, 20 Fed Rules Evid Serv 241, held that the death sentence imposed against a convicted rapist-murderer violated the cruel and unusual punishment clause of the Federal Constitution's Eighth Amendment where the testimony of two jailers and one regular visitor to the jail, to the effect that the accused had made a good adjustment during the time he spent in jail prior to trial, had been excluded from evidence at the sentencing hearing. A defendant's disposition to make a well-behaved and peaceful adjustment to life in prison, the Supreme Court stated, is an aspect of his or her character that is, by its nature, relevant to the sentencing determination in a capital case. In rejecting several justifications offered by the state for the exclusion of the accused's evidence, the Supreme Court noted that this testimony (1) had not been offered as improper lay opinion regarding future behavior; (2) had not been excluded by the trial court solely to bar the introduction of irrelevant evidence of future behavior, but had apparently been barred for any use whatsoever; and (3) had not been merely cumulative of similar but less disinterested testimony by the accused and his wife. A judgment of the state supreme court affirming the accused's death sentence was therefore reversed, and the case was remanded for further proceedings.

Restating the rule that, under the Federal Constitution's Eighth Amendment prohibition against cruel and unusual punishment, the sentencer in a capital case may not refuse to consider, or be precluded from considering, any relevant mitigating evidence, the court in Hitchcock v Dugger (1987) 481 US 393, 95 L Ed 2d 347, 107 S Ct 1821, infra § 19, held that this rule had been violated where, in the sentencing hearing for a convicted murderer in a state trial court, the sentencing judge (1) refused to consider, and instructed the jury not to consider, evidence of nonstatutory mitigating circumstances, and thereby (2) effectively barred consideration of certain mitigating circumstances asserted by the defense with regard to, among other things, the defendant's potential for rehabilitation.

A convicted murderer was held to have the right, under the Federal Constitution's Eighth Amendment, to have the sentencing jury consider in mitigation of the offense evidence that he had had no record of disciplinary violations while incarcerated both before and after the offense, in Franklin v Lynaugh (1988) 487 US 164, 101 L Ed 2d 155, 108 S Ct 2320, reh den 487 US 1263, 101 L Ed 2d 976, 109 S Ct 25. However, the Supreme Court ruled that this right had been fully protected where a state trial court (1) had instructed the jury that the convict would be sentenced to death if the jurors answered "yes" to both of two special issues asking whether the convict (a) acted deliberately and with a reasonable expectation that death would result and (b) would probably commit future acts of violence, and (2) had refused a defense request to further instruct the jury that any evidence considered by them to mitigate against the death penalty should be taken into account in answering the special issues and could alone be enough to justify a negative answer to either special issue. Evidence of the convict's prison record, the Supreme Court stated, was relevant only to the issue of his future dangerousness and so could be fully considered by the jury in answering the second special issue. The judgments of lower federal courts, denying the convict's petition for habeas corpus, were affirmed.

[d] Jury's residual doubt as to guilt

It has been held, in connection with a trial court's refusal to broadly instruct the jury in a capital sentencing proceeding to consider any mitigating circumstances in answering the special issues which determine whether a death sentence is appropriate, that the Federal Constitution's Eighth Amendment does not require capital sentencing juries to reconsider any residual doubt they may have as to the defendant's guilt.

Although unable to agree on a majority opinion, six Justices of the United States Supreme Court ruled in Franklin v Lynaugh (1988) 487 US 164, 101 L Ed 2d 155, 108 S Ct 2320, reh den 487 US 1263, 101 L Ed 2d 976, 109 S Ct 25, that (1) the Federal Constitution's Eighth Amendment does not require that capital juries reconsider, in the sentencing phase of the trial, any "residual doubt" they may have as to a defendant's guilt, and (2) a death sentence imposed by a state court upon a convicted murderer was not invalid under the Eighth Amendment where the trial court, having instructed the jury that the convict would be sentenced to death if the jurors answered "yes" to both of two special issues, had refused a defense request to further instruct the jury that any evidence considered by them to mitigate against the death penalty should be taken into account in answering the special issues and could alone be enough to justify a negative answer to either issue. The special issues asked whether the convict (1) had acted deliberately and with a reasonable expectation that death would result, and (2) would probably commit future acts of violence. The plurality opinion, expressing the views of Justice White, Chief Justice Rehnquist, and Justices Scalia and Kennedy, stated that a consideration of "residual doubt" was not mandated under the rule that the sentencer in a capital case may not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense, because lingering doubts over a defendant's guilt are not over any aspect of the defendant's character or record or a circumstance of the offense. Justices O'Connor and Blackmun concurred in the judgment and stated that, because "residual doubt" about guilt is not a mitigating circumstance, reconsideration of residual doubt was not required.

[e] Miscellaneous circumstances

The United States Supreme Court held in the following cases that the Federal Constitution's Eighth Amendment is violated when the sentencer in a capital case refuses to consider or is precluded from considering, as mitigating circumstances weighing against the imposition of the death penalty, such factors as the defendant's age, intoxication, voluntary surrender to authorities, or lack of prior convictions.

A state statute which provided a mandatory death penalty for the murder of firefighters or peace officers was invalidated by the United States Supreme Court in Roberts v Louisiana (1977) 431 US 633, 52 L Ed 2d 637, 97 S Ct 1993, 5 Ohio Ops 3d 252, on the ground that it violated the cruel and unusual punishment clause of the Federal Constitution's Eighth Amendment by blocking the consideration of mitigating circumstances such as (1) the youth of the offender; (2) the absence of any prior conviction; (3) the influence of drugs, alcohol, or extreme emotional disturbance; or (4) the existence of circumstances which the offender reasonably believed to provide a moral justification for his or her conduct. The Supreme Court relied in part on the opinion announcing the judgment of the court in Roberts v Louisiana (1976) 428 US 325, 49 L Ed 2d 974, 96 S Ct 3001, reh den 429 US 890, 50 L Ed 2d 173, 97 S Ct 248, which opinion, expressing the views of Justices Stewart, Powell, and Stevens, had stated that the constitutional vice of mandatory death sentence statutes was their lack of focus on the circumstances of the particular offense and the character and propensities of the offender.

Restating the rule that, under the Federal Constitution's Eighth Amendment prohibition against cruel and unusual punishment, the sentencer in a capital case may not refuse to consider, or be precluded from considering, any relevant mitigating evidence, the court in Hitchcock v Dugger (1987) 481 US 393, 95 L Ed 2d 347, 107 S Ct 1821, infra § 19, held that this rule had been violated where, in the sentencing hearing for a convicted murderer in a state trial court, the sentencing judge (1) refused to consider, and instructed the jury not to consider, evidence of nonstatutory mitigating circumstances, and thereby (2) effectively barred consideration of certain mitigating circumstances asserted by the defense with regard to, among other things, the defendant's voluntary surrender to authorities, and the defendant's having been a fond and affectionate uncle to the children of one of his brothers.

See Lockett v Ohio (1978) 438 US 586, 57 L Ed 2d 973, 98 S Ct 2954, 9 Ohio Ops 3d 26, supra § 14[a], where a plurality opinion joined by Chief Justice Burger and Justices Stewart, Powell, and Stevens, in expressing the view that the state's death penalty statute was invalid because it included only a limited list of mitigating circumstances that could avoid the imposition of the death penalty for "aggravated" murder, noted particularly that such factors as the absence of direct proof that the defendant intended to cause the victim's death, the defendant's minor role in the offense, or the defendant's age, would not as such be permitted to affect the sentencing decision under the statute.

§ 15. Relevancy of mitigating evidence, generally

In order to be relevant to the decision whether or not to impose a death sentence, the United States Supreme Court has held, mitigating evidence need only tend logically to prove or disprove some fact or circumstance which a factfinder could reasonably deem to have mitigating value, and whether the evidence is accepted or rejected by the factfinder or is sufficient to convince the factfinder of the proposition for which it is offered has no bearing on its relevancy.

In holding that a state's capital sentencing instructions violated the Federal Constitution's Eighth Amendment by preventing the sentencing jury from considering any mitigating circumstance that the jury did not unanimously find to exist, the court in McKoy v North Carolina (1990) 494 US 433, 108 L Ed 2d 369, 110 S Ct 1227, infra § 20, rejected the state's argument that mitigating evidence is relevant only if the jury unanimously finds that it proves the existence of a mitigating circumstance, as the court ruled that (1) in a capital sentencing proceeding, "relevant" mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a factfinder could reasonably deem to have mitigating value; and (2) whether the factfinder accepts or rejects the evidence has no bearing on its relevancy, and it is not necessary that the item of evidence alone convinces, or is sufficient to convince, the factfinder of the proposition for which it is offered. The court stated that (1) mitigating circumstances not unanimously found by the jury to be present do not become irrelevant to mitigation merely because one or more jurors either did not believe that a given circumstance had been proven or did not think that the circumstance, though proved, mitigated the offense, and (2) evidence, in order to be relevant to an inquiry, need not conclusively prove the ultimate fact at issue, but need only have any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

§ 16. Validity of statutory mitigating circumstances

It has been held by the United States Supreme Court that certain mitigating circumstances identified by a state's death penalty statute as matters which a sentencing authority should consider as weighing against the imposition of a death sentence were not too imprecise to provide the meaningful guidance for the sentencer's discretion that is required under the cruel and unusual punishment clause of the Federal Constitution's Eighth Amendment.

Upholding a state's death penalty statute against claims that its application would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Federal Constitution, the court in Proffitt v Florida (1976) 428 US 242, 49 L Ed 2d 913, 96 S Ct 2960, reh den 429 US 875, 50 L Ed 2d 158, 97 S Ct 197, 97 S Ct 198, rejected a claim that the mitigating circumstances enumerated in the statute were too imprecise to satisfy constitutional requirements. Specifically, a convicted murderer sentenced to death under the statute had argued that whether a defendant acted "under the influence of extreme mental or emotional disturbance," whether a defendant's capacity "to conform his conduct to the requirements of law was substantially impaired," whether a defendant's participation as an accomplice in a capital felony was "relatively minor," and whether the defendant had no "significant history of prior criminal activity," within the terms of the statute, were questions beyond the capacity of a judge or jury to determine, and also that neither a judge nor a jury was capable of deciding how to weigh a defendant's age. In an opinion announcing the judgment of the court, and expressing the views of Justices Stewart, Powell, and Stevens, it was observed that while these questions and decisions might be hard, they required no more line drawing than is commonly required of the factfinder in a lawsuit. Justice White, Chief Justice Burger, and Justice Rehnquist, concurring in the judgment, similarly expressed the view that, although the aggravating and mitigating circumstances set forth in the statute in question were not susceptible to mechanical application, they were by no means so vague and overbroad as to leave the discretion of the sentencing authority unfettered.

§ 17. Necessity of jury finding as to mitigating circumstances

The United States Supreme Court, or an individual Justice thereof, has held in the following cases that the jury trial provision of the Federal Constitution's Sixth Amendment, among other constitutional provisions, does not require that the specific findings authorizing the imposition of the death penalty in a capital case—including findings as to the existence of one or more "mitigating circumstances"—be made by a jury.

In discussing appellate reweighing of aggravating and mitigating evidence in a capital case, the court in Clemons v Mississippi (1990) 494 US 738, 108 L Ed 2d 725, 110 S Ct 1441, supra § 5, ruled that the Federal Constitution does not require that a jury make the findings prerequisite to the imposition of a death sentence.

Similarly, the court in Walton v Arizona (1990) 497 US 639, 111 L Ed 2d 511, 110 S Ct 3047, reh den (US) 111 L Ed 2d 828, 111 S Ct 14, supra § 5, held that a state capital sentencing statute which provided that factual findings with regard to the existence of aggravating or mitigating circumstances would be made by the trial judge, rather than by the jury, did not violate the jury trial provision of the Federal Constitution's Sixth Amendment.

Justice Rehnquist, acting as Circuit Justice to deny an individual's application to (1) suspend a previous Supreme Court order denying certiorari or (2) stay the individual's execution, pending action on his petition for rehearing, ruled in Richmond v Arizona (1977) 434 US 1323, 54 L Ed 2d 34, 98 S Ct 8, that a state capital sentencing statute which specifically enumerates several factors constituting mitigating circumstances, but which fails to take into account certain other factors such as age, prior criminal history, or intellectual level, need not, for purposes of the Sixth, Eighth, or Fourteenth Amendments to the Federal Constitution, provide for jury input into the determination as to whether mitigating circumstances exist. Such input, Justice Rehnquist stated, does not appear to be required under the Supreme Court's decision in Proffitt v Florida (1976) 428 US 242, 49 L Ed 2d 913, 96 S Ct 2960, reh den 429 US 875, 50 L Ed 2d 158, 97 S Ct 197, 97 S Ct 198, supra §§ 7[a], 9.

§ 18. Burden of proof as to mitigating circumstances

At least so long as the prosecution's burden of proof as to the elements of the capital offense and as to the existence of aggravating circumstances is not lessened, the United States Supreme Court has held, a state capital sentencing statute may, without violating a capital defendant's rights under the Federal Constitution's Eighth and Fourteenth Amendments, place upon the defendant the burden of establishing mitigating circumstances by a preponderance of the evidence.

A state capital sentencing statute which imposed upon a defendant convicted of first-degree murder the burden of establishing, by a preponderance of the evidence, the existence of mitigating circumstances sufficiently substantial to call for leniency was held not to violate the Federal Constitution's Eighth or Fourteenth Amendment in Walton v Arizona (1990) 497 US 639, 111 L Ed 2d 511, 110 S Ct 3047, reh den (US) 111 L Ed 2d 828, 111 S Ct 14, where a plurality opinion, expressing the views of Justice White, Chief Justice Rehnquist, and Justices O'Connor and Kennedy, stated that such a rule was constitutional so long as the state's method of allocating the burden of proof did not lessen the prosecution's burden to prove every element of the offense charged or, in this case, to prove the existence of aggravating circumstances. The plurality opinion observed that (1) there had been no complaint in the case at hand that the state statute or practice excluded from consideration any particular type of mitigating evidence; (2) a state was not constitutionally precluded from specifying how the mitigating circumstances are to be proved; (3) unlike Mills v Maryland (1988) 486 US 367, 100 L Ed 2d 384, 108 S Ct 1860, supra § 20, how a jury would have read its instructions was not a problem in the present case, where the judge alone was the sentencer; and (4) if there were a jury, it would be permissible to require each juror, before weighing a claimed mitigating circumstance in the balance, to be convinced in his or her own mind that such circumstance had been proved by a preponderance of the evidence. Justice Scalia, concurring in the judgment, expressed the view that the statute's alleged restriction of the sentencer's discretion to consider mitigating circumstances would not violate the Eighth Amendment.

B. Validity of Particular Alleged Restrictions on Consideration of Mitigating Circumstances or Evidence

§ 19. Restriction to statutory mitigating circumstances

The United States Supreme Court, in applying its holding that the Federal Constitution's Eighth Amendment requires that the sentencer in a capital case consider any relevant mitigating circumstances, has ruled that the sentencer may not be restricted to considering only those mitigating circumstances that are specifically identified in the applicable death penalty statute.

Restating the rule that, under the Federal Constitution's Eighth Amendment prohibition against cruel and unusual punishment, the sentencer in a capital case may not refuse to consider, or be precluded from considering, any relevant mitigating evidence, the court in Hitchcock v Dugger (1987) 481 US 393, 95 L Ed 2d 347, 107 S Ct 1821, held that this rule had been violated where, in the sentencing hearing for a convicted murderer in a state trial court, the sentencing judge refused to consider, and instructed the jury not to consider, evidence of mitigating factors other than those specifically enumerated in the state's death penalty statute. Defense counsel had argued in the sentencing hearing that a death sentence should not be imposed because of several mitigating factors, including (1) the accused's youth, (2) his innocence of prior criminal activity or violent behavior, (3) the difficult circumstances of his upbringing, (4) his potential for rehabilitation, and (5) his voluntary surrender to authorities. The sentencing judge, however, had instructed the advisory jury that the "mitigating circumstances which you may consider shall be the following," and recited the mitigating factors listed in the state statute, which included a defendant's age and lack of significant criminal history but not any of the other factors relied on by counsel. In accepting the jury's ensuing recommendation that the convict be sentenced to death, the judge found that there were not sufficient mitigating circumstances "as enumerated in" the statute to outweigh the aggravating circumstances in the case. The Supreme Court, in reversing lower federal court decisions which had denied the convict's petition for habeas corpus, found it unnecessary to determine whether the state statute itself improperly required that the consideration of mitigating circumstances be limited to those enumerated, since the sentencing judge had clearly barred the consideration of nonstatutory mitigating factors. This, the Supreme Court stated, was an error which rendered the death sentence invalid in the absence of any argument that the error had been harmless.

§ 20. Unanimous finding requirement

Capital sentencing statutes or instructions which limited the members of a sentencing jury to considering those mitigating circumstances which the jury unanimously found to exist, or which barred the jury from considering any mitigating evidence if the jurors did not unanimously find that some particular mitigating circumstance existed, would violate the Federal Constitution's Eighth Amendment, the United States Supreme Court held in the following cases.

If a state's capital sentencing statute is correctly interpreted as providing that (1) a sentencing jury which does not unanimously agree on the existence of a particular mitigating circumstance must determine that such circumstance does not exist, and (2) a jury which does not unanimously agree on the existence of any particular mitigating circumstance may not give mitigating evidence any effect whatsoever and must impose a sentence of death, ruled the court in Mills v Maryland (1988) 486 US 367, 100 L Ed 2d 384, 108 S Ct 1860, then the imposition of the death penalty by a jury under that statute is arbitrary and invalid —the court apparently relying on the Federal Constitution's Eighth Amendment—and it is the duty of a reviewing court to remand such a case for resentencing. In the case at hand, wherein the defendant, a prison inmate, had been convicted of the first-degree murder of his cellmate, the sentencing jury had been given a sentencing form, parts of which (1) presented jurors with a list of possible mitigating circumstances, accompanied by spaces in which they could check "yes" or "no" and preceded by a statement that the jury unanimously found that each of the mitigating circumstances marked "yes" had been proven to exist by a preponderance of the evidence, while those marked "no" had not been so proven; and (2) asked the jury to affirm or deny that it "unanimously" found the mitigating circumstances marked "yes" to outweigh the aggravating circumstances marked "yes" in another section of the form. The trial judge's instructions had repeatedly emphasized that all jury determinations, including those as to mitigating circumstances, had to be unanimous. The defendant contended that the state's death penalty law was unconstitutionally mandatory because it required the imposition of the death penalty if the jury unanimously agreed as to the existence of an aggravating circumstance and could not unanimously agree on any one mitigating circumstance. In vacating the defendant's sentence, the United States Supreme Court (1) found a substantial probability that reasonable jurors would have interpreted the verdict form and instructions as suggested by the defendant; and (2) ruled that it would be the height of arbitrariness to allow or require the imposition of the death penalty under the circumstances postulated by the inmate. Under its precedents, the Supreme Court observed, a sentencer may not refuse to consider nor be precluded—by statute, by the sentencing court, or by an evidentiary ruling—from considering any relevant mitigating evidence; and where the sentencer's failure to consider all the mitigating evidence risks erroneous imposition of the death penalty, it is the court's duty to remand for resentencing.

Under its decision in Mills v Maryland, supra, held the court in McKoy v North Carolina (1990) 494 US 433, 108 L Ed 2d 369, 110 S Ct 1227, a portion of a state's capital sentencing instructions, which portion effectively prevented the sentencing jury from considering any mitigating factor that the jurors did not unanimously find to exist, violated the Federal Constitution's Eighth Amendment by preventing the sentencer from considering all mitigating evidence. Specifically, the instructions in question asked the jury (1) whether they unanimously found from the evidence, beyond a reasonable doubt, the existence of one or more specified aggravating circumstances, which were listed on the verdict form with spaces for marking "yes" or "no" with regard to each circumstance; (2) whether they unanimously found from the evidence, by a preponderance of the evidence, the existence of one or more specified mitigating circumstances, which were similarly listed on the verdict form; (3) whether they unanimously found, beyond a reasonable doubt, that the mitigating circumstances "found by you" were insufficient to outweigh the aggravating circumstances "found by you"; and (4) whether they unanimously found, beyond a reasonable doubt, that the aggravating circumstances "found by you" were sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstances "found by you." An attempt to distinguish Mills v Maryland on the basis of the fourth part of the instructions described above was rejected by the Supreme Court, which found that (1) the instructions as a whole prevented the jurors from giving effect to evidence which they believed called for a sentence less than death, even if all the jurors agreed that some mitigating circumstances existed, unless they unanimously found the existence of the same mitigating circumstance; and (2) the instructions still allowed the jury to consider only those mitigating factors which it unanimously found to exist. The Supreme Court ruled that the state could not save the unanimity requirement by characterizing it as a standard of proof intended to insure the reliability of mitigating evidence, because the Eighth Amendment requires states to allow consideration of mitigating evidence in capital cases, and any barrier to such consideration must therefore fail, regardless of whether it is interposed by statute, by the sentencing court, by an evidentiary ruling, or by a single juror's holdout vote against finding the presence of a mitigating circumstance. The fact that the instructions permitted jurors to consider mitigating evidence when they decided collectively whether any mitigating circumstances was no answer to the constitutional objections, the Supreme Court added, as the Mills decision required that each juror be permitted to consider and give effect to mitigating evidence when making the ultimate decision whether to vote for the death sentence. Finally, the Supreme Court rejected the state's contention that requiring unanimity as to mitigating circumstances was constitutional because the instructions also required unanimity on aggravating circumstances. The judgment of the state appellate court was accordingly reversed.

§ 21. Hearsay rules

The United States Supreme Court has held that, under the circumstances presented in a particular capital case, the due process clause of the Federal Constitution's Fourteenth Amendment prohibited state hearsay evidence rules from being applied so as to bar the defendant from introducing relevant mitigating evidence in opposition to the imposition of the death penalty.

The exclusion from evidence at a capital sentencing trial, pursuant to state evidentiary rules regarding hearsay, of testimony to the effect that an alleged confederate of the defendant in question had admitted that the defendant had not been present when the confederate had committed the murder for which both were convicted, was held to violate the defendant's rights under the due process clause of the Fourteenth Amendment, even if the testimony properly came within the state's hearsay rule, under the circumstances presented in Green v Georgia (1979) 442 US 95, 60 L Ed 2d 738, 99 S Ct 2150. The Supreme Court noted that (1) the defendant had sought to introduce that testimony in order to prove that he had not actually perpetrated the murder, (2) the excluded testimony involved a spontaneous statement made against interest by the alleged confederate to a close friend, and (3) the testimony was therefore highly relevant to a critical issue in the punishment phase of the trial and was of sufficient reliability that it had been utilized by the state in the confederate's trial, with a capital sentence based upon it. The defendant's sentence was accordingly vacated and the case remanded for further proceedings.

§ 22. Instructional descriptions or examples of mitigating circumstances

Instructions given to the jury in capital sentencing proceedings—which instructions either (1) gave specific examples of mitigating circumstances that the jury could consider, or (2) described a catchall mitigating circumstance in an arguably restrictive manner—have been held by the United States Supreme Court not to restrict the sentencer's consideration of relevant mitigating evidence, in violation of the defendant's rights under the Federal Constitution's Eighth Amendment, under the particular circumstances presented.

Instructions giving the jury in a state capital sentencing proceeding specific examples of mitigating circumstances that it was entitled to consider—namely, whether the defendant had been (1) affected by an "extreme" mental or emotional disturbance, (2) "substantially" impaired from appreciating his conduct, or (3) acting under "extreme" duress—were held not to impermissibly preclude the jury's consideration of lesser degrees of disturbance, impairment, or duress under the circumstances presented in Blystone v Pennsylvania (1990) 494 US 299, 108 L Ed 2d 255, 110 S Ct 1078, where the Supreme Court noted that the trial court (1) had satisfied the dictates of the Federal Constitution's Eighth Amendment as to individualized sentencing in capital cases by specifically instructing the jury to consider, as mitigating evidence, any matter concerning the character or record of the defendant or the circumstances of the offense, and (2) had made it clear to the jury that the example which had been given were merely items which the jurors could consider, among others.

While holding generally that evidence about a defendant's background and character is relevant in capital sentencing proceedings, because of society's long-held belief that defendants who commit criminal acts that are attributable to a disadvantaged background or to mental or emotional problems may be less culpable than those who have no such excuse, the court in Boyde v California (1990) 494 US 370, 108 L Ed 2d 316, 110 S Ct 1190, reh den 495 US 924, 109 L Ed 2d 322, 110 S Ct 1961, reviewing the death sentence imposed by the state upon a convicted murderer who had presented mitigating evidence relating to his background and character, ruled that the Federal Constitution's Eighth and Fourteenth Amendments were not violated by a jury instruction which listed 11 factors for consideration, including a final catchall factor referring to "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse," as the court found that there was no reasonable likelihood that jurors had understood this instruction as precluding the consideration of relevant mitigating evidence as to the convict's background and character. The convict had contended that the instructions did not allow the jury to consider non-crime-related factors such as background and character, since (1) of the first 10 factors, several focussed only on the immediate circumstances of the crime itself, while two centering on the presence or absence of prior violent criminal activity or prior felony convictions appeared to be solely aggravating factors, and (2) the final catchall factor, by referring to circumstances which extenuate "the gravity of the crime," appeared to limit jury to evidence related to the crime. The Supreme Court, however, stated that the convict had had an opportunity, through the catchall factor, to argue that his background or character extenuated or excused the seriousness of the crime; and the court saw no reason to believe that reasonable jurors would resist society's long-held view that such evidence would, in an appropriate case, counsel imposition of a sentence less than death. The Supreme Court noted that the language of the catchall factor did not limit the jury's consideration to other circumstances of the crime, but directed the jury to consider "any other evidence" that might excuse the crime, which would include a defendant's background and character. Even if the language of the catchall factor were less clear, the Supreme Court found, it was improbable that jurors would interpret that factor as precluding consideration of all non-crime-related evidence when it was viewed together with other factors which did allow consideration of mitigating evidence not connected to the crime itself, such as the absence of prior criminal activity or of prior felony convictions, or the defendant's youth. The fact that volumes of mitigating evidence had been introduced without objection, the Supreme Court added, was relevant in deciding how the jury would have understood an instruction that was at worst ambiguous, particularly since the jury had been instructed to consider all of the evidence that had been received. As to the contention that the prosecutor's arguments had encouraged the jury to take a narrow view of the catchall factor, the Supreme Court stated that (1) the prosecutor had argued only that the background and character evidence presented did not sufficiently mitigate the crime, not that such evidence could not be considered; and (2) prosecutorial arguments are not to be regarded as having the same force as instructions from the court. Also, the Supreme Court found no merit in the contention that arguments of prosecutors in other cases bore on the validity of the instructions in this case. The judgment of a state court upholding the convict's death sentence was affirmed.

§ 23. Instruction against influence of sympathy

In upholding the death sentences imposed by state courts against capital offenders in cases where the sentencing jury had been instructed to avoid any influence of sympathy, the United States Supreme Court expressly or apparently held in the following cases that such instructions do not impermissibly restrict the jury's consideration of mitigating circumstances or evidence in violation of the Federal Constitution's Eighth or Fourteenth Amendment.

An instruction informing jurors, in the penalty phase of a state capital-murder trial, that they "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling," was held in California v Brown (1987) 479 US 538, 93 L Ed 2d 934, 107 S Ct 837, not to violate the Federal Constitution's Eighth and Fourteenth Amendments by causing the death penalty to be administered in an arbitrary and unpredictable fashion, or by preventing the jury from considering relevant mitigating evidence. The Supreme Court found that a reasonable juror would interpret this instruction as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase, rather than solely as a directive not to be swayed by "sympathy"; and the court considered this to be especially true where, as in the case at hand, the defendant had produced 13 witnesses in his favor over the course of 3 days. An instruction prohibiting a jury in a capital sentencing proceeding from basing its decision on factors not presented at trial does not violate the Federal Constitution, the Supreme Court concluded, but rather serves the useful purpose of (1) confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors, (2) furthering the Eighth Amendment requirement of reliability in the determination that death is the appropriate punishment in a specific case, and (3) insuring the availability of meaningful judicial review. The judgment of a state supreme court, which had reversed the conviction of the defendant in the case at hand on the ground that the instruction diverted the jury from its constitutional duty to consider any sympathetic aspect of the defendant's character or record, was reversed, and the case was remanded for further proceedings.

In holding that habeas corpus review was not available for a claim that the Federal Constitution's Eighth Amendment was violated by a state's capital sentencing instruction, which advised the sentencing jury that it had to consider all mitigating circumstances but that it should avoid any influence of sympathy, the court in Saffle v Parks (1990) 494 US 484, 108 L Ed 2d 415, 110 S Ct 1257, reh den 495 US 924, 109 L Ed 2d 322, 110 S Ct 1960, stated that it was constitutionally permissible, if not constitutionally required, for the state to insist that the individualized assessment of the appropriateness of the death penalty be a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence. There is a simple and logical distinction, the court observed, between rules that govern what factors the jury must be permitted to consider in making its sentencing decision, and rules that govern how the state may guide the jury in considering and weighing those factors in reaching a decision; and so, the court concluded, it could not be said that the large majority of state and federal courts had been unreasonable in holding that antisympathy instructions similar to the one at issue in the present case do not violate the rule that the sentencer in a capital case may not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. The judgment of a lower federal court, invalidating the death sentence imposed against a convicted murderer by a jury which had received such an instruction, was reversed.

IV. Interaction of Aggravating and Mitigating Circumstances

§ 24. Generally

The United States Supreme Court has held that the Federal Constitution's Eighth Amendment is not violated by a state death penalty statute which does not (1) require the sentencer in a capital case to give any particular weight to single or multiple aggravating circumstances, or (2) set a particular standard for weighing aggravating and mitigating circumstances.

The court in Zant v Stephens (1983) 462 US 862, 77 L Ed 2d 235, 103 S Ct 2733, stated that a death penalty statute—which (1) required only a finding of at least one aggravating circumstance before the death penalty became a possibility, and (2) did not not direct the jury to (a) give any special weight to aggravating circumstances, (b) consider multiple aggravating circumstances as being more significant than a single such circumstance, or (c) weigh aggravating and mitigating circumstances pursuant to any particular standard—did not, in either regard, violate the Supreme Court's precedents prohibiting, under the cruel and unusual punishment clause of the Federal Constitution's Eighth Amendment, unguided discretion for capital sentencing juries.

◆

The United States Supreme Court has held in the following cases that certain state death penalty statutes or instructions were not impermissibly mandatory,[12] in violation of capital defendants' rights under the Federal Constitution's Eighth and Fourteenth Amendments, where those statutes or instructions required that the death penalty be imposed if the sentencer, in a particular capital case, found that the evidence in that case established (1) at least one valid aggravating circumstance and no mitigating circumstances, or (2) aggravating circumstances which outweighed any mitigating circumstances that had been shown to exist.

A state death penalty statute which (1) set forth an exclusive list of aggravating circumstances and a nonexclusive list of mitigating circumstances which could be considered in sentencing determinations, and (2) provided that a death sentence must be imposed if the sentencing jury unanimously found (a) at least one aggravating circumstance and no mitigating circumstances, or (b) one or more aggravating circumstances which outweighed any mitigating circumstances, was held in Blystone v Pennsylvania (1990) 494 US 299, 108 L Ed 2d 255, 110 S Ct 1078, not to be impermissibly mandatory in violation of the Federal Constitution's Eighth Amendment, since death was not automatically imposed under the statute upon conviction for certain types of murder, but was imposed only if the jury made the aforementioned findings with regard to the particular crime committed by the particular defendant. In the case at hand, involving a defendant who had allegedly picked up, robbed, and killed a hitchhiker, the sentencing jury had sentenced the defendant to death pursuant to the statute based on its findings that one aggravating circumstance was present in the case—namely that the defendant had killed in the course of perpetrating a felony—and that no mitigating circumstances were present, the defendant having offered no mitigating evidence. In affirming state court decisions which had upheld that sentence, the Supreme Court ruled that a statute mandating the imposition of the death sentence on a finding of one aggravating circumstance and no mitigating circumstances did not violate the Eighth Amendment requirement of individualized sentencing, despite the defendant's argument that the statutory scheme barred the jury from considering whether the severity of the aggravating circumstance warranted the death sentence, since (1) the presence of aggravating circumstances served the purpose of limiting the class of death-eligible defendants, and (2) the Eighth Amendment did not require that these aggravating circumstances be further refined or weighed by a jury. The requirement of individualized sentencing in capital cases, the Supreme Court added, was satisfied by allowing the jury to consider all relevant mitigating evidence.

Citing the decision in Blystone v Pennsylvania, supra, the court in Boyde v California (1990) 494 US 370, 108 L Ed 2d 316, 110 S Ct 1190, reh den 495 US 924, 109 L Ed 2d 322, 110 S Ct 1961, similarly held that the mandatory language of a state capital sentencing instruction —which directed the jury to consider all applicable aggravating and mitigating circumstances, and then stated that the jury "shall" impose a death sentence if it concludes that the aggravating circumstances outweighed the mitigating circumstances, or "shall" impose a sentence of life imprisonment without possibility of parole if it concludes that the mitigating circumstances outweigh the aggravating circumstances —did not unconstitutionally prevent an individualized assessment of a case by the jury so as to violate the Federal Constitution's Eighth and Fourteenth Amendments. Although the defendant in the present case, unlike the one in the Blystone v Pennsylvania, had presented mitigating evidence at the penalty phase of his murder trial, the Supreme Court ruled that the legal principle expounded in Blystone required the rejection of a challenge to the mandatory language of the instruction at issue here, because that language was not alleged to have interfered with the consideration of mitigating evidence. The Supreme Court also rejected the defendant's argument that the jury must have freedom to decline to impose the death penalty even if the jury decides that the aggravating circumstances outweigh the mitigating circumstances; there is no such constitutional requirement of unfettered sentencing discretion in the jury, the court stated, and the requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence.

---

[12] As to the rule prohibiting mandatory death sentences, see §§ 8[b]-8[d] of the annotation at 90 L Ed 2d 1001, entitled "Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed or carried out."

☆Note: While holding that the instruction in question met constitutional requirements, the court in Boyde v California, supra, observed that the state supreme court, to avoid any possible confusion over the jury's role, had since amended its proposed capital sentencing instructions so as to specifically advise the jury that the weighing of aggravating and mitigating factors does not mean the mere mechanical weighing of factors on an imaginary scale or the arbitrary assignment of weights to any factors, that jurors are free to assign whatever moral or sympathetic value they deem appropriate to the factors they may consider, that they are to consider the totality of the aggravating circumstances with the totality of the mitigating circumstances, and that a death sentence is to be imposed only if the jurors are persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances as to warrant death.

A state capital sentencing statute which provided that a trial court "shall" impose the death penalty upon a person convicted of first-degree murder if, at a sentencing hearing before the trial court alone, one or more aggravating circumstances are found and the mitigating circumstances are determined to be insufficient to call for leniency, was held in Walton v Arizona (1990) 497 US 639, 111 L Ed 2d 511, 110 S Ct 3047, reh den (US) 111 L Ed 2d 828, 111 S Ct 14, not to create an unconstitutional presumption, in violation of the Federal Constitution's Eighth and Fourteenth Amendments, that death was the proper sentence, where the statute (1) did not preclude the sentencer from considering any type of mitigating evidence, and (2) did not automatically impose a death sentence upon conviction for certain types of murder. A plurality opinion, expressing the views of Justice White, Chief Justice Rehnquist, and Justices O'Connor and Kennedy, stated that a challenge to this provision of the statute was foreclosed by its decisions in Blystone v Pennsylvania and Boyde v California, both supra. Justice Scalia, concurring in the judgment, expressed the view that the precedents barring state-imposed restrictions on what mitigating circumstances may be considered in deciding whether to impose the death penalty were invalid, and that the statute's alleged restriction of the sentencer's discretion to consider mitigating circumstances therefore would not violate the Eighth Amendment.

Consult POCKET PART in this volume for later case service

BRIEFS OF COUNSEL

UNITED STATES, Petitioner
v
MARSHA B. KOKINDA et al.

Reported in this volume: p 571, supra.

Holding: United States Postal Service held permitted, under Federal Constitution's First Amendment, to prohibit in-person solicitation of funds on government-owned sidewalk adjoining post office.

BRIEFS AND APPEARANCES OF COUNSEL

Deputy Solicitor General **John G. Roberts, Jr.,** of the Department of Justice, Washington, D.C., argued the cause and, with Solicitor General **Kenneth W. Starr,** Assistant Attorney General **Edward S. G. Dennis, Jr., Amy L. Wax,** and **Thomas E. Booth,** all also of the Department of Justice, Washington, D.C., filed briefs for petitioner:

The Postal Service regulation prohibiting solicitation from the off-street walkway on the premises of the Bowie Post Office does not violate the First Amendment.

Jay Alan Sekulow, of Washington, D.C., argued the cause and, with **James M. Henderson, Sr.,** also of Washington, D.C., and **Eric Alan Daly,** of Atlanta, Georgia, filed a brief for respondents:

The ban on solicitation on postal premises does not apply to an outside sidewalk open to the public.

The ban on solicitation is unconstitutional as applied to peaceful solicitation on a sidewalk open to the public.

Steven R. Shapiro and **Daniel A. Farber** filed a brief for the American Civil Liberties Union et al. as amici curiae urging affirmance; **Marsha S. Berzon** and **Laurence Gold** filed a brief for the American Federation of Labor and Congress of Industrial Organizations as amicus curiae urging affirmance; **Thomas Patrick Monaghan** filed a brief for Free Speech Advocates as amicus curiae urging affirmance; **Frank M. Dunbaugh** filed a brief for the National Committees of the Libertarian Party et al. as amici curiae urging affirmance; **David M. Liberman** filed a brief for the International Society for Krishna Conciousness of California, Inc. as amicus curiae urging affirmance; **Alice Neff Lucan, Richard P. Holme, Stephanie Seigel, Lawrence J. Aldrich, Boisfeuillet Jones, Jr., Joseph P. Thornton, Alexander Wellford,** and **David C. Kohler** filed a brief for Newport News Daily Press et al. as amici curiae urging affirmance; and **Andrew J. Ekonomou** filed a brief for Project for Public Spaces, Inc. as amicus curiae urging affirmance.

SAMUEL A. LEWIS, Director, Arizona Department of Corrections, et al., Petitioners

v

JIMMIE WAYNE JEFFERS

Reported in this volume: p 606, supra.

Holding: Arizona's "especially heinous, cruel or depraved manner" aggravating circumstance held (1) not unconstitutionally vague as applied to accused's case, and (2) not applied in arbitrary or capricious manner.

Annotation: p 947, supra.

BRIEFS AND APPEARANCES OF COUNSEL

Gerald R. Grant, Assistant Attorney General of Arizona, of Phoenix, Arizona, argued the cause and, with **Robert K. Corbin,** Attorney General, and **Jessica Gifford Funkhouser,** both also of Phoenix, Arizona, filed briefs for petitioners:

The Ninth Circuit erroneously set aside respondent's death sentence based on its finding that the evidence did not support the aggravating circumstance that the murder was "especially heinous and depraved."

James S. Liebman, of New York City, by appointment of the court, 493 US 952, 107 L Ed 2d 398, 110 S Ct 361, argued the cause and, with **Susan A. Kettlewell, Donald S. Klein,** and **Frank P. Leto,** all of Tuscon, Arizona, filed a brief for respondent:

Maynard and Godfrey dictate the Court of Appeals' conclusion that the Arizona "especially heinous . . . or depraved" circumstance failed to serve its constitutional narrowing function.

Arizona's efforts to avoid the clear dictates of Maynard and Godfrey by creating a spurious "standard of review" issue are unavailing.

Kent S. Scheidegger and **Charles L. Hobson** filed a brief for the Criminal Justice Legal Foundation as amicus curiae urging reversal.

IDAHO, Petitioner

v

LAURA LEE WRIGHT

Reported in this volume: p 638, supra.

Holding: Admission, at Idaho criminal trial for sexual abuse of child, of 2½-year-old declarant's hearsay statements made to examining pediatrician held to violate confrontation clause of Sixth Amendment.

BRIEFS AND APPEARANCES OF COUNSEL

James T. Jones, Attorney General of Idaho, of Boise, Idaho, argued the cause and, with **John J. McMahon,** Chief Deputy Attorney General, and **Myrna A. I. Stahman,** Deputy Attorney General, both also of Boise, Idaho, filed briefs for petitioner:

The confrontation clause has never been interpreted to exclude the admission of reliable out-of-court statements of unavailable witnesses.

Considerations of necessity and trustworthiness must take account of the unique situation of child sexual abuse victims.

Deputy Solicitor General **William C. Bryson,** of the Department of Justice, Washington, D.C., argued the cause and, with Solicitor General **Kenneth W. Starr,** Assistant Attorney General **Edward S. G. Dennis, Jr.,** and **Michael R. Dreeben,** all also of the Department of Justice, Washington, D.C., filed a brief for the United States as amicus curiae urging reversal.

Rolf Michael Kehne, of Boise, Idaho, by appointment of the court, 493 US 1067, 107 L Ed 2d 1015, 110 S Ct 1107, argued the cause and filed a brief for respondent:

The factors discussed by the state court—preconceptions of the interrogator, use of leading questions, the child's inability to communicate, and absence of a videotape record—are interrelated.

Videotaping interviews of children believed to be victims satisfies many of the goals of the confrontation clause.

Alleged corroboration by Jeannie Wright does not justify admission of these statements without confrontation.

Ernest S. Preate, Jr., Attorney General of Pennsylvania, and **Marylou Barton,** Chief Deputy Attorney General, and the following attorneys for their respective jurisdictions filed a brief for the Commonwealth of Pennsylvania et al. as amici curiae urging reversal: **Douglas B. Baily,** Attorney General of Alaska, **Robert K. Corbin,** Attorney General of Arizona, **Steve Clark,** Attorney General of Arkansas, **Duane Woodard,** Attorney General of Colorado, **Charles M. Oberly III,** Attorney General of Delaware, **Robert A. Butterworth,** Attorney General of Florida, **Neil F. Hartigan,** Attorney General of Illinois, **Linley E. Pearson,** Attorney General of Indiana, **Tom Miller,** Attorney General of Iowa, **Robert T. Stephan,** Attorney General of Kansas, **Frederic J. Cowan,** Attorney General of Kentucky, **William J. Guste, Jr.,** Attorney General of Louisiana, **Joseph Curran, Jr.,** Attorney General of Maryland, **James M. Shannon,** Attorney General of Massachusetts, **Frank J. Kelly,** Attorney General of Michigan, **Michael C. Moore,** Attorney General of Mississippi, **William L. Webster,** Attorney General of Missouri, **Marc Racicot,** Attorney General of Montana, **Robert M. Spire,** Attorney General of Nebraska, **Brian McKay,** Attorney General of Nevada, **John P. Arnold,** Attorney General of New Hampshire, **Robert Del Tufo,** Attorney General Designate of New Jersey, **Hal Stratton,** Attorney General of New Mexico, **Lacy H. Thornburg,** Attorney General of North Carolina, **Nicholas Spaeth,** Attorney General of North Dakota, **Robert H. Henry,**

Attorney General of Oklahoma, **T. Travis Medlock,** Attorney General of South Carolina, **Roger A. Tellinghuisen,** Attorney General of South Dakota, **Paul Van Dam,** Attorney General of Utah, **Jeffrey L. Amestoy,** Attorney General of Vermont, **Godfrey R. de Castro,** Attorney General of the Virgin Islands, **Mary Sue Terry,** Attorney General of Virginia, and **Joseph B. Meyer,** Attorney General of Wyoming.

Margaret A. Berger and **Steven R. Shapiro** filed a brief for the American Civil Liberties Union as amicus curiae urging affirmance; and **Natman Schaye** filed a brief for the National Association of Criminal Defense Lawyers as amicus curiae urging affirmance.

John E. B. Meyers, Stephan E. Lawton, Thomas N. Bulleit, Kirk B. Johnson, Edward B. Hirshfeld, David Orentlicher, Kim A. Grandy, and **Thomas R. Finn** filed a brief for the American Professional Society on the Abuse of Children et al. as amici curiae.

MARYLAND, Petitioner

v

SANDRA ANN CRAIG

Reported in this volume: p 666, supra.

Holding: Sixth Amendment's confrontation clause held not absolutely to prohibit Maryland from using one-way closed-circuit television for receipt of testimony by child witness in child abuse case.

BRIEFS AND APPEARANCES OF COUNSEL

J. Joseph Curran, Jr., Attorney General of Maryland, of Baltimore, Maryland, argued the cause and, with **Gary E. Bair** and **Ann N. Bosse,** Assistant Attorneys General, and **William R. Hymes,** all also of Baltimore, Maryland, filed briefs for petitioner:

Less than face-to-face confrontation is permissible when it furthers an important public interest and is based on case-specific findings of necessity.

Section 9-102 of the Md Cts & Jud Proc Code Ann is a proper response to the important public interest in protecting victims of child abuse.

The use of one-way closed-circuit television by the child victims was based on appropriate case-specific findings of necessity.

The Court of Appeals' decision does not rest on adequate and independent state grounds.

William H. Murphy, Jr., of Baltimore, Maryland, argued the cause and, with **Maria Cristina Gutierrez, Gary S. Bernstein, Frederick P. Charleston, Gil A. Amaral,** and **Byron L. Warnken,** all also of Baltimore, Maryland, and **Clarke F. Ahlers,** of Columbia, Maryland, filed a brief for respondent:

The Sixth Amendment right to face-to-face confrontation, in all circumstances in which the evidence does not possess inherent reliability, is absolute, because the integrity of the factfinding process requires that the testimony of fact witnesses, particularly child witnesses highly susceptible to influence, be subjected to live, face-to-face confrontation, in a formal courtroom setting, in the presence of the defendant, the judge, and the factfinder.

Even if the right to face-to-face confrontation is not absolute, the Maryland statute is unconstitutional, because either the state lacks a compelling state interest in televised testimony, taken outside of the courtroom, and not in the live presence of the defendant, the factfinder, and the judge, or the defendant's right to face-to-face confrontation outweighs such interest, particularly when considering the statute's unconstitutional impact on the Sixth Amendment's rights to counsel and trial by jury.

Even if the Maryland statute is constitutional, it is unconstitutional as applied, because the trial judge failed to make an individualized finding, based upon personally questioning and observing the child fact witnesses in the defendant's presence, that each of them would suffer serious emotional distress, casually connected to testifying in the presence of the defendant.

Even if the Maryland statute is constitutional, the judgment of the Court of Appeals of Maryland should nevertheless be affirmed because its judgment was based solely upon a plain statement of independent and adequate state grounds.

Robert A. Butterworth, Attorney General of Florida, and **Richard E. Doran** and **Bradley R. Bischoff,** Assistant Attorneys General, and the following attorneys for their respective jurisdictions filed a brief for the state of Florida et al. as amici curiae urging reversal: **Don Siegelman,** Attorney General of Alabama, **Douglas B. Baily,** Attorney General of Alaska, **Robert K. Corbin,** Attorney General of Arizona, **John Steven Clark,** Attorney General of Arkansas, **Duane Woodard,** Attorney General of Colorado, **John J. Kelly,** Chief State's Attorney of Connecticut, **Charles M. Oberly III,** Attorney General of Delaware, **Warren Price III,** Attorney General of Hawaii, **Jim Jones,** Attorney General of Idaho, **Neil F. Hartigan,** Attorney General of Illinois, **Linley E. Pearson,** Attorney General of Indiana, **Thomas J. Miller,** Attorney General of Iowa, **Robert T. Stephan,** Attorney General of Kansas, **Frederic J. Cowan,** Attorney General of Kentucky, **William J. Guste, Jr.,** Attorney General of Louisiana, **James E. Tierney,** Attorney General of Maine, **James M. Shannon,** Attorney General of Massachusetts, **Frank J. Kelly,** Attorney General of Michigan, **Hubert H. Humphrey III,** Attorney General of Minnesota, **Michael C. Moore,** Attorney General of Mississippi, **William L. Webster,** Attorney General of Missouri, **Marc Racicot,** Attorney General of Montana, **Robert M. Spire,** Attorney General of Nebraska, **Brian McKay,** Attorney General of Nevada, **Robert Del Tufo,** Attorney General of New Jersey, **Hal Stratton,** Attorney General of New Mexico, **Robert Abrahms,** Attorney General of New York, **Lacy H. Thornburg,** Attorney General of North Carolina, **Anthony J. Celebrezze, Jr.,** Attorney General of Ohio, **Robert H. Henry,** Attorney General of Oklahoma, **Ernest D. Preate,** Attorney General of Pennsylvania, **Hector Rivera Cruz,** Attorney General of Puerto Rico, **T. Travis Medlock,** Attorney General of South Carolina, **Roger A. Tellinghuisen,** Attorney General of South Dakota, **Charles W. Burson,** Attorney General of Tennessee, **Jim Mattox,** Attorney General of Texas, **Paul Van Dam,** Attorney General of Utah, **Godfrey R. de Castro,** Attorney General of the Virgin Islands, **Mary Sue Terry,** Attorney General of Virginia,

Kenneth O. Eikenberry, Attorney General of Washington, and **Joseph B. Meyer,** Attorney General of Wyoming; **Charles J. Hynes, Peter A. Weinstein, Jay Cohen, Lois M. Raff, Tammy J. Smiley, Robert T. Johnson, Anthony Girese, Richard L. Kellner,** and **Howard R. Relin** filed a brief for the District Attorney of Kings County, New York et al. as amici curiae urging reversal; **Kent S. Scheidegger** and **Charles L. Hobson** filed a brief for the Criminal Justice Legal Foundation as amicus curiae urging reversal; **Jacqueline Y. Parker, Thomas R. Finn,** and **Philip J. McCarthy, Jr.** filed a brief for the National Association of Counsel for Children et al. as amici curiae urging reversal; **Judith D. Schretter, Wallace A. Christensen,** and **Paul A. Dorf** filed a brief for People Against Child Abuse as amicus curiae urging reversal; and **Gary B. Born** and **Ross A. Albert** filed a brief for the Stephanie Roper Foundation as amicus curiae urging reversal.

David P. Bergschneider filed a brief for the Illinois Public Defender Association et al. as amici curiae urging affirmance; **Maria Cristina Gutierrez** and **Annabelle Whiting Hall** filed a brief for the National Association of Criminal Defense Lawyers as amicus curiae urging affirmance; and **Lawrence A. Stanley** filed a brief for Victims of Child Abuse Laws National Network (Vocal) as amicus curiae urging affirmance.

David W. Odgen filed a brief for the American Psychological Society as amicus curiae; **Edward R. Jagels, Jonathan B. Conklin,** and **Jeffrey T. Even** filed a brief for the Appellate Committee of the California District Attorney's Association as amicus curiae; **Louis Kiefer** filed a brief for the Institute for Psychological Therapies as amicus curiae; and **Alan Silber** filed a brief for Richard A. Gardner as amicus curiae.

MANUEL LUJAN, Jr., Secretary of the Interior, et al., Petitioners

v

NATIONAL WILDLIFE FEDERATION et al.

Reported in this volume: p 695, supra.

Holding: Conservation-advocacy organization held not to have established right to judicial review, under 5 USCS § 702, of Federal Government's land classification determinations which allegedly violated federal environmental and other statutes.

BRIEFS AND APPEARANCES OF COUNSEL

Acting Solicitor General **John G. Roberts, Jr.,** of the Department of Justice, Washington, D.C., argued the cause and, with Assistant Attorney General **Richard B. Stewart,** Deputy Solicitor General **Lawrence G. Wallace, Lawrence S. Robbins, Peter R. Steenland, Jr., Anne S. Almy, Fred R. Disheroon, David A. Kubichek,** and **Vicki L. Plaut,** all also of the Department of Justice, Washington, D.C., filed briefs for petitioners:

The decision of the Court of Appeals expands the standing doctrine beyond meaningful limitation. The court's misapplication of standing principles would permit respondent, and similar plaintiffs in the future, to petition federal courts for far-reaching relief from injuries that they have not shown any likelihood of suffering.

To secure standing to sue, a party must allege and, if challenged, prove that he has suffered a "distinct and palpable" injury as a result of the challenged governmental action.

Having correctly concluded that respondant had wholly failed to establish its standing to sue, the District Court properly granted summary judgment in favor of petitioners.

E. Barrett Prettyman, Jr., of Washington, D.C., argued the cause and, with **John C. Keeney, Jr., David G. Leitch, Scott H. Reisch, Kathleen C. Zimmerman,** and **Norman L. Dean, Jr.,** all also of Washington, D.C., filed a brief for respondents:

The decision rests on a ground so unimportant and noncontroversial that the Supreme Court should dismiss the writ as improvidently granted.

The Court of Appeals was correct in upholding respondant's standing on the basis of the evidence in the record at the time of the District Court's decision.

William Perry Pendley, of Denver, Colorado, filed a brief for respondents Mountain States Legal Foundation et al.

Kathryn A. Oberly and **John J. Rademacher** filed a brief for the American Farm Bureau Federation et al. as amici curiae urging reversal; **Jerry L. Haggard** and **Gerrie Apker Kurtz** filed a brief for the American Mining Congress as amicus curiae urging reversal; **Constance E. Brooks** filed a brief for the National Cattlemen's Association et al. as amici curiae urging reversal; **Ronald A. Zumbrun, Robin L. Rivett,** and **James S. Burling** filed a brief for the Pacific Legal Foundation as amicus curiae urging reversal; and **Terence P. Ross, Daniel J. Popeo,** and **Richard A. Samp** filed a brief for the Washington Legal Foundation et al. as amici curiae urging reversal.

John K. Van de Kamp, Attorney General of California, **Andrea Sheridan Ordin,** Chief Assistant Attorney General, and **Craig C. Thompson, Susan L. Durbin, Clifford L. Rechtschaffen,** and **Nilda M. Mesa,** Assistant Attorneys General, and the following attorneys for their respective jurisdictions filed a brief for the state of California et al. as amici curiae urging affirmance: **Robert A. Butterworth,** Attorney General of Florida, **Lacy H. Thornburg,** Attorney General of North Carolina, **Anthony J. Celebrezze, Jr.,** Attorney General of Ohio, **Jeffrey L. Amestoy,** Attorney General of Vermont, and **Joseph B. Meyer,** Attorney General of Wyoming; and **Bruce J. Ennis, Jr.** filed a brief for the Wilderness Society et al. as amici curiae urging affirmance.

ASHLAND OIL, INC., Appellant

v

MICHAEL E. CARYL, Tax Commissioner of the State of West Virginia

Reported in this volume: p 734, supra.

Holding: Rule of Armco, Inc. v Hardesty—that state's imposition of gross receipts tax on wholesalers other than local manufacturers violated commerce clause—held retroactively applicable.

NATIONAL MINES CORPORATION, Petitioner

v

MICHAEL E. CARYL, Tax Commissioner of the State of West Virginia

Reported in this volume: p 740, supra.

Holding: Rule of Armco, Inc. v Hardesty—that state's imposition of gross receipts tax on wholesalers other than local manufacturers violated commerce clause—held retroactively applicable.

INDEX TO DECISIONS AND ANNOTATIONS

INDEX TO DECISIONS AND ANNOTATIONS —111 L Ed 2d

(annotation topics appear in italics)

ABORTION

Annotation

– *Supreme Court's views as to validity, under Federal Constitution, of abortion laws, 111 L Ed 2d 879*

Fourteenth Amendment held not violated by Ohio statute prohibiting abortion on minor absent either (1) parental notice, (2) parental consent, (3) judicial bypass, or (4) judicial inaction, 111 L Ed 2d 405

Minnesota's two-parent notification requirement for minor's abortion, without judicial bypass provision, held to violate Federal Constitution, but such requirement with judicial bypass held valid, 111 L Ed 2d 344

ABUSE OF PERSONS

Abortion (this index)

Confrontation of Witnesses (this index)

ACCRETION OR AVULSION

Boundaries: disputes between Georgia and South Carolina over location of their boundary along Savannah River, at river's mouth, and their lateral seaward boundary, resolved in original action, 111 L Ed 2d 309

ADMINISTRATIVE LAW

Conservation-advocacy organization held not to have established right to judicial review, under 5 USCS § 702, of Federal Government's land classification determinations which allegedly violated federal environmental and other statutes, 111 L Ed 2d 695

ADMINISTRATIVE PROCEDURE ACT

Conservation-advocacy organization held not to have established right to judicial review, under 5 USCS § 702, of Federal Government's land classification determinations which allegedly violated federal environmental and other statutes, 111 L Ed 2d 695

ADMIRALTY EXTENSION ACT

Federal District Court held to have maritime jurisdiction, under 28 USCS § 1333(1), of suit to limit liability for damages resulting from fire on board yacht docked in marina on navigable waters, 111 L Ed 2d 292

ADVERTISING AND ADVERTISEMENTS

Annotation

– *Supreme Court's views as to validity, under Federal Constitution, of abortion laws, 111 L Ed 2d 879*

AFFIDAVITS

Conservation-advocacy organization held not to have established right to judicial review, under 5 USCS § 702, of Federal Government's land classification determinations which allegedly violated federal environmental and other statutes, 111 L Ed 2d 695

AGE

Annotation

– *validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances—Supreme Court cases, 111 L Ed 2d 947*

Children and Minors (this index)

AGGRAVATION OF CIRCUMSTANCES

Capital Offenses and Punishment (this index)

ANONYMITY

Abortion: Fourteenth Amendment held not violated by Ohio statute prohibiting abortion on minor absent either (1) parental notice, (2) parental consent, (3) judicial bypass, or (4) judicial inaction, 111 L Ed 2d 405

ANTITRUST

Monopolies, Restraints of Trade, and Unfair Trade Practices (this index)

APPEAL AND ERROR

Abortion: Fourteenth Amendment held not violated by Ohio statute prohibiting abortion on minor absent either (1) parental notice, (2) parental consent, (3) judicial bypass, or (4) judicial inaction, 111 L Ed 2d 405

Conservation-advocacy organization held not to have established right to judicial review, under 5 USCS § 702, of Federal Government's land classification determinations which allegedly violated federal environmental and other statutes, 111 L Ed 2d 695

Discrimination: Federal Court of Appeals' judgment rejecting federal defendant's claim that prosecution improperly challenged black jurors remanded for reconsideration in light of Solicitor General's recognition of error, 111 L Ed 2d 439

Sentence and punishment: ex post facto clause of Federal Constitution (Art I, § 10) held not violated by application to convicted person of new Texas statute which allowed reformation of jury verdict assessing unauthorized punishment, 111 L Ed 2d 30

ARGUMENTS OF COUNSEL

Death penalty: rule of Caldwell v Mississippi, concerning state prosecutor's argument diminishing jury responsibility for death sentence, held not retroactively available to support federal habeas corpus relief, 111 L Ed 2d 193

ARREST

Annotation

– *validity, under Federal Constitution's Fourth Amendment, of search conducted pursuant to consent—Supreme Court cases, 111 L Ed 2d 850*

Search and seizure: warrantless entry onto accused's premises held valid, under Fourth Amendment, where based on consent of third party whom police reasonably believe to possess common authority over premises, 111 L Ed 2d 148

ASSOCIATION, FREEDOM OF

Discrimination: Federal Constitution's First Amendment held to forbid basing decisions as to promotion, transfer, recall after layoff, and hiring of low-level public employee on party affiliation and support, 111 L Ed 2d 52

ASSOCIATIONS AND CLUBS

Tax deductions: social club's losses from sales to nonmembers held not tax deductible against investment income, where profit motive as to such sales is not shown, 111 L Ed 2d 126

ATTORNEY OR ASSISTANCE OF ATTORNEY

Abortion: Fourteenth Amendment held not violated by Ohio statute prohibiting abortion on minor absent either (1) parental notice, (2) parental consent, (3) judicial bypass, or (4) judicial inaction, 111 L Ed 2d 405

Death penalty: rule of Caldwell v Mississippi, concerning state prosecutor's argument diminishing jury responsibility for death sentence, held not retroactively available to support federal habeas corpus relief, 111 L Ed 2d 193

AUTOMOBILES AND HIGHWAY TRAFFIC

Annotation

– *validity, under Federal Constitution's Fourth Amendment, of search conducted pursuant to consent—Supreme Court cases, 111 L Ed 2d 850*

BANKRUPTCY

Common carriers: ICC's policy of relieving shipper of obligation of paying filed rate when shipper and motor common carrier have privately negotiated lower rate held inconsistent with Interstate Commerce Act, 111 L Ed 2d 94

BEST INTEREST OF PERSON

Abortion: Fourteenth Amendment held not violated by Ohio statute prohibiting abortion on minor absent either (1) parental notice, (2) parental consent, (3) judicial bypass, or (4) judicial inaction, 111 L Ed 2d 405

BOATS AND BOATING

Jurisdiction: Federal District Court held to have maritime jurisdiction, under 28 USCS § 1333(1), of suit to limit liability for damages resulting from fire on board yacht docked in marina on navigable waters, 111 L Ed 2d 292

BOUNDARIES

Disputes between Georgia and South Carolina over location of their boundary along Savannah River, at river's mouth, and their lateral seaward boundary, resolved in original action, 111 L Ed 2d 309

BROADCAST LICENSES

FCC's minority preference policies with regard to applications for new broadcast licenses and "distress sales" of licenses held not to violate equal protection component of Fifth Amendment, 111 L Ed 2d 445

BURDEN OF PROOF

Presumptions and Burden of Proof (this index)

BUREAU OF LAND MANAGEMENT

Conservation-advocacy organization held not to have established right to judicial review, under 5 USCS § 702, of Federal Government's land classification determinations which allegedly violated federal environmental and other statutes, 111 L Ed 2d 695

CAPITAL OFFENSES AND PUNISHMENT

Annotation

– *validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances—Supreme Court cases, 111 L Ed 2d 947*

Arizona capital sentencing statute providing for finding of aggravating and mitigating circumstances by trial court held valid; statutory aggravating circumstance held not unconstitutionally vague, 111 L Ed 2d 511

Arizona's "especially heinous, cruel or depraved manner" aggravating circumstance held (1) not unconstitutionally vague as applied to accused's case, and (2) not applied in arbitrary or capricious manner, 111 L Ed 2d 606

Rule of Caldwell v Mississippi, concerning state prosecutor's argument diminishing jury responsibility for death sentence, held not retroactively available to support federal habeas corpus relief, 111 L Ed 2d 193

CARRIERS

Common carriers rates: ICC's policy of relieving shipper of obligation of paying filed rate when shipper and motor common carrier have privately negotiated lower rate held inconsistent with Interstate Commerce Act, 111 L Ed 2d 94

CERTIFIED MAIL

Abortion (this index)

CHALLENGE TO JURY

Federal Court of Appeals' judgment rejecting federal defendant's claim that prosecution improperly challenged black jurors remanded for reconsideration in light of Solicitor General's recognition of error, 111 L Ed 2d 439

CHARGES

Rates and Charges (this index)

CHILDREN AND MINORS

Abortion (this index)

Confrontation of Witnesses (this index)

CIVIL PROCEDURE RULES

Rules of Civil Procedure (this index)

CIVIL RIGHTS

Discrimination (this index)

CIVIL SERVANTS

Discrimination: Federal Constitution's First Amendment held to forbid basing decisions as to promotion, transfer, recall after layoff, and hiring of low-level public employee on party affiliation and support, 111 L Ed 2d 52

CLAYTON ACT

Utility alone, and not states on behalf of utility customers, held to have standing to bring antitrust suit under § 4 of Clayton Act against natural gas suppliers allegedly overcharging utility, 111 L Ed 2d 169

CLEAR AND CONVINCING EVIDENCE

Right to die: Missouri requirement that incompetent's wishes as to withdrawal of life-sustaining treatment be proved by clear and convincing evidence held not violative of due process, 111 L Ed 2d 224

CLOSED-CIRCUIT TELEVISION

Child abuse: Sixth Amendment's confrontation clause held not absolutely to prohibit Maryland from using one-way closed-circuit television for receipt of testimony by child witness in child abuse case, 111 L Ed 2d 666

CLUBS

Tax deductions: social club's losses from sales to nonmembers held not tax deductible against investment income, where profit motive as to such sales is not shown, 111 L Ed 2d 126

COAL

Gross receipts tax: rule of Armco, Inc. v Hardesty—that state's imposition of gross receipts tax on wholesalers other than local manufacturers violated commerce clause—held retroactively applicable, 111 L Ed 2d 740

COMMERCE

Common carriers: ICC's policy of relieving shipper of obligation of paying filed rate when shipper and motor common carrier have privately negotiated lower rate held inconsistent with Interstate Commerce Act, 111 L Ed 2d 94

COMMERCE—Cont'd

Gross Receipts Tax (this index)

Maritime jurisdiction: Federal District Court held to have maritime jurisdiction, under 28 USCS § 1333(1), of suit to limit liability for damages resulting from fire on board yacht docked in marina on navigable waters, 111 L Ed 2d 292

COMMERCE CLAUSE

Gross Receipts Tax (this index)

COMMON CARRIERS

Rates: ICC's policy of relieving shipper of obligation of paying filed rate when shipper and motor common carrier have privately negotiated lower rate held inconsistent with Interstate Commerce Act, 111 L Ed 2d 94

CONFIDENTIALITY

Abortion: Fourteenth Amendment held not violated by Ohio statute prohibiting abortion on minor absent either (1) parental notice, (2) parental consent, (3) judicial bypass, or (4) judicial inaction, 111 L Ed 2d 405

CONFRONTATION OF WITNESSES

Hearsay: admission, at Idaho criminal trial for sexual abuse of child, of 2½-year-old declarant's hearsay statements made to examining pediatrician held to violate confrontation clause of Sixth Amendment, 111 L Ed 2d 638

Televised testimony: Sixth Amendment's confrontation clause held not absolutely to prohibit Maryland from using one-way closed-circuit television for receipt of testimony by child witness in child abuse case, 111 L Ed 2d 666

CONSENT

Annotations

- *Supreme Court's views as to validity, under Federal Constitution, of abortion laws, 111 L Ed 2d 879*
- *validity, under Federal Constitution's Fourth Amendment, of search conducted pursuant to consent—Supreme Court cases, 111 L Ed 2d 850*

Abortion (this index)

Warrantless entry onto accused's premises held valid, under Fourth Amendment, where based on consent of third party whom police reasonably believe to possess common authority over premises, 111 L Ed 2d 148

CONSERVATION

Conservation-advocacy organization held not to have established right to judicial review, under 5 USCS § 702, of Federal Government's land classification determinations which allegedly violated federal environmental and other statutes, 111 L Ed 2d 695

CONSTRUCTION AND INTERPRETATION

Boundaries: disputes between Georgia and South Carolina over location of their boundary along Savannah River, at river's mouth, and their lateral seaward boundary, resolved in original action, 111 L Ed 2d 309

Capital Offenses and Punishment (this index)

Child abuse: Sixth Amendment's confrontation clause held not absolutely to prohibit Maryland from using one-way closed-circuit television for receipt of testimony by child witness in child abuse case, 111 L Ed 2d 666

Common carriers: ICC's policy of relieving shipper of obligation of paying filed rate when shipper and motor common carrier have privately negotiated lower rate held inconsistent with Interstate Commerce Act, 111 L Ed 2d 94

CONSTRUCTIVE AUTHORIZATION

Abortion: Fourteenth Amendment held not violated by Ohio statute prohibiting abortion on minor absent either (1) parental notice, (2) parental consent, (3) judicial bypass, or (4) judicial inaction, 111 L Ed 2d 405

CONSTRUCTIVE NOTICE

Abortion: Fourteenth Amendment held not violated by Ohio statute prohibiting abortion on minor absent either (1) parental notice, (2) parental consent, (3) judicial bypass, or (4) judicial inaction, 111 L Ed 2d 405

CRIMINAL LAW

As to particular crimes or procedures, see more specific topics

CRUEL AND UNUSUAL PUNISHMENT

Capital Offenses and Punishment (this index)

DAMAGES

Defamation: First Amendment held not to require separate privilege for "opinion," where statements published in newspaper were allegedly defamatory under state law, 111 L Ed 2d 1

DAMAGES—Cont'd

Maritime jurisdiction: Federal District Court held to have maritime jurisdiction, under 28 USCS § 1333(1), of suit to limit liability for damages resulting from fire on board yacht docked in marina on navigable waters, 111 L Ed 2d 292

Utility alone, and not states on behalf of utility customers, held to have standing to bring antitrust suit under § 4 of Clayton Act against natural gas suppliers allegedly overcharging utility, 111 L Ed 2d 169

DAMAGE TO PROPERTY

Maritime jurisdiction: Federal District Court held to have maritime jurisdiction, under 28 USCS § 1333(1), of suit to limit liability for damages resulting from fire on board yacht docked in marina on navigable waters, 111 L Ed 2d 292

DEATH SENTENCE

Capital Offenses and Punishment (this index)

DEDUCTIONS

Social club's losses from sales to nonmembers held not tax deductible against investment income, where profit motive as to such sales is not shown, 111 L Ed 2d 126

DEFAMATION

First Amendment held not to require separate privilege for "opinion," where statements published in newspaper were allegedly defamatory under state law, 111 L Ed 2d 1

DEREGULATION

ICC's policy of relieving shipper of obligation of paying filed rate when shipper and motor common carrier have privately negotiated lower rate held inconsistent with Interstate Commerce Act, 111 L Ed 2d 94

DISCHARGE FROM EMPLOYMENT OR OFFICE

Discrimination: Federal Constitution's First Amendment held to forbid basing decisions as to promotion, transfer, recall after layoff, and hiring of low-level public employee on party affiliation and support, 111 L Ed 2d 52

DISCRIMINATION

Common carriers rates: ICC's policy of relieving shipper of obligation of paying filed rate when shipper and motor common carrier have privately negotiated lower rate held inconsistent with Interstate Commerce Act, 111 L Ed 2d 94

DISCRIMINATION—Cont'd

Federal Court of Appeals' judgment rejecting federal defendant's claim that prosecution improperly challenged black jurors remanded for reconsideration in light of Solicitor General's recognition of error, 111 L Ed 2d 439

Gross Receipts Tax (this index)

Licenses: FCC's minority preference policies with regard to applications for new broadcast licenses and "distress sales" of licenses held not to violate equal protection component of Fifth Amendment, 111 L Ed 2d 445

Public employees: Federal Constitution's First Amendment held to forbid basing decisions as to promotion, transfer, recall after layoff, and hiring of low-level public employee on party affiliation and support, 111 L Ed 2d 52

DISTRESS SALES

Broadcasting licenses: FCC's minority preference policies with regard to applications for new broadcast licenses and "distress sales" of licenses held not to violate equal protection component of Fifth Amendment, 111 L Ed 2d 445

DORMITORIES

Annotation

– *validity, under Federal Constitution's Fourth Amendment, of search conducted pursuant to consent—Supreme Court cases, 111 L Ed 2d 850*

DRUGS AND NARCOTICS

Annotation

– *validity, under Federal Constitution's Fourth Amendment, of search conducted pursuant to consent—Supreme Court cases, 111 L Ed 2d 850*

DUE PROCESS

Abortion (this index)

Capital Offenses and Punishment (this index)

Right to die: Missouri requirement that incompetent's wishes as to withdrawal of life-sustaining treatment be proved by clear and convincing evidence held not violative of due process, 111 L Ed 2d 224

EIGHTH AMENDMENT

Cruel and unusual punishment. **Capital Offenses and Punishment** (this index)

EMOTIONAL DISTRESS

Child abuse: Sixth Amendment's confrontation clause held not absolutely to prohibit Maryland from using one-way closed-circuit television for receipt of testimony by child witness in child abuse case, 111 L Ed 2d 666

ENVIRONMENTAL LAW

Conservation-advocacy organization held not to have established right to judicial review, under 5 USCS § 702, of Federal Government's land classification determinations which allegedly violated federal environmental and other statutes, 111 L Ed 2d 695

EQUAL PROTECTION

Discrimination: Federal Court of Appeals' judgment rejecting federal defendant's claim that prosecution improperly challenged black jurors remanded for reconsideration in light of Solicitor General's recognition of error, 111 L Ed 2d 439

Licenses: FCC's minority preference policies with regard to applications for new broadcast licenses and "distress sales" of licenses held not to violate equal protection component of Fifth Amendment, 111 L Ed 2d 445

EUTHANASIA

Missouri requirement that incompetent's wishes as to withdrawal of life-sustaining treatment be proved by clear and convincing evidence held not violative of due process, 111 L Ed 2d 224

EVIDENCE

Defamation: First Amendment held not to require separate privilege for "opinion," where statements published in newspaper were allegedly defamatory under state law, 111 L Ed 2d 1

Exclusion and Suppression of Evidence (this index)

Presumptions and Burden of Proof (this index)

EXCLUSION AND SUPPRESSION OF EVIDENCE

Child abuse: admission, at Idaho criminal trial for sexual abuse of child, of 2½-year-old declarant's hearsay statements made to examining pediatrician held to violate confrontation clause of Sixth Amendment, 111 L Ed 2d 638

Warrantless entry onto accused's premises held valid, under Fourth Amendment, where based on consent of third party whom police reasonably believe to possess common authority over premises, 111 L Ed 2d 148

EX POST FACTO CLAUSE

Sentence and punishment: ex post facto clause of Federal Constitution (Art I, § 10) held not violated by application to convicted person of new Texas statute which allowed reformation of jury verdict assessing unauthorized punishment, 111 L Ed 2d 30

FAMILY, RELATIVES, AND HOUSEHOLD

Annotation

- *validity, under Federal Constitution's Fourth Amendment, of search conducted pursuant to consent—Supreme Court cases, 111 L Ed 2d 850*

Abortion (this index)

FCC

Licenses: FCC's minority preference policies with regard to applications for new broadcast licenses and "distress sales" of licenses held not to violate equal protection component of Fifth Amendment, 111 L Ed 2d 445

FEDERAL COMMUNICATIONS ACT AND COMMISSION

Licenses: FCC's minority preference policies with regard to applications for new broadcast licenses and "distress sales" of licenses held not to violate equal protection component of Fifth Amendment, 111 L Ed 2d 445

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

Conservation-advocacy organization held not to have established right to judicial review, under 5 USCS § 702, of Federal Government's land classification determinations which allegedly violated federal environmental and other statutes, 111 L Ed 2d 695

FEDERAL RULES OF CIVIL PROCEDURE

Rules of Civil Procedure (this index)

FIFTH AMENDMENT

Licenses: FCC's minority preference policies with regard to applications for new broadcast licenses and "distress sales" of licenses held not to violate equal protection component of Fifth Amendment, 111 L Ed 2d 445

FILED RATE DOCTRINE

Common carriers: ICC's policy of relieving shipper of obligation of paying filed rate when shipper and motor common carrier have privately negotiated lower rate held inconsistent with Interstate Commerce Act, 111 L Ed 2d 94

FINES

Sentence and punishment: ex post facto clause of Federal Constitution (Art I, § 10) held not violated by application to convicted person of new Texas statute which allowed reformation of jury verdict assessing unauthorized punishment, 111 L Ed 2d 30

FIRES

Federal District Court held to have maritime jurisdiction, under 28 USCS § 1333(1), of suit to limit liability for damages resulting from fire on board yacht docked in marina on navigable waters, 111 L Ed 2d 292

FIRST AMENDMENT

Speech and Press, Freedom of (this index)

FOURTEENTH AMENDMENT

Capital punishment: Arizona's "especially heinous, cruel or depraved manner" aggravating circumstance held (1) not unconstitutionally vague as applied to accused's case, and (2) not applied in arbitrary or capricious manner, 111 L Ed 2d 606

Discrimination: Federal Constitution's First Amendment held to forbid basing decisions as to promotion, transfer, recall after layoff, and hiring of low-level public employee on party affiliation and support, 111 L Ed 2d 52

Due Process (this index)

Equal Protection (this index)

Search and seizure: Warrantless entry onto accused's premises held valid, under Fourth Amendment, where based on consent of third party whom police reasonably believe to possess common authority over premises, 111 L Ed 2d 148

Sixth Amendment's confrontation clause held not absolutely to prohibit Maryland from using one-way closed-circuit television for receipt of testimony by child witness in child abuse case, 111 L Ed 2d 666

FOURTH AMENDMENT

Search and Seizure (this index)

GAS

Rates and charges: utility alone, and not states on behalf of utility customers, held to have standing to bring antitrust suit under § 4 of Clayton Act against natural gas suppliers allegedly overcharging utility, 111 L Ed 2d 169

GROSS RECEIPTS TAX

Coal: rule of Armco, Inc. v Hardesty—that state's imposition of gross receipts tax on wholesalers other than local manufacturers violated commerce clause—held retroactively applicable, 111 L Ed 2d 740

Oil: rule of Armco, Inc. v Hardesty—that state's imposition of gross receipts tax on wholesalers other than local manufacturers violated commerce clause—held retroactively applicable, 111 L Ed 2d 734

GUARDIAN AD LITEM

Abortion: Fourteenth Amendment held not violated by Ohio statute prohibiting abortion on minor absent either (1) parental notice, (2) parental consent, (3) judicial bypass, or (4) judicial inaction, 111 L Ed 2d 405

Right to die: Missouri requirement that incompetent's wishes as to withdrawal of life-sustaining treatment be proved by clear and convincing evidence held not violative of due process, 111 L Ed 2d 224

HABEAS CORPUS

Capital punishment: Arizona's "especially heinous, cruel or depraved manner" aggravating circumstance held (1) not unconstitutionally vague as applied to accused's case, and (2) not applied in arbitrary or capricious manner, 111 L Ed 2d 606

Ex post facto clause of Federal Constitution (Art I, § 10) held not violated by application to convicted person of new Texas statute which allowed reformation of jury verdict assessing unauthorized punishment, 111 L Ed 2d 30

Rule of Caldwell v Mississippi, concerning state prosecutor's argument diminishing jury responsibility for death sentence, held not retroactively available to support federal habeas corpus relief, 111 L Ed 2d 193

HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976

Utility alone, and not states on behalf of utility customers, held to have standing to bring antitrust suit under § 4 of Clayton Act against natural gas suppliers allegedly overcharging utility, 111 L Ed 2d 169

HEALTH

Abortion (this index)

HEARSAY EVIDENCE

Child abuse: admission, at Idaho criminal trial for sexual abuse of child, of 2½-year-old declarant's hearsay statements made to examining pediatrician held to violate confrontation clause of Sixth Amendment, 111 L Ed 2d 638

HEINOUS, CRUEL OR DEPRAVED CONDUCT

Capital Offenses and Punishment (this index)

HIRING

Discrimination: Federal Constitution's First Amendment held to forbid basing decisions as to promotion, transfer, recall after layoff, and hiring of low-level public employee on part affiliation and support, 111 L Ed 2d 52

HOME

Residence (this index)

HOSPITALS

Annotation

– *Supreme Court's views as to validity, under Federal Constitution, of abortion laws, 111 L Ed 2d 879*

HOTELS AND MOTELS

Annotation

– *validity, under Federal Constitution's Fourth Amendment, of search conducted pursuant to consent—Supreme Court cases, 111 L Ed 2d 850*

HOUSE

Residence (this index)

HOUSEHOLD GOODS TRANSPORTATION ACT OF 1980

Common carriers: ICC's policy of relieving shipper of obligation of paying filed rate when shipper and motor common carrier have privately negotiated lower rate held inconsistent with Interstate Commerce Act, 111 L Ed 2d 94

HUSBAND AND WIFE

Annotation

– *validity, under Federal Constitution's Fourth Amendment, of search conducted pursuant to consent—Supreme Court cases, 111 L Ed 2d 850*

ICC

Rates: ICC's policy of relieving shipper of obligation of paying filed rate when shipper and motor common carrier have privately negotiated lower rate held inconsistent with Interstate Commerce Act, 111 L Ed 2d 94

ILLEGITIMATE CHILDREN

Abortion (this index)

INCOME TAX

Social club's losses from sales to nonmembers held not tax deductible against investment income, where profit motive as to such sales is not shown, 111 L Ed 2d 126

INCOMPETENT PERSONS

Right to die: Missouri requirement that incompetent's wishes as to withdrawal of life-sustaining treatment be proved by clear and convincing evidence held not violative of due process, 111 L Ed 2d 224

INDIGENTS

Annotation

– *Supreme Court's views as to validity, under Federal Constitution, of abortion laws, 111 L Ed 2d 879*

INTERIOR DEPARTMENT AND SECRETARY

Conservation-advocacy organization held not to have established right to judicial review, under 5 USCS § 702, of Federal Government's land classification determinations which allegedly violated federal environmental and other statutes, 111 L Ed 2d 695

INTERNAL REVENUE CODE OF 1954

Social club's losses from sales to nonmembers held not tax deductible against investment income, where profit motive as to such sales is not shown, 111 L Ed 2d 126

INTERSTATE COMMERCE

Common carriers: ICC's policy of relieving shipper of obligation of paying filed rate when shipper and motor common carrier have privately negotiated lower rate held inconsistent with Interstate Commerce Act, 111 L Ed 2d 94

Gross Receipts Tax (this index)

INTERSTATE COMMERCE ACT

Rates: ICC's policy of relieving shipper of obligation of paying filed rate when shipper and motor common carrier have privately negotiated lower rate held inconsistent with Interstate Commerce Act, 111 L Ed 2d 94

INTERSTATE COMMERCE COMMISSION

Common carriers: ICC's policy of relieving shipper of obligation of paying filed rate when shipper and motor common carrier have privately negotiated lower rate held inconsistent with Interstate Commerce Act, 111 L Ed 2d 94

INVESTMENT INCOME

Taxation: social club's losses from sales to nonmembers held not tax deductible against investment income, where profit motive as to such sales is not shown, 111 L Ed 2d 126

ISLANDS

Boundaries: disputes between Georgia and South Carolina over location of their boundary along Savannah River, at river's mouth, and their lateral seaward boundary, resolved in original action, 111 L Ed 2d 309

JOB PROMOTIONS

Discrimination: Federal Constitution's First Amendment held to forbid basing decisions as to promotion, transfer, recall after layoff, and hiring of low-level public employee on party affiliation and support, 111 L Ed 2d 52

JUDICIAL BYPASS

Abortion (this index)

JUDICIAL REVIEW

Appeal and Error (this index)

JURISDICTION

Federal District Court held to have maritime jurisdiction, under 28 USCS § 1333(1), of suit to limit liability for damages resulting from fire on board yacht docked in marina on navigable waters, 111 L Ed 2d 292

JURY AND JURY TRIAL

Aggravation and mitigation: Arizona capital sentencing statute providing for finding of aggravating and mitigating circumstances by trial court held valid; statutory aggravating circumstance held not unconstitutionally vague, 111 L Ed 2d 511

Argument: rule of Caldwell v Mississippi, concerning state prosecutor's argument diminishing jury responsibility for death sentence, held not retroactively available to support federal habeas corpus relief, 111 L Ed 2d 193

JURY AND JURY TRIAL—Cont'd

Discrimination: Federal Court of Appeals' judgment rejecting federal defendant's claim that prosecution improperly challenged black jurors remanded for reconsideration in light of Solicitor General's recognition of error, 111 L Ed 2d 439

Vacation or Modification of Judgment or Verdict (this index)

JUVENILE COURT

Abortion: Fourteenth Amendment held not violated by Ohio statute prohibiting abortion on minor absent either (1) parental notice, (2) parental consent, (3) judicial bypass, or (4) judicial inaction, 111 L Ed 2d 405

LANDLORD AND TENANT

Annotation

– *validity, under Federal Constitution's Fourth Amendment, of search conducted pursuant to consent—Supreme Court cases, 111 L Ed 2d 850*

LAND WITHDRAWAL REVIEW PROGRAM

Conservation-advocacy organization held not to have established right to judicial review, under 5 USCS § 702, of Federal Government's land classification determinations which allegedly violated federal environmental and other statutes, 111 L Ed 2d 695

LAW ENFORCEMENT OFFICERS

Warrantless entry onto accused's premises held valid, under Fourth Amendment, where based on consent of third party whom police reasonably believe to possess common authority over premises, 111 L Ed 2d 148

LAYOFF OF EMPLOYEE

Discrimination: Federal Constitution's First Amendment held to forbid basing decisions as to promotion, transfer, recall after layoff, and hiring of low-level public employee on party affiliation and support, 111 L Ed 2d 52

LEGISLATIVE INTENT

Taxation: social club's losses from sales to nonmembers held not tax deductible against investment income, where profit motive as to such sales is not shown, 111 L Ed 2d 126

LIBEL

First Amendment held not to require separate privilege for "opinion," where statements published in newspaper were allegedly defamatory under state law, 111 L Ed 2d 1

LICENSES AND PERMITS

Annotation

– *Supreme Court's views as to validity, under Federal Constitution, of abortion laws, 111 L Ed 2d 879*

Broadcasting: FCC's minority preference policies with regard to applications for new broadcast licenses and "distress sales" of licenses held not to violate equal protection component of Fifth Amendment, 111 L Ed 2d 445

LIFE-SUSTAINING TREATMENT

Missouri requirement that incompetent's wishes as to withdrawal of life-sustaining treatment be proved by clear and convincing evidence held not violative of due process, 111 L Ed 2d 224

LIMITED LIABILITY ACT

Federal District Court held to have maritime jurisdiction, under 28 USCS § 1333(1), of suit to limit liability for damages resulting from fire on board yacht docked in marina on navigable waters, 111 L Ed 2d 292

LIVING WILL STATUTE

Right to die: Missouri requirement that incompetent's wishes as to withdrawal of life-sustaining treatment be proved by clear and convincing evidence held not violative of due process, 111 L Ed 2d 224

MAIL

Abortion (this index)

Solicitation: United States Postal Service held permitted, under Federal Constitution's First Amendment, to prohibit in-person solicitation of funds on government-owned sidewalk adjoining post office, 111 L Ed 2d 571

MALICE

Defamation: First Amendment held not to require separate privilege for "opinion," where statements published in newspaper were allegedly defamatory under state law, 111 L Ed 2d 1

MARINAS

Federal District Court held to have maritime jurisdiction, under 28 USCS § 1333(1), of suit to limit liability for damages resulting from fire on board yacht docked in marina on navigable waters, 111 L Ed 2d 292

MARITIME JURISDICTION

Federal District Court held to have maritime jurisdiction, under 28 USCS § 1333(1), of suit to limit liability for damages resulting from fire on board yacht docked in marina on navigable waters, 111 L Ed 2d 292

MATURITY OF CHILD

Abortion: Fourteenth Amendment held not violated by Ohio statute prohibiting abortion on minor absent either (1) parental notice, (2) parental consent, (3) judicial bypass, or (4) judicial inaction, 111 L Ed 2d 405

MEDICAL CARE AND TREATMENT

Abortion (this index)

Right to die: Missouri requirement that incompetent's wishes as to withdrawal of life-sustaining treatment be proved by clear and convincing evidence held not violative of due process, 111 L Ed 2d 224

MEMBERS AND MEMBERSHIPS

Tax deductions: social club's losses from sales to nonmembers held not tax deductible against investment income, where profit motive as to such sales is not shown, 111 L Ed 2d 126

MINES AND MINING

Conservation-advocacy organization held not to have established right to judicial review, under 5 USCS § 702, of Federal Government's land classification determinations which allegedly violated federal environmental and other statutes, 111 L Ed 2d 695

Gross receipts tax: rule of Armco, Inc. v Hardesty—that state's imposition of gross receipts tax on wholesalers other than local manufacturers violated commerce clause—held retroactively applicable, 111 L Ed 2d 740

MINORITY OWNERSHIP

Licenses: FCC's minority preference policies with regard to applications for new broadcast licenses and "distress sales" of licenses held not to violate equal protection component of Fifth Amendment, 111 L Ed 2d 445

MITIGATION OR AGGRAVATION OF PUNISHMENT
Capital Offenses and Punishment (this index)

MONOPOLIES, RESTRAINTS OF TRADE, AND UNFAIR TRADE PRACTICES
Common carriers rates: ICC's policy of relieving shipper of obligation of paying filed rate when shipper and motor common carrier have privately negotiated lower rate held inconsistent with Interstate Commerce Act, 111 L Ed 2d 94
Utility alone, and not states on behalf of utility customers, held to have standing to bring antitrust suit under § 4 of Clayton Act against natural gas suppliers allegedly overcharging utility, 111 L Ed 2d 169

MOTOR CARRIER ACT OF 1980
Rates: ICC's policy of relieving shipper of obligation of paying filed rate when shipper and motor common carrier have privately negotiated lower rate held inconsistent with Interstate Commerce Act, 111 L Ed 2d 94

MURDER
Capital Offenses and Punishment (this index)

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969
Conservation-advocacy organization held not to have established right to judicial review, under 5 USCS § 702, of Federal Government's land classification determinations which allegedly violated federal environmental and other statutes, 111 L Ed 2d 695

NATURAL GAS
Utility alone, and not states on behalf of utility customers, held to have standing to bring antitrust suit under § 4 of Clayton Act against natural gas suppliers allegedly overcharging utility, 111 L Ed 2d 169

NAVIGABLE WATERS
Federal District Court held to have maritime jurisdiction, under 28 USCS § 1333(1), of suit to limit liability for damages resulting from fire on board yacht docked in marina on navigable waters, 111 L Ed 2d 292

NEGOTIATED RATES
Common carriers rates: ICC's policy of relieving shipper of obligation of paying filed rate when shipper and motor common carrier have privately negotiated lower rate held inconsistent with Interstate Commerce Act, 111 L Ed 2d 94

NEWSPAPERS AND PERIODICALS
Defamation: First Amendment held not to require separate privilege for "opinion," where statements published in newspaper were allegedly defamatory under state law, 111 L Ed 2d 1

NEW YORK TIMES RULE
First Amendment held not to require separate privilege for "opinion," where statements published in newspaper were allegedly defamatory under state law, 111 L Ed 2d 1

NONPROFIT CORPORATIONS
Tax deductions: social club's losses from sales to nonmembers held not tax deductible against investment income, where profit motive as to such sales is not shown, 111 L Ed 2d 126

NOTICE AND KNOWLEDGE
Abortion (this index)

OPINIONS
Defamation: First Amendment held not to require separate privilege for "opinion," where statements published in newspaper were allegedly defamatory under state law, 111 L Ed 2d 1

ORIGINAL ACTION
Boundaries: disputes between Georgia and South Carolina over location of their boundary along Savannah River, at river's mouth, and their lateral seaward boundary, resolved in original action, 111 L Ed 2d 309

PARENS PATRIAE
Utility alone, and not states on behalf of utility customers, held to have standing to bring antitrust suit under § 4 of Clayton Act against natural gas suppliers allegedly overcharging utility, 111 L Ed 2d 169

PARENT AND CHILD
Abortion (this index)

PARTIES

Conservation-advocacy organization held not to have established right to judicial review, under 5 USCS § 702, of Federal Government's land classification determinations which allegedly violated federal environmental and other statutes, 111 L Ed 2d 695

Utility alone, and not states on behalf of utility customers, held to have standing to bring antitrust suit under § 4 of Clayton Act against natural gas suppliers allegedly overcharging utility, 111 L Ed 2d 169

PARTY AFFILIATION

Discrimination: Federal Constitution's First Amendment held to forbid basing decisions as to promotion, transfer, recall after layoff, and hiring of low-level public employee on part affiliation and support, 111 L Ed 2d 52

PATRONAGE HIRING

Discrimination: Federal Constitution's First Amendment held to forbid basing decisions as to promotion, transfer, recall after layoff, and hiring of low-level public employee on party affiliation and support, 111 L Ed 2d 52

PEDIATRICIANS

Child abuse: admission, at Idaho criminal trial for sexual abuse of child, of 2½-year-old declarant's hearsay statements made to examining pediatrician held to violate confrontation clause of Sixth Amendment, 111 L Ed 2d 638

PEREMPTORY CHALLENGES

Discrimination: Federal Court of Appeals' judgment rejecting federal defendant's claim that prosecution improperly challenged black jurors remanded for reconsideration in light of Solicitor General's recognition of error, 111 L Ed 2d 439

PERJURY

Defamation: First Amendment held not to require separate privilege for "opinion," where statements published in newspaper were allegedly defamatory under state law, 111 L Ed 2d 1

PHYSICIANS AND SURGEONS

Abortion (this index)

Child abuse: admission at Idaho criminal trial for sexual abuse of child, of 2½-year-old declarant's hearsay statements made to examining pediatrician held to violate confrontation clause of Sixth Amendment, 111 L Ed 2d 638

PLEADING

Abortion: Fourteenth Amendment held not violated by Ohio statute prohibiting abortion on minor absent either (1) parental notice, (2) parental consent, (3) judicial bypass, or (4) judicial inaction, 111 L Ed 2d 405

POLICE

Warrantless entry onto accused's premises held valid, under Fourth Amendment, where based on consent of third party whom police reasonably believe to possess common authority over premises, 111 L Ed 2d 148

POLITICS AND POLITICAL MATTERS

Discrimination: Federal Constitution's First Amendment held to forbid basing decisions as to promotion, transfer, recall after layoff, and hiring of low-level public employee on party affiliation and support, 111 L Ed 2d 52

POOR PERSONS

Annotation

– *Supreme Court's views as to validity, under Federal Constitution, of abortion laws, 111 L Ed 2d 879*

POSTAL SERVICE

Solicitation: United States Postal Service held permitted, under Federal Constitution's First Amendment, to prohibit in-person solicitation of funds on government-owned sidewalk adjoining post office, 111 L Ed 2d 571

PRESERVATION OF LIFE

Right to die: Missouri requirement that incompetent's wishes as to withdrawal of life-sustaining treatment be proved by clear and convincing evidence held not violative of due process, 111 L Ed 2d 224

PRESUMPTIONS AND BURDEN OF PROOF

Abortion: Fourteenth Amendment held not violated by Ohio statute prohibiting abortion on minor absent either (1) parental notice, (2) parental consent, (3) judicial bypass, or (4) judicial inaction, 111 L Ed 2d 405

Capital punishment: Arizona capital sentencing statute providing for finding of aggravating and mitigating circumstances by trial court held valid; statutory aggravating circumstance held not unconstitutionally vague, 111 L Ed 2d 511

PRESUMPTIONS AND BURDEN OF PROOF—Cont'd

Conservation-advocacy organization held not to have established right to judicial review, under 5 USCS § 702, of Federal Government's land classification determinations which allegedly violated federal environmental and other statutes, 111 L Ed 2d 695

Right to die: Missouri requirement that incompetent's wishes as to withdrawal of life-sustaining treatment be proved by clear and convincing evidence held not violative of due process, 111 L Ed 2d 224

Search and seizure: warrantless entry onto accused's premises held valid, under Fourth Amendment, where based on consent of third party whom police reasonably believe to possess common authority over premises, 111 L Ed 2d 148

PRICE DISCRIMINATION

Common carriers rates: ICC's policy of relieving shipper of obligation of paying filed rate when shipper and motor common carrier have privately negotiated lower rate held inconsistent with Interstate Commerce Act, 111 L Ed 2d 94

PRIVACY

Annotation

– *Supreme Court's views as to validity, under Federal Constitution, of abortion laws, 111 L Ed 2d 879*

PROBABLE CAUSE

Search and seizure: warrantless entry onto accused's premises held valid, under Fourth Amendment, where based on consent of third party whom police reasonably believe to possess common authority over premises, 111 L Ed 2d 148

PROFIT AND LOSS

Taxation: social club's losses from sales to nonmembers held not tax deductible against investment income, where profit motive as to such sales is not shown, 111 L Ed 2d 126

PROMOTION OF EMPLOYEE

Discrimination: Federal Constitution's First Amendment held to forbid basing decisions as to promotion, transfer, recall after layoff, and hiring of low-level public employee on party affiliation and support, 111 L Ed 2d 52

PROSECUTORIAL COMMENTS

Rule of Caldwell v Mississippi, concerning state prosecutor's argument diminishing jury responsibility for death sentence, held not retroactively available to support federal habeas corpus relief, 111 L Ed 2d 193

PROSPECTIVE EFFECT

Retrospective or Prospective Effect (this index)

PUBLICATIONS

Defamation: First Amendment held not to require separate privilege for "opinion," where statements published in newspaper were allegedly defamatory under state law, 111 L Ed 2d 1

PUBLIC FIGURES

Defamation: First Amendment held not to require separate privilege for "opinion," where statements published in newspaper were allegedly defamatory under state law, 111 L Ed 2d 1

PUBLIC LANDS AND PROPERTY

Boundaries: disputes between Georgia and South Carolina over location of their boundary along Savannah River, at river's mouth, and their lateral seaward boundary, resolved in original action, 111 L Ed 2d 309

Conservation-advocacy organization held not to have established right to judicial review, under 5 USCS § 702, of Federal Government's land classification determinations which allegedly violated federal environmental and other statutes, 111 L Ed 2d 695

PUBLIC OFFICERS AND EMPLOYEES

Patronage hiring: Federal Constitution's First Amendment held to forbid basing decisions as to promotion, transfer, recall after layoff, and hiring of low-level public employee on party affiliation and support, 111 L Ed 2d 52

Warrantless entry onto accused's premises held valid, under Fourth Amendment, where based on consent of third party whom police reasonably believe to possess common authority over premises, 111 L Ed 2d 148

PUBLIC UTILITIES

Rates and charges: utility alone, and not states on behalf of utility customers, held to have standing to bring antitrust suit under § 4 of Clayton Act against natural gas suppliers allegedly overcharging utility, 111 L Ed 2d 169

QUESTIONS OF LAW AND FACT

Defamation: First Amendment held not to require separate privilege for "opinion," where statements published in newspaper were allegedly defamatory under state law, 111 L Ed 2d 1

RACE

Discrimination (this index)

RADIO

Licenses: FCC's minority preference policies with regard to applications for new broadcast licenses and "distress sales" of licenses held not to violate equal protection component of Fifth Amendment, 111 L Ed 2d 445

RATES AND CHARGES

Common carriers: ICC's policy of relieving shipper of obligation of paying filed rate when shipper and motor common carrier have privately negotiated lower rate held inconsistent with Interstate Commerce Act, 111 L Ed 2d 94

Natural gas: utility alone, and not states on behalf of utility customers, held to have standing to bring antitrust suit under § 4 of Clayton Act against natural gas suppliers allegedly overcharging utility, 111 L Ed 2d 169

RECALLS FROM LAYOFFS

Discrimination: Federal Constitution's First Amendment held to forbid basing decisions as to promotion, transfer, recall after layoff, and hiring of low-level public employee on party affiliation and support, 111 L Ed 2d 52

REHABILITATION

Annotation

– *validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances—Supreme Court cases, 111 L Ed 2d 947*

REMAND

Discrimination: Federal Court of Appeals' judgment rejecting federal defendant's claim that prosecution improperly challenged black jurors remanded for reconsideration in light of Solicitor General's recognition of error, 111 L Ed 2d 439

RESIDENCE

Annotation

– *validity, under Federal Constitution's Fourth Amendment, of search conducted pursuant to consent—Supreme Court cases, 111 L Ed 2d 850*

Search and seizure: warrantless entry onto accused's premises held valid, under Fourth Amendment, where based on consent of third party whom police reasonably believe to possess common authority over premises, 111 L Ed 2d 148

RESIDUAL HEARSAY EXCEPTION

Child abuse: admission, at Idaho criminal trial for sexual abuse of child, of 2½-year-old declarant's hearsay statements made to examining pediatrician held to violate confrontation clause of Sixth Amendment, 111 L Ed 2d 638

RESTRAINTS OF TRADE

Monopolies, Restraints of Trade, and Unfair Trade Practices (this index)

RETROSPECTIVE OR PROSPECTIVE EFFECT

Capital punishment: rule of Caldwell v Mississippi, concerning state prosecutor's argument diminishing jury responsibility for death sentence, held not retroactively available to support federal habeas corpus relief, 111 L Ed 2d 193

Gross Receipts Tax (this index)

Unauthorized punishment: ex post facto clause of Federal Constitution (Art I, § 10) held not violated by application to convicted person of new Texas statute which allowed reformation of jury verdict assessing unauthorized punishment, 111 L Ed 2d 30

REVERSE DISCRIMINATION

Licenses: FCC's minority preference policies with regard to applications for new broadcast licenses and "distress sales" of licenses held not to violate equal protection component of Fifth Amendment, 111 L Ed 2d 445

RIGHT TO DIE

Missouri requirement that incompetent's wishes as to withdrawal of life-sustaining treatment be proved by clear and convincing evidence held not violative of due process, 111 L Ed 2d 224

RIVERS

Disputes between Georgia and South Carolina over location of their boundary along Savannah River, at river's mouth, and their lateral seaward boundary, resolved in original action, 111 L Ed 2d 309

RULES OF CIVIL PROCEDURE

Conservation-advocacy organization held not to have established right to judicial review, under 5 USCS § 702, of Federal Government's land classification determinations which allegedly violated federal environmental and other statutes, 111 L Ed 2d 695

Discrimination: Federal Constitution's First Amendment held to forbid basing decisions as to promotion, transfer, recall after layoff, and hiring of low-level public employee on party affiliation and support, 111 L Ed 2d 52

SALES

Taxation: social club's losses from sales to nonmembers held not tax deductible against investment income, where profit motive as to such sales is not shown, 111 L Ed 2d 126

SEARCH AND SEIZURE

Annotation

– *validity, under Federal Constitution's Fourth Amendment, of search conducted pursuant to consent—Supreme Court cases, 111 L Ed 2d 850*

Warrantless entry onto accused's premises held valid, under Fourth Amendment, where based on consent of third party whom police reasonably believe to possess common authority over premises, 111 L Ed 2d 148

SENTENCE AND PUNISHMENT

Capital Offenses and Punishment (this index)

Unauthorized punishment: ex post facto clause of Federal Constitution (Art I, § 10) held not violated by application to convicted person of new Texas statute which allowed reformation of jury verdict assessing unauthorized punishment, 111 L Ed 2d 30

SEX AND SEXUAL MATTERS

Confrontation of Witnesses (this index)

SHIPS AND VESSELS

Jurisdiction: Federal District Court held to have maritime jurisdiction, under 28 USCS § 1333(1), of suit to limit liability for damages resulting from fire on board yacht docked in marina on navigable waters, 111 L Ed 2d 292

SIDEWALKS

Solicitation: United States Postal Service held permitted, under Federal Constitution's First Amendment, to prohibit in-person solicitation of funds on government-owned sidewalk adjoining post office, 111 L Ed 2d 571

SIXTH AMENDMENT

Capital punishment: Arizona capital sentencing statute providing for finding of aggravating and mitigating circumstances by trial court held valid; statutory aggravating circumstance held not unconstitutionally vague, 111 L Ed 2d 511

Confrontation of Witnesses (this index)

Discrimination: Federal Court of Appeals' judgment rejecting federal defendant's claim that prosecution improperly challenged black jurors remanded for reconsideration in light of Solicitor General's recognition of error, 111 L Ed 2d 439

SOCIAL CLUBS

Tax deductions: social club's losses from sales to nonmembers held not tax deductible against investment income, where profit motive as to such sales is not shown, 111 L Ed 2d 126

SOLICITATION

United States Postal Service held permitted, under Federal Constitution's First Amendment, to prohibit in-person solicitation of funds on government-owned sidewalk adjoining post office, 111 L Ed 2d 571

SOLICITOR GENERAL

Discrimination: Federal Court of Appeals' judgment rejecting federal defendant's claim that prosecution improperly challenged black jurors remanded for reconsideration in light of Solicitor General's recognition of error, 111 L Ed 2d 439

SPECIAL MASTER

Disputes between Georgia and South Carolina over location of their boundary along Savannah River, at river's mouth, and their lateral seaward boundary, resolved in original action, 111 L Ed 2d 309

SPEECH AND PRESS, FREEDOM OF

Broadcasting licenses: FCC's minority preference policies with regard to applications for new broadcast licenses and "distress sales" of licenses held not to violate equal protection component of Fifth Amendment, 111 L Ed 2d 445

SPEECH AND PRESS, FREEDOM OF —Cont'd

Defamation: First Amendment held not to require separate privilege for "opinion," where statements published in newspaper were allegedly defamatory under state law, 111 L Ed 2d 1

Discrimination: Federal Constitution's First Amendment held to forbid basing decisions as to promotion, transfer, recall after layoff, and hiring of low-level public employee on party affiliation and support, 111 L Ed 2d 52

Solicitation: United States Postal Service held permitted, under Federal Constitution's First Amendment, to prohibit in-person solicitation of funds on government-owned sidewalk adjoining post office, 111 L Ed 2d 571

STATES

Boundaries: disputes between Georgia and South Carolina over location of their boundary along Savannah River, at river's mouth, and their lateral seaward boundary, resolved in original action, 111 L Ed 2d 309

Discrimination: Federal Constitution's First Amendment held to forbid basing decisions as to promotion, transfer, recall after layoff, and hiring of low-level public employee on party affiliation and support, 111 L Ed 2d 52

STREAMS

Boundaries: disputes between Georgia and South Carolina over location of their boundary along Savannah River, at river's mouth, and their lateral seaward boundary, resolved in original action, 111 L Ed 2d 309

SUICIDE

Right to die: Missouri requirement that incompetent's wishes as to withdrawal of life-sustaining treatment be proved by clear and convincing evidence held not violative of due process, 111 L Ed 2d 224

SUMMARY JUDGMENT

Conservation-advocacy organization held not to have established right to judicial review, under 5 USCS § 702, of Federal Government's land classification determinations which allegedly violated federal environmental and other statutes, 111 L Ed 2d 695

SUPPRESSION OF EVIDENCE

Exclusion and Suppression of Evidence (this index)

SYMPATHY

Annotation

– *validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances—Supreme Court cases, 111 L Ed 2d 947*

TARIFF RATES

Common carriers: ICC's policy of relieving shipper of obligation of paying filed rate when shipper and motor common carrier have privately negotiated lower rate held inconsistent with Interstate Commerce Act, 111 L Ed 2d 94

TAXATION

Gross Receipts Tax (this index)

Social club's losses from sales to nonmembers held not tax deductible against investment income, where profit motive as to such sales is not shown, 111 L Ed 2d 126

TELEVISION

Child abuse: Sixth Amendment's confrontation clause held not absolutely to prohibit Maryland from using one-way closed-circuit television for receipt of testimony by child witness in child abuse case, 111 L Ed 2d 666

Licenses: FCC's minority preference policies with regard to applications for new broadcast licenses and "distress sales" of licenses held not to violate equal protection component of Fifth Amendment, 111 L Ed 2d 445

THIRD PARTY

Search and seizure: Warrantless entry onto accused's premises held valid, under Fourth Amendment, where based on consent of third party whom police reasonably believe to possess common authority over premises, 111 L Ed 2d 148

THREATS

Annotation

– *validity, under Federal Constitution's Fourth Amendment, of search conducted pursuant to consent—Supreme Court cases, 111 L Ed 2d 850*

TIME OR DATE

Abortion (this index)

TRANSFER OF EMPLOYEE

Discrimination: Federal Constitution's First Amendment held to forbid basing decisions as to promotion, transfer, recall after layoff, and hiring of low-level public employee on party affiliation and support, 111 L Ed 2d 52

INDEX TO DECISIONS AND ANNOTATIONS

(annotation topics appear in italics)

TRANSPORTATION

Common carriers: ICC's policy of relieving shipper of obligation of paying filed rate when shipper and motor common carrier have privately negotiated lower rate held inconsistent with Interstate Commerce Act, 111 L Ed 2d 94

TREATY OF BEAUFORD

Disputes between Georgia and South Carolina over location of their boundary along Savannah River, at river's mouth, and their lateral seaward boundary, resolved in original action, 111 L Ed 2d 309

UNEMANCIPATED MINOR

Abortion (this index)

UNFAIR TRADE PRACTICES

Monopolies, Restraints of Trade, and Unfair Trade Practices (this index)

VACANCY IN EMPLOYMENT

Discrimination: Federal Constitution's First Amendment held to forbid basing decisions as to promotion, transfer, recall after layoff, and hiring of low-level public employee on part affiliation and support, 111 L Ed 2d 52

VACATION OR MODIFICATION OF JUDGMENT OR VERDICT

Capital punishment: rule of Caldwell v Mississippi, concerning state prosecutor's argument diminishing jury responsibility for death sentence, held not retroactively available to support federal habeas corpus relief, 111 L Ed 2d 193

Discrimination: Federal Court of Appeals' judgment rejecting federal defendant's claim that prosecution improperly challenged black jurors remanded for reconsideration in light of Solicitor General's recognition of error, 111 L Ed 2d 439

Ex post facto clause of Federal Constitution (Art I, § 10) held not violated by application to convicted person of new Texas statute which allowed reformation of jury verdict assessing unauthorized punishment, 111 L Ed 2d 30

VAGUENESS

Capital Offenses and Punishment (this index)

VERDICT

Vacation or Modification of Judgment or Verdict (this index)

WAIVER

Search and seizure: Warrantless entry onto accused's premises held valid, under Fourth Amendment, where based on consent of third party whom police reasonably believe to possess common authority over premises, 111 L Ed 2d 148

WARRANT

Search and seizure: warrantless entry onto accused's premises held valid, under Fourth Amendment, where based on consent of third party whom police reasonably believe to possess common authority over premises, 111 L Ed 2d 148

WATERS AND WATERCOURSES

Boundaries: disputes between Georgia and South Carolina over location of their boundary along Savannah River, at river's mouth, and their lateral seaward boundary, resolved in original action, 111 L Ed 2d 309

Jurisdiction: Federal District Court held to have maritime jurisdiction, under 28 USCS § 1333(1), of suit to limit liability for damages resulting from fire on board yacht docked in marina on navigable waters, 111 L Ed 2d 292

WHOLESALE PRICES

Gross Receipts Tax (this index)

WILDLIFE PROTECTION

Conservation-advocacy organization held not to have established right to judicial review, under 5 USCS § 702, of Federal Government's land classification determinations which allegedly violated federal environmental and other statutes, 111 L Ed 2d 695

WITNESSES

Confrontation of Witnesses (this index)

WRITTEN NOTICE

Abortion (this index)

lccn_17025985111
lccn_17025985111
lccn_17025985111